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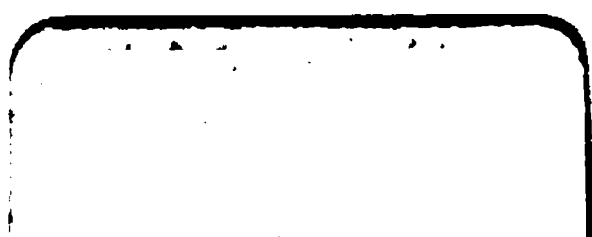
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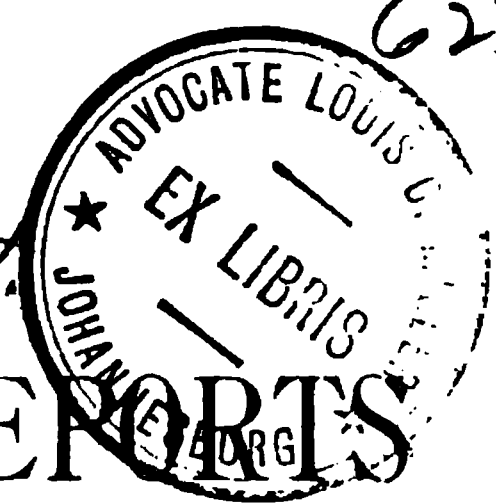
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Cape of Good Hope Supreme Court



"CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1901.

(WITH INDEX OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL, K.C.,

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from February 9th till the end of the year.**

**BUCHANAN, THE HON. E. J. (Senior Puisne Judge). Acted as Chief Justice
from February 9th till the end of the year.**

MAASDORP, THE HON. C. G. (Junior Puisne Judge).

**JONES, THE HON. S. T. (Puisne Judge of the Eastern Districts Court) from
February 9th to November 30th.**

ATTORNEY-GENERAL

THE HON. JAMES ROSE INNES, K.C.

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"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1901.
 } Jan. 12th.

On the motion of Mr. Joubert, Mr. Charles William de Villiers was admitted as an advocate of the Supreme Court.

On the motion of Mr. Close, Mr. Frederick Sellar was admitted as an advocate of the Supreme Court.

On the motion of Mr. Benjamin, Mr. Edward Benedictus Herbert was admitted as a conveyancer.

PROVISIONAL CASES.

WILLIAM MUSGRAVE HOPLEY V. PETRUS JOHANNES THERON.

On the motion of Mr. Benjamin, provisional sentence was granted against the defendant making certain property under a mortgage bond executable for the amount of £2,200.

HENRY FLINT EAST V. JAN HENDRIK BOSCH.

On the motion of Mr. Nathan, provisional sentence was granted against the defendant making certain property under a mortgage bond executable for the amount of £250, with interest at 6 per cent. from July 1, 1899.

JULIUS ALBERTUS VOSKULE V. EXECUTORS IN THE ESTATE OF THE LATE GEORGE FREDERICK RAUTENBACH.

On the motion of Mr. Buchanan, judgment was given against the defendant, by consent, for £1,500 under a mortgage bond, with interest at 10 per cent. from February 19, 1898.

THE STANDARD BANK V. THOMPSON, RAT CLIFF AND CO.

On the application of Mr. Close, judgment was given for plaintiffs for £1,205 9s. 9d., the plaintiffs to deliver to the defendants certain 3,699 pockets of rice held by them as security for the said debt on the payment of the amount with costs, charges, and interest, at 6 per cent., from December 1, 1900.

CHAS. BROWN AND CO. V. JOHN DU PLESSIS.

On the application of Mr. Close, provisional sentence was given against defendant for £155 15s. 2d., £158 16s., and £161 18s., on promissory notes, with interest at 6 per cent. from December 1, 1898, from March 1, 1899, and from June 1, 1899, in the three instances respectively, with costs.

ESTATE H. C. FLEMMER V. SERVAAS DANIEL VAN ZYL.

On the application of Mr. Close, provisional sentence was given against the defendant for £60 on a promissory note, with interest at 6 per cent. from December 20, 1896, property under a covering bond for £75 to be executable.

M. M. MILLS V. F. P. J. SNYMAN.

On the motion of Mr. Close, provisional sentence was given against the defendant for £200 on a mortgage bond, with interest at 6 per cent. from January 1, 1899.

KINNES AND GRAY V. JOHN ANDERSON.

On the application of Mr. Buchanan, a decree of civil imprisonment was granted against the defendant owing to non-payment of a sum of £9 2s., costs in a case in which judgment had been given against him for £31. He had paid the capital but failed to pay the costs.

VINCENTE PARAZA V. ANTONIO ALEMAN.

On the application of Mr. Benjamin, a decree of civil imprisonment was granted against the respondent in relation to non-payment of debt of £17 15s. 10d., with interest from December 3, 1900, less £2 paid on account.

J. W. W. BEYERS V. W. D. P. MEYER.

On the application of Mr. Close, an order was granted placing respondent's estate under sequestration.

ROOD, PENBERTHY AND CO. V. H. A. BRUYNS.

On the application of Mr. Molteno, provisional sentence was given against the defendant for £49 19s. and costs on a promissory note, less £50 paid. The £50 paid was insufficient to cover the amount and the costs.

IZAAK KARK V. J. J. P. VAN WYK.

On the application of Mr. Close, provisional sentence was given against the defendant for £155 5s., with interest at 6 per cent. from March 13, 1895, less £12 paid on account, property secured by bond for that amount to be executable.

WILLIAM MARSH V. EDWARD QUIN.

On the application of Mr. Close, provisional sentence was given against the defendant for £200 and £500, with interest at 6 per cent. from May 25, 1900, property secured by bonds for that amount to be executable.

J. A. PEROLD V. L. J. SMALL.

On the application of Mr. Close, provisional sentence was given against the defendant for £140 on a bond, and £40 on a promissory note, property secured by the former to be executable.

COLONIAL GOVERNMENT V. CHARLES F. W. JEPPE.

On the application of Mr. Ward, provisional sentence was given against the defendant for £637 5s. 3d., being interest on a mortgage bond for £4,506 16s. at 4 per cent. from July 5, 1897, to January 1, 1901.

JOHN GARLICK V. CHARLES WHEELER.

On the application of Mr. Close, this case was postponed until the first day of February next.

MARY SOLOMON V. W. THOMSON.

On the application of Mr. Benjamin, provisional sentence was given against defendant for £300, money lent on September 7, 1895, with interest *a tempore moræ*.

EDWARD SHERWOOD V. H. E. CARTER.

On the application of Mr. Searle, Q.C., judgment was given against the defendant for £295 6s. 3d. under Rule 329d.

WILLIAM GOLDSMITH KILPATRICK V. HARRY WISE.

On the application of Mr. Nathan, judgment was given against the defendant under Rule 329d. for £1,015, the purchase price of a house, less £50 paid.

BERRANGE AND SON V. JOSEPH YATES.

On the application of Mr. Benjamin, judgment was given against the defendant under Rule 329d. for £31 and £32, amounts disbursed.

Ex parte JACOBUS DU PRE.

Mr. De Waal applied for the rehabilitation of Jacobus Johannes du Pré.

The application was granted.

IN THE ESTATE OF THE LATE ELIZABETH PILLINER.

On the application of Mr. Buchanan, the Court granted an order making absolute a rule *nisi* under the Derelict Lands Act.

IN THE ESTATE OF THE LATE OCKERT JACOBUS JOHANNES OOSTHUIZEN.

On the application of Mr. Buchanan, an order was granted making absolute a rule *nisi* for the removal of the executor,

In re THE PETITION OF JACOBUS VAN BYN.

On the motion of Mr. Close, a rule *nisi* under the Derelict Lands Act was made absolute.

IN THE ESTATE OF THE LATE GERT DIRK PETRUS ALBERTSE.

On the motion of Mr. Buchanan, an order was granted amending an order given on November 22, 1900, in regard to certain property which the Court had granted permission to mortgage, and in which minors were interested. The property had not been accurately described, and an amended description was now proposed.

IN THE ESTATE OF THE LATE GERT DIRK PETRUS ALBERTSE.

On the application of Mr. Percy Jones, an order was granted removing a certain Venter from the position of executor, and authorising the Master to take the necessary steps for the appointment of another executor.

Venter belonged to the Albert district, and had joined the Free State forces when they entered that district, leaving the Colony with them. His present whereabouts was unknown, hence the application for his removal.

IN THE ESTATE OF THE LATE HESTER VORSTER (BORN BUYS).

On the motion of Mr. Percy Jones, an order was granted authorising the transfer to one of the executors of certain landed property purchased by him from the estate.

The property was purchased at public auction at a price equivalent to the Divisional Council valuation. There was no affidavit by the auctioneer as to the value of the property. The Court, in granting the order, said that it would have been better to have obtained such an affidavit.

In re THE PETITION OF WILLIAM WHITE.

On the motion of Mr. Benjamin, leave was given the applicant to sue Hutchinson Scott *in forma pauperis* for damages.

The case was referred to Mr. Benjamin for his certificate.

J. J. MICHAU V. CAPE TIMES LIMITED.

Mr. McGregor applied for the fixing of a day for the hearing of this action before a jury.

Mr. Searle, Q.C., for the respondent, consenting, the Court set the case down for February 8, 1901.

IN THE ESTATE OF THE LATE ROBERT BLAKE.

Mr. Schreiner, Q.C., moved for the appointment of a *curator bonis* and a *curator ad litem* in this estate. The application was on behalf of the widow who, on her husband dying intestate, had become trustee in his estate, valued at between £200,000 and £300,000, and consisting largely of claim rights in the Transvaal. She had certain personal claims against the estate which would entail litigation, but in the interests of the minors she wished to have someone to represent them.

The Court appointed the secretary of the Board of Executors to be *curator ad litem*, if the petitioner should take any steps against the estate. The matter of a *curator bonis* being allowed to stand over.

The price was £9,250, said by the auctioneers to be the full and fair value of the property.

MUSGRAVE V. MUSGRAVE.

In this case Mr. McGregor moved for an amendment of record and extension of return day.

The date of the marriage was wrongly stated on the record. The return day of the rule was extended until May 1, 1901, and the record ordered to be amended.

WHEELER AND ANOTHER V. DE JONG AND WALTON. 1901.
Jan. 12th.
Play-right—Performance—Interdict.

This was an application for an order restraining respondents from playing, representing, or performing any numbers, extracts from, or portions of certain theatrical plays.

There was no appearance for the respondents.

Mr. Schreiner, Q.C., for the applicant, said this application was similar to many that had been made of recent years. The names of the plays which the applicants wished to restrain the respondents from using were "The Messenger Boy," "The Runaway Girl," "Floradora," "San Toy," "Circus Girl," "Casino Girl," "Kitty Gray," "My Girl," "Greek Slave," "Shop Girl," and "The Geisha." The matter had come before Mr. Justice Buchanan in chambers, but his lordship had ruled that notice must be given the respondents. Such notice had been given, and there was now no appearance. In an affidavit, one of the applicants, Mr. Frank Wheeler, stated

that he and his co-applicant were the assigns of the owners of these plays. On Saturday night, the 5th inst., he witnessed the play "A Trip to China Town" at the Opera House, and heard three numbers performed from "Floradora," one from the "Casino Girl," and, he believed, another from "San Toy." He had reason to believe that "A Trip to China Town" would be repeated in different parts of the country, and alleged that its performance with these numbers would damage the applicant's plays when they came to be performed in this country in their entirety. Mr. Schreiner referred to the cases of *Scarelle v. Bonamici* (3 Sheil, 171) and of *Edwardes v. Pollard and Chester* (9 Sheil, 31), as precedents for the granting an interdict in the present case.

[De Villiers, C.J.: In the cases cited entire plays were performed and sought to be interdicted.]

Mr. Schreiner, Q.C.: That is so. But in this case the respondents were warned against using these selections.

De Villiers, C.J.: There is no appearance for the respondents. The applicant can take an interdict with costs restraining the performance of the plays mentioned in the affidavit, with leave to the respondents to apply for its discharge.

WOODSTOCK MUNICIPALITY V. COLONIAL GOVERNMENT.

Mr. Schreiner, Q.C., applied to have the award of an arbitrator made a rule of Court.

Mr. Ward, for the Government, consented.

Order granted.

Ex parte P. H. HAYLETT.

Mr. Close said that this was the return day of a rule nisi under the Derelict Lands Act, but as the rule had not been personally served on the respondent, and such service was impossible, he asked that substituted service by publication in the "Bloemfontein Post" be made, and the return day fixed at the last day of term.

Order granted.

In re THE PETITION OF WILLEM HENDRIK FRONENFELDER KLEYN.

On the application of Mr. De Waal, a rule nisi under the Derelict Lands Act was made absolute.

VILJOEN V. THE COLONIAL GOVERNMENT.

Mr. Rowson appeared for the applicant. Mr. Ward for the respondent.

On the motion of Mr. Rowson, Mr. Ward consenting, the award of the arbitor was made a rule of Court.

In re THE PETITION OF CARL WILLEM SONEMANN.

On the application of Mr. Nathan, a rule nisi under the Derelict Lands Act was made absolute.

Ex parte ANTHONY WHITE.

On the motion of Mr. McGregor, leave was granted for the raising of money on a certain life policy by the trustee appointed under the ante-nuptial contract entered into between James Cook and Caroline Jane Cook.

The policy was ceded by the husband to the wife by the ante-nuptial contract. The parties were now in straitened circumstances, and needed the money to start a small business.

Order granted.

REGINA V. MUSKEWITZ. { 1901. { Jan. 11th.

Hawker—Licence—Act 13 of 1870—
Fine and imprisonment—Ordinance 6 of 1839, sections 1, 2.

Accused was convicted under section 6 of Act 13 of 1870 of trading as a hawker without a licence, and was sentenced to pay a fine of £10 or undergo two months' imprisonment. The amount payable for the licence was 30s. for six months.

Held, that the Magistrate was wrong in imposing a fine of more than £7 10s. (five times the value of the licence), and was not authorised by Ordinance 6 of 1839 in imposing the alternative imprisonment as part of the sentence.

This case came on review before Mr. Justice Buchanan in Chambers, and was referred by him to the Attorney-General for his consideration.

The accused was convicted under section 6 of Act 13 of 1870 for hawking goods without a licence, and was fined £10, with an alternative of two months' imprisonment. The amount of the licence was 30s.

Mr. Ward, for the Crown: The accused traded on two different farms, so that there were really two offences, each punishable. The amount of the licence was 30s., being for six months only.

[Buchanan, J.: But there was only one charge and one count.]

The Magistrate acted under Ordinance 6 of 1839. Sec. 2 of that Act provides that such fines should be recoverable by distress, but on a return of *nulla bona*, imprisonment may be substituted for the fine. The Magistrate evidently intended to act under that ordinance.

[De Villiers, C.J.: But the ordinance requires that a writ of execution should first issue.]

I admit that the record is imperfect. The fine was imposed under Act 13 of 1870. See *Regina v. Sepungo* (4 E.D.C., p. 271), and *Regina v. Sampson and Bacon* (6 Juta, 277). If the Court cannot support the decision of the Magistrate, the case might be referred back to the Magistrate, with orders to complete the record.

De Villiers, C.J.: It is quite clear that, as regards the fine of £10, the Magistrate made a mistake, and that the amount of the fine should only be £7 10s. The Act of 1870 rendered the accused liable to a fine of five times the amount of the licence. In addition to the fine, the Magistrate imposed an alternative of two months' imprisonment. It is quite clear that, under the Act of 1870, the Magistrate could only impose a fine. The fine will be reduced to £7 10s., and the alternative sentence will be struck out.

STELLENBOSCH MUNICIPALITY (1901.
V. RATTRAY. } Jan. 14th.

This was application for an interdict restraining the respondent from leading or driving wagons or vehicles or animals in or across a certain avenue in Stellenbosch, and for an order compelling him to remove a certain bridge which he had constructed across a furrow running parallel with the avenue.

The respondent had been twice charged and convicted for contravening the Stellenbosch Municipal Regulations by removing the posts at the top of this avenue and driving down it to his property. On appeal against these sentences the convictions were sustained. The respondent then placed a bridge across the public furrow in the avenue. The Municipal authorities removed it, but the respondent replaced it, and persisted in maintaining that

there was a right of way to and through the avenue, to which he was entitled.

Mr. Schreiner, Q.C., for the applicants.

Mr. Buchanan for the respondent.

[De Villiers, C.J.: Is this not a case for action rather than motion?]

Mr. Schreiner: The respondent should bring the action.

[De Villiers, C.J.: Why does not the Municipality prosecute the respondent for breach of the regulations?]

The respondent simply pays the fine (10s.) and again contravenes the regulation.

[De Villiers, C.J.: Does the respondent claim any prescriptive right?]

He declares that he cannot get to his property by any other way, and that the avenue is a public road.

[De Villiers, C.J.: Someone must bring an action. We cannot decide this question on motion.]

Then the respondent, who declares this avenue is a public road, and who threatened the Municipality with an action for a declaration of rights if they did not grant him leave to place his bridge as he has, must take the initiative.

Mr. Buchanan: If an action is to be brought will there be any objection to the bridge remaining until the action is decided? The respondent does not wish to go to action, because as soon as he can obtain another piece of land for which he is negotiating he will be able to dispense with the avenue. The position the Municipality has taken up is unreasonable.

Mr. Schreiner: That is the first we have heard of this.

[De Villiers, C.J.: An action will have to be brought next term.]

Mr. Buchanan: Will the Municipality refrain from prosecuting the respondent for using the bridge?

Mr. Schreiner: I can give no undertaking on behalf of the Municipality, but I will most strongly advise them to that effect.

De Villiers, C.J.: The further hearing of this matter will be postponed until the respondent brings an action for a declaration of rights, the case to come up for trial next term. The costs will stand over.

Ex parte HADJE GAMIET. { 1901.
} Jan. 14th.

Mr. Benjamin applied for an order authorising the amendment of a certain deed of transfer passing the ownership in certain property in Cape Town, situate at the

corner of Rose and Castle streets. The description of the property clearly applied to Lot A, which was to have been transferred, but the deed referred to it as Lot C. The Registrar of Deeds did not oppose the application.

The order was granted.

JAMIESON V. MCKENZIE (1901.
AND CO. (Jan. 14th.

This was an application for a commission *de bene esse* to issue, for the purpose of having the evidence of two witnesses taken at Colosberg, Cape Colony, in connection with an action pending between the parties. The applicant was suing the respondents for the value of a certain trunk lodged in their hands for delivery to one of the steamship companies in Cape Town. The reason for asking for the commission was that the witnesses were resident at Naauwpoort, and could not, without difficulty, attend at Cape Town, owing to their inability to obtain leave of absence from their employers and the martial law restrictions.

Mr. Close for the applicant.

Sir Henry Juta, Q.C., for the respondents: We oppose the application, on the ground that the reasons given for the non-attendance of the witnesses are insufficient. There is nothing to show that the witnesses will not come down if they are subpoenaed.

Mr. Close: I admit that the witnesses will be bound to answer their subpoenas, but I wish to have the subpoenas withheld, especially as the expense of bringing the witnesses down will be very great. The amount in dispute is only £50, and that would be swallowed up in costs.

De Villiers, C.J.: The application must be refused. The question of costs will stand over until the action is heard.

[Applicant's Attorney, E. J. Wood; Respondents' Attorneys, Messrs. Silberbauer Wahl and Fuller.]

DEN DAUW V. LIQUIDATORS OF (1901.
DE JOND, SON AND CO. (Jan. 14th.

This was an application to have a rule *nisi* made absolute. The rule *nisi* was one calling on the respondents to show cause why they should not be restrained from selling or otherwise dealing with certain tiles.

From the affidavits it appeared that the tiles were pledged by Joseph de Jond to the applicant as security for a loan of £400, advanced by Den Dauw to De Jond. Prior to the firm of De Jond, Son and Co. going into liquidation, the applicant established

his claim to the tiles, and had since sold a large portion of them. The liquidators of the firm now claimed the tiles.

The respondents contended that the tiles were given as security, and that the applicant did not establish his claim to them prior to the liquidation. They claimed that the tiles had been sold by the applicant on commission, and that they were virtually the property of the respondents.

Mr. Schreiner, Q.C., for the applicant, moved.

Mr. Close, for the respondents: If we pay the £400 the tiles are ours.

[De Villiers, C.J.: Are you prepared to pay the amount?]

I understand that my clients are prepared to pay to the applicant the difference between what he has so far received by the sale of the tiles and £400. There is no proof of possession on the part of the applicant. Failing such proof, the pledge is useless. *Wilson v. Shaw* (1 Sheil, p. 299).

Mr. Schreiner, Q.C.: My learned friend admits we dealt with the tiles as owners, and is prepared to set off the amount realised by the sales against the £400.

De Villiers, C.J.: The rule *nisi* will be made absolute, with costs, with leave to the respondents to bring an action to set aside the order, the case to come to trial next term.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

In re COLONIAL ASSURANCE CO. (1901.
IN LIQUIDATION. (Jan. 15th.

On the motion of Mr. P. S. Jones, the liquidation report in the above matter was confirmed.

ENGELS V. VAN NIEKERK AND ANOTHER.

Mr. Benjamin applied for leave to sue the defendant, who was believed to be in the Orange River Colony, by edictal citation. The money claimed was due on a mortgage bond hypothecating certain property at Molteno.

The Court granted a rule *nisi*, personal service to be effected, if possible, and failing that, publication to be made of the rule once in the "Government Gazette" and once in the "Bloemfontein Post."

BADENHORST V. BADENHORST.

Mr. P. S. Jones applied to have a rule *nisi* calling upon the respondent to show cause why certain property sold by him to the applicant should not be made absolute. Publication as required had been made.

The rule was made absolute.

In re **ROBERT GORDON.**

This was an application for an order authorising the Registrar of Deeds to accept a certain power of attorney. It appeared that Mr. G. W. Steytler, secretary of the Board of Executors, required the power of attorney of Robert Gordon for the purposes of a certain transfer. Robert Gordon, who was in Ireland, sent a power of attorney, duly attested by a Magistrate there, but which did not fulfil the requirements of the Deeds Office. The consequence was that the Registrar of Deeds declined to recognise the power in regard to the transfer. There was an affidavit by G. W. Steytler to the effect that he knew Gordon's signature, and that the one attached to the power was his.

The order was granted.

Ex parte **BRUNT.**

Mr. Buchanan moved for the admission of Edmund Brunt as a conveyancer.

Granted.

In re **THE LATE JANE WOODWARD.**

Mr. Benjamin applied for leave to mortgage certain property held by Mary Elizabeth Woodward, under the will of the late Jane Woodward, to the extent of £2,500.

The Master's report was favourable.

The Court granted the order, the costs to be paid out of the estate.

STEVENSON V. SAUNDERS (1901.
AND CO. (Jan. 15th.

Interdict—Personal attachment—
Contempt of Court.

This was an application to make absolute a rule *nisi* calling upon the respondents to show cause why they should not be restrained from trespassing on certain property, and for an order for the personal attachment of the respondent Saunders for contempt of Court, on the ground that he had wilfully disregarded the order, made by the Court in granting the rule *nisi*, that the obstruction placed by him on the property in question be removed.

The rule *nisi* was granted on December 15, restraining the respondents from placing on the applicants' property certain vehicles, wagons, timber, and other goods. The respondents were coachbuilders, and it was alleged that, in violation of applicant's rights, they obstructed the private roadway leading to his houses, and trespassed on a plot of private ground. Being inconvenienced, the applicant remonstrated with the respondents, who took no heed. The obstruction was a source of danger at night, there being no lights there. The rule *nisi* being obtained, the respondents refused to recognise it, and finally the applicant gave Saunders notice that he would apply for an order of personal attachment.

There was an affidavit by the respondent, to which objection was taken by the applicant's counsel, on the ground that the affidavit was only put in at the last moment, and there was consequently no time to reply to it. If the affidavit was to be read, it was contended, the case would have to be postponed. On the suggestion of the Court, it was allowed to be read, without prejudice. In it the respondent Saunders said he removed the obstructions by January 8, 1901, and was prevented from doing so before, owing to the difficulty in obtaining labour during the holidays.

Mr. Molteno, for the applicant: We press both applications. If the respondent will pay the costs of the second motion, I will not press it. We were justified in coming into court.

Mr. McGregor, for the respondents: I do not oppose the granting of the first order, *i.e.*, the interdict, although I do not consider it necessary, the obstruction having been removed. The contempt should be dropped.

Mr. Molteno: The offer to withdraw the second application if the respondents pay all costs is fair.

Maasdorp, J.: As to the first application, the rule *nisi* will be made absolute. There is really no opposition to that application, and upon the evidence before the Court there can be no opposition. It is quite clear that the rule must be made absolute. The plaintiff is entitled to have his property kept clear of the obstructions of the respondent. As to the second application, it appears that the rule *nisi* was granted on December 15, and it was accompanied by the further order that the rule should operate as an interdict. That meant that in the meantime the property should be cleared of the

obstructions by the respondent. The respondent apparently did not obey that order of the Court. He did not clear the obstructions within a reasonable time. He did not remove some of his obstructions until January 8. That is unreasonable. Though it is not necessary in these circumstances for the Court to use such strong measures as granting an order for personal attachment for contempt of Court, it is quite clear that plaintiff was right in coming to court with his application. The Court therefore will make the rule *nisi* absolute, and order respondent to pay the costs of both applications.

[Applicant's Attorneys, Messrs. Sauer and Standen; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

Ex parte THE MINORS BAIRSTOW.

Mr. Benjamin appeared for an order authorising certain expenses in connection with the maintenance, education, and support of the minors.

An order as prayed was granted.

IN THE ESTATE OF THE LATE DONALD MCCOLL MURRAY.

On the application of Mr. C. W. de Villiers, an order was granted authorising transfer to one of the executors of certain landed property purchased from the estate of the late Donald McColl Murray.

Ex parte JOHN ALEXANDER FELLOWS.

On the application of Mr. Searle, Q.C., an order was granted for the cancellation of certain mortgage bonds in the matter of Emily Mary Higham, on payment of the principal and interest to the Master.

VOS V. VOS.

This was an application for the making absolute of a rule for leave to sue *in forma pauperis* in an action for divorce.

Mr. De Waal appeared for the applicant, and asked for an extension of the return day, as the respondent could not be found.

The Court fixed February 7 as the return day.

The rule was subsequently on February 8 made absolute, due publication having been proved.

REGINA V. COHEN. } 1901.
Jan. 15th.
.. 17th.

Extradition — Contravention of Transvaal Gold Law—Fugitive Offenders Act—Annexation—Act 22 of 1882.

C. was arrested at Cape Town on a charge of having contravened the Transvaal Gold Law of 1898, in the Transvaal in August, 1900. On an application by C. for his release, the Court granted the order, holding that there could be no extradition for such an offence under the Act 22 of 1882, and that as the offence was committed before the annexation to the British Crown of the South African Republic, the accused could not be extradited under the Fugitive Offenders Act.

This was an application for an inquiry as to the authority for the detention of the applicant Cohen, and in default of lawful authority, for an order for his immediate liberation and discharge. The matter was mentioned on January 15, and the Court then decided to hear it to-day, January 17.

From the petition it appeared that the petitioner was a British subject. In August, 1900, he was residing in Johannesburg. Towards the end of August the petitioner went to Cape Town. There he was arrested on a provisional warrant granted under the Fugitive Offenders' Act, 1881, on a charge of contravening article 142 of the Gold Law of the Transvaal (1898), it being alleged that he was in illegal possession of raw gold. On November 14 he was brought before the Acting Resident Magistrate of Cape Town on this charge. He was remanded from time to time until January 3, when he was committed to prison. The petitioner's appeal for bail was refused, with the result that petitioner was still in gaol. He now sought to gain relief under section 5, part I. of the Fugitive Offenders Act, by applying for a writ of *habeas corpus*. He therefore prayed that the Court would inquire by what authority he was detained, and in the absence of such authority order his discharge. From the statement of counsel it appeared that the accused was arrested

by Detective Walker at 101, Long-street. On being charged he said he knew nothing about any gold. The detective examined applicant's baggage, but found no gold.

The annexation of the South African Republic took place in or about the month of September, 1900.

Mr. Benjamin, for the applicant: The offence with which the applicant is charged is not one of those provided for under the Fugitive Offenders Act. The Act does not apply to offences committed in a territory previous to its becoming British territory.

[Maasdorp, J.: When did the applicant leave the Transvaal?]

I am not quite certain. He is charged with being in possession of raw gold in August, while the proclamation of annexation was issued on September 1, 1900.

[Maasdorp, J.: If the applicant remained in the Transvaal subsequently to the annexation, would he then have been punishable?]

That is a matter for argument.

[Maasdorp, J.: Well, that is a point which it might be well to make clear. It might be better to have the time when he left. Because if he were there after the annexation it would be a question whether or no he would then be punishable.]

I am not in possession of the exact date. The petition says he left before the end of August. Act 22 of 1882 does not apply to the offence charged.

Mr. Ward, for the Crown: The proclamation of annexation dates back to May 31, the day of the taking of the capital. It is retrospective. The offence alleged to have been committed prior to annexation was really committed after it. That point is, however, only a matter of procedure. The man has undoubtedly committed an offence, and it was committed in a territory now forming part of Her Majesty's dominions.

[Maasdorp, J.: Suppose the Transvaal had applied for his extradition, and that application had been refused, do you contend that on the territory becoming British territory the applicant would have been liable to be handed over under the Fugitive Offenders Act?]

Mr. Ward admitted that he took up that position.

[De Villiers, C.J.: Suppose there had been no war and the accused had been released here. Would you have had him arrested at some future time under the Fugitive Offenders Act?]

C

Mr. Ward said that was his view.

[De Villiers, C. T.: I can only say that that is straining the law against the liberty of the subject.]

De Villiers, C.J.: The warrant of apprehension charged the applicant with having on or about August 1, 1900, committed a contravention of Article 142 of the Transvaal Gold Law of 1898. It is clear that the contravention of the Gold Law will not afford the Court any right to order the extradition. The Act of 1882, it is admitted, does not apply to contraventions of the Gold Law. If, therefore, the applicant ought to be extradited, it can only be under the Fugitive Offenders Act. The question now is whether the second section of that Act applied in cases like the present one. That section provides that a person committing an offence in one part of Her Majesty's dominions and taking refuge in another part of Her dominions is liable to be apprehended and returned to the part from which he is a fugitive. The offence was committed on Aug. 1, 1900. At that time the Transvaal was still an independent Republic. It was only in the following month that the annexation took place. The question now is: Can the accused, in such circumstances, be said to have committed an offence in one part of Her Majesty's dominions? The Court can not lose sight of the fact that this is a question where the liberty of the applicant is concerned, and the Court should give the words of the section a strict and reasonable construction. My opinion of a reasonable construction is that the offence must have been committed in a country that was at the time part of Her Majesty's dominions. If it was committed before, the Court must consider whether at the time the offence was committed it was one in respect of which the applicant could be extradited. As the applicant is not charged with an extraditable offence under Act 22 of 1882, I am of opinion that before the annexation he could not have been extradited from this Colony, and if he could not have been extradited then I am of opinion that the aid of the Fugitive Offenders Act cannot be invoked for the purpose of extraditing the offender. I am therefore of opinion that the applicant must succeed, and that an order must be made as prayed.

Maasdorp, J., concurred.

[Applicant's Attorney, D. Tennant, Jun.]

Ex parte BESSIE ROSENWAX. { 1901.
Jan. 15th.
" 17th

Malicious desertion—Jurisdiction.

R. and her husband were married in Natal, and a week after the marriage the husband, pretending to come to Cape Town, went to Bulawayo. The wife subsequently came to Cape Town, and was joined twelve months later by her husband with whom she then lived for one month, the parties having, as she alleged, the intention of residing in Cape Town. At the end of the month the husband deserted the wife and went to Australia.

Held, that the Court had no jurisdiction to try an action for divorce at the instance of the wife, the circumstances having established no domicile.

This was an application for leave to sue *in forma pauperis* in an action for divorce, and on the matter coming before the Court on the 15th January, an affidavit in regard to the domicile of the parties was asked for.

The applicant filed an affidavit to the effect that she was married in Durban, where it was arranged that she and her husband should go to Cape Town. A week after the marriage ceremony the husband left, as applicant thought, for Cape Town, but as it later appeared, for Bulawayo. Subsequently applicant went to Cape Town, and her husband arriving from Bulawayo twelve months later, they lived together in Cape Town for a month, intending to reside there. In January, 1898, the husband deserted petitioner, and was now believed to be in Australia, and beyond the jurisdiction of the Court.

Mr. Nathan for the applicant.

The Court held that residence for a month in Cape Town, notwithstanding the circumstances, did not establish domicile, and refused the application.

THE IMPERIAL GOVERNMENT { 1901.
V. HERTZOG. Jan. 15th
" 17th

Costs—Criminal case.

Where a person in the custody of of the Imperial Government gave

notice of and filed an application for release and withdrew the application at the last moment, the Court on the application of the Imperial Government refused to grant them the costs which they had incurred in connection with the application.

This was an application made on behalf of the Imperial Government for an award of costs against one Mrs. Hertzog, who, while in their custody, in the camp for deported women at Port Elizabeth, gave notice of and filed an application for her release from custody. At the last moment Mrs. Hertzog removed the application from the roll after the Government had incurred costs in the matter. Notice was given of the present application to Mrs. Hertzog, who, however, was in default.

Mr. Searle, Q.C., for the applicant.

De Villiers, C.J.: There seems to be no reason for departing from the practice of the Court by allowing costs in a case of this kind. There are no special grounds why the Crown should have costs, and the application must be refused.

PFUHL V. LAUGHTON. { 1901.
Jan. 17th.

Audit—Costs—Partnership.

This was an application for an order as to costs in connection with the compilation of an auditor's report upon the affairs of the partnership between the applicant and the respondent. It appeared that during the existence of the partnership a dispute arose between the parties and the present applicant applied to Court for leave to have an inspection made of the books. Mr. J. E. P. Close was appointed to examine the books and report to the Court. This report, which was the result of the labours of Mr. Close and two assistants for three months, was now before the Court for confirmation, both parties being satisfied therewith. The applicant, however, claimed that the costs of the auditors, which amounted to 100 guineas, should be borne by the respondent, on the ground that it was owing to the disgraceful condition of the books of the partnership, which was wholly managed and supervised by the respondent, that any inspection was necessary. The books were in a chaotic condition, and teemed with errors and omissions.

The respondent claimed that the costs of the report should be borne by the partnership in terms of the letter written by the applicant to him on September 7. Mr. Close, in his report, was thoroughly satisfied of the bona fides of the respondent in his conduct of the business.

Sir Henry Juta, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondent.

After argument,

De Villiers, C.J., in giving judgment, said: The 4th clause of the deed of partnership provides that Laughton should devote himself to the business; the fifth clause provides that Mrs. Pfuhr should take no active part in the business, but should promote its interests where possible; the 6th clause provides that Laughton would have the appointment of apprentices, assistants, etc., in connection with the business. It is clear from the report drawn up by Mr. Close that if Laughton had done his duty in terms of this agreement no disputes would have occurred. There was considerable negligence on his part in the appointment of assistants. Had he appointed an accountant to go through the books, the difficulties would never have arisen. Inasmuch as the report shows considerable negligence on the part of the respondent, I am of opinion that the respondent should pay the costs of the application. As to the fees of the auditor, I think they should be divided between the partners. It is admitted on all sides, by the respondent as well as by the applicant, that the work was well done, and I think the fees amounting to a hundred guineas should be borne by the partners. The judgment of the Court therefore is that the costs of the application be borne by the respondent, and the accountant's fees amounting to 100 guineas by the partners in terms of the deed of partnership; the applicant one-fourth and the respondent three-fourths.

Maasdorp, J., concurred.

BAMBANI V. THE IMPERIAL GOVERNMENT. } 1901.
 } Jan. 17th.

This was an application for an order on the Imperial Government to allow the applicant's cattle to graze on the commonage in Queen's Town. The military had taken possession of the commonage, and had debarred the applicant and others from grazing their cattle on the ground.

Sir Henry Juta, Q.C., for the applicant.

Mr. Searle, Q.C., for the respondent, applied for a postponement, on the ground that

an affidavit expected from the officer in charge of the Remount Depot had not yet arrived.

Sir Henry Juta, Q.C. opposed, on the ground that delay would injure the cattle.

The Chief Justice said in this case the matter was a very important one, and each better be heard by the full Court. It would therefore have to stand over until the first day of the term. If, in the meantime, any damage were suffered by these people, he could only hope they would be compensated by the Imperial Government.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl, and Fuller; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN.]

ADMISSIONS. } 1901.
 } Feb. 1st.

Mr. McGregor moved for the admission of Thomas D. R. Hull as attorney and notary of the Supreme Court.

Order granted and the oaths administered.

Mr. Buchanan moved for the admission of Jacobus C. Faure as an attorney, notary, and conveyancer of the Supreme Court.

Order granted and the oaths administered.

Mr. C. W. de Villiers moved for the admission of Cornelius Johannes van Ryn as an interpreter to the Supreme Court.

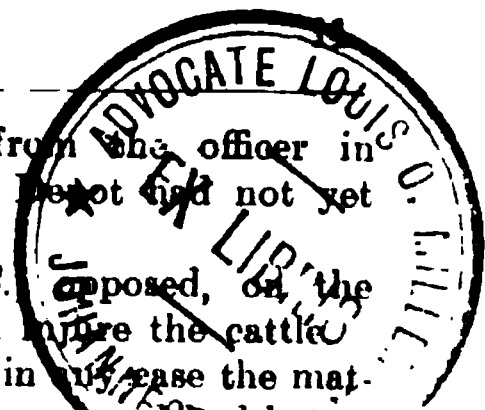
Order granted and the oath administered.

Ex parte CARROLL. } 1901.
 } Feb. 1st.

Articled Clerk—Admission—Break in service—Misconduct.

C. was articled on 6th September, 1896, and served continuously until 7th April, 1899, when owing to his having overstayed his leave by two days, the articles were cancelled by the attorney to whom he had been apprenticed.

C. being unable to article himself again, studied for and passed the Law Examination within the next two months. On war breaking out he joined the Kimberley Town Guard and subsequently on April 16, 1900, be-



*came articulated to another attorney.
(On an application for his admission as an attorney,*

Held, that the misconduct was not such as would justify the Court in refusing to allow the service before the break to count.

This was an application by an articulated clerk for admission as an attorney and notary. The facts were as follows: The petitioner entered into an agreement on September 6, 1896, to serve Attorney Coghlan for a period of three years as an articulated clerk. After serving for two years and seven months, he was allowed a few days' leave, being due again at the attorney's office on the 5th April, 1899. He, however, did not return until April 7, 1899, upon which, after he and the attorney had had some words, the attorney cancelled the articles and wrote to the Registrar of the Court and the secretary of the Law Society stating that he had done so. Failing to find work as an articulated clerk with any other attorney in Kimberley, the applicant was driven to seek other employment, in the meantime studying for and passing his law examination. When war broke out the applicant joined the Town Guard at Kimberley, and subsequently on April 16, 1900, articulated himself to Louis F. Legard, an attorney, with whom he served eight months, making in all service of three years and three months, with a break of a little over one year. The Law Society opposed the application for admission on the ground that the service was not continuous, which was due to the fault and misconduct of the applicant. There was an affidavit by Attorney Coghlan that during the period of the applicant's service with him the applicant had with the exception of the occasion which caused the cancellation of the articles, faithfully performed his duties.

Sir Henry Juta, Q.C., for the applicant: The point to be taken into consideration is the fact that after the cancellation of the articles the applicant could not find a single attorney who could accept his services. The 150th Rule of Court, with regard to continuous service, will not be pressed in such a case. The applicant has served over three years. During the break he studied law and passed his examination. Must a break which he could not help prejudice him and rob him of the two years and seven months' service? See *ex parte Anders* (10 Sheil, 584).

Mr. Searle, Q.C., for the Law Society: The application is without precedent. The applicant has himself to thank for his difficult position. He ought to have appealed at once against the cancellation of the articles. There has been a break of a year owing to the applicant's misconduct, and during that year he did work in no way connected with his profession.

Sir Henry Juta, Q.C., in reply: To overstay leave by two days is not such misconduct as will justify the refusal of this application.

Buchanan, J., in giving judgment, said: The petitioner entered into an agreement on September 6, 1896, to serve Mr. Coghlan for a period of three years as an articulated clerk. After serving for a period of two years and seven months he overstayed a few days' leave which had been given him, returning to office on the morning of the 7th instead of the 5th April, whereupon he and Mr. Coghlan seem to have had some words, and the latter cancelled the articles between the parties. I agree with Mr. Searle that the Law Society was quite right in bringing before the Court any misconduct on the part of an articulated clerk, and if that misconduct was such as to justify the cancellation of the articles altogether, the proper course might be to require the articulated clerk to serve for a complete consecutive term of three years after the break had taken place. In the present case the petitioner had five months still to serve when the break took place, but since then he has studied for his law examination, and passed it two months afterwards, and for these two months, if application had been made at the time, leave would have been granted. This brought the period of service up to two years and nine months. The rule no doubt requires the service to be continuous, so that the knowledge gained by the clerk should be practical and useful, and not liable to be lost or become weak by casual attendance to study; but I think that in this case the applicant has served his articles, at least to such an extent that for a trivial thing like this he should not lose his past service. If there had been any misconduct on the part of an articulated clerk, such as to warrant the cancellation of his articles, his past services would in all probability not be allowed to count. In the peculiar circumstances of this country at this time, and seeing what Mr. Coghlan in his affidavit himself said about the general conduct and efficiency of the applicant, I think the Court in this case should waive the breach in the continuity of service.

An order was accordingly made for the applicant's admission as an attorney and notary, the oaths to be taken before the Registrar of the High Court at Kimberley.

[Applicant's Attorney, Gus Trollip; Attorneys for the Law Society, Messrs. Van Zyl and Buissinne.]

BEST V. HARRIS. (1901.
(Feb 1st.

Arrest—Writ—8th Rule of Court—
Affidavit—Intention to leave—
Discharge of writ.

The plaintiff took out a writ of arrest against the defendant under the 8th Rule of Court, and stated as his ground of belief that the defendant was about to leave the Colony, the fact that defendant showed him a telegram which he stated was an invitation to him to go to Bulawayo to take up a position he had applied for.

The defendant moved for the discharge of the writ and stated that he had shown the plaintiff a telegram telling him the situation was filled up and produced the telegram.

The Court discharged the writ, but allowed it to stand as a summons in case the action was proceeded with.

This was an application by the defendant Harris to have a writ of arrest set aside. It appeared that he was arrested on January 18, under Rule of Court No. 8, on an affidavit, which stated that the plaintiff believed the defendant, who owed him money, was about to leave the Colony for Bulawayo, and that this belief was founded on the statement made by the defendant to the plaintiff that he was about to leave for Bulawayo, and on the fact that the defendant showed him a telegram which purported to come from the Town Clerk of Bulawayo, inviting the defendant to leave Cape Town on the 18th January. The defendant was released on bail on January 24.

The defendant, in his affidavit, alleged that on January 10 he showed the plaintiff a telegram, which stated that the vacancy he was applying for was filled. The telegram was annexed to the affidavit, in which he also

stated that he never told the plaintiff that he intended leaving. His wife also made an affidavit, in which she stated that on January 15 she met the plaintiff and told him that her husband had lost the situation for which he was applying.

Mr. Uppington, for the defendant (applicant) referred to Rule of Court No. 8 and *Smith v. Davis* (Buchanan, 1878, p. 54).

Mr. Gardiner for the plaintiff (respondent).

Buchanan, J.: The application before the Court is one to set aside the writ of arrest taken out by the plaintiff against the defendant. This writ was taken out under a Rule of Court, which required that certain particulars should be stated. The Rule of Court 8 requires the person who makes the affidavit to state his place of abode, and this has not been done. The rule also requires that in his affidavit the plaintiff must state the grounds on which he believed the defendant was about to move. In the present instance the plaintiff stated that his grounds for such belief were that the defendant told him he was going to leave for Bulawayo on January 18, and had shown him a telegram from the Town Clerk there requiring him to leave on that date. The defendant denies that he had ever made such a statement or showed plaintiff such a telegram, and further he now produced a telegram he received on January 10 notifying him that the vacancy he was applying for had been filled, while Mrs. Harris, his wife, says that about the 15th she met plaintiff and told him about that telegram, and that her husband had lost the situation. This was before the plaintiff made the affidavit upon which the writ was issued. Best, in his reply, did not refer to the terms of that affidavit, but simply said that he joined issue. The rule gave the creditor considerable powers, and persons who would exercise those powers involving the liberty of the subject must be very careful in such exercise, and if exercised unduly and without reasonable and sufficient grounds they must take the consequences. If this case goes further, it will be easy to show whether any such telegram as that plaintiff alleged he saw was received, but as the papers stand at present, it appears to be most improbable that there was any such telegram. On the affidavit of the defendant, supported by that of his wife and the telegram received, I must come to the conclusion that defendant did not tell plaintiff that he was leaving on the 18th, and did not show him the telegram as alleged. Under these

circumstances the writ must be discharged with costs, but the writ will be allowed to stand as a summons in case the action is proceeded with.

[Applicant's Attorney, D. Tennant, jun.; Respondents' Attorneys, Dempers and Van Ryneveld.]

MASTER V. KELLY'S EXECUTORS.

Mr. Ward moved for the usual order calling upon the respondent to file an account.

The usual order was granted.

VAN BENEN V. A. J. SMIT.

Mr. Joubert moved for provisional sentence on a mortgage bond for £90, with interest at the rate of 6 per cent. from December 3, 1900. It was also asked that the property specially hypothecated be declared executable.

Granted, and property declared executable.

BELL V. HAYWARD. { 1901. Feb. 1st.

Provisional sentence—Summons—
Amendment—Mortgage bond.

Where on a claim for provisional sentence on a mortgage bond, which provided that on failure of the payment of the half-yearly interest the whole amount would become due, the summons did not state the ground on which the principal amount of the bond became due, the Court granted provisional sentence subject to the amendment of the summons.

The defendant was in default.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £100, which had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

It was pointed out that in the summons the ground upon which the bond became due was not set forth.

Provisional sentence was granted as prayed, subject to the summons being amended.

RIDDELL V. E. J. SHERWOOD. { 1901. Feb. 1st.

Civil imprisonment—Suspension—
Monthly payment.

Sir Henry Juta moved for a decree of civil imprisonment upon an unsatisfied judgment for £380 odd.

The respondent appeared in person, and offered to pay the debt by giving a sum of £50 down, and the balance by instalments of £4 monthly.

Sir H. Juta objected to the offer, on the ground that the amount of the instalments was too small, and that at the rate proposed it would take some seven years to liquidate the debt.

The respondent was accordingly examined on oath regarding his affairs, in particular as to his interest in a certain patent for artificial stone. That interest he considered worth at least £1,250, but if he had to dispose of it at present, supposing he were able to do so, it would only realise £500. During the last twelve months his earnings as an architect had averaged £32 per month, but he maintained that he could not afford more than £4 per month, as there were other creditors whose claims had arisen in connection with the same matter as the one now sued upon. He also stated that he had a judgment against one Carter for a sum of £280.

The Court granted a decree of civil imprisonment, but with a stay of execution provided defendant paid £50 by March 1, and made subsequent payments of £10 monthly, leave being reserved the applicant to apply at any time for an increase.

WEHR'S ESTATE V. MYBURGH.

Mr. Maskew moved for provisional sentence on a mortgage bond for the sum of £48, being the interest overdue.

Granted.

PHILLIPS AND CO. V. G. F. STADLER.

Mr. Close moved for provisional sentence upon an acknowledgment of debt. The amount of the acknowledgment was £950, but of this only the first instalment of £450 was due, and it was for this amount provisional sentence was asked.

Provisional judgment granted as prayed.

JOUBERT V. VAN NIEKERK.

Mr. Rubie moved for provisional sentence for £35 due on a mortgage bond, with in-

terest, and also that the property specially hypothecated be declared executable.
Granted.

WILSON. SON AND CO V. ABDULLAH KHAN.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.
Granted.

ESTATE OF BLAKE V. N. DU PLESSIS.

Mr. De Waal asked that this matter be postponed *sine die*.
Granted.

PHILIP V. J. FICK.

Mr. P. S. Jones moved for provisional sentence for £300 due on a mortgage bond, with interest from July 1, 1900, and costs of suit. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.
Order granted as prayed.

WALKER AND ANOTHER V. JOHN LUCAS.

Mr. Benjamin moved for judgment, under Rule 329d, for £16 5s. 9d., being unpaid balance of an account for professional services rendered and money disbursed.
Grant d.

SUBURBAN ESTATE DEVELOPING AND BUILDING COMPANY V. DOIG.

Mr. Rubie moved for judgment, under Rule 329d, for the sum of £40 due for rent, and also that the defendant be forthwith ejected from the premises in question.
Granted.

KARIE V. E. R. HOWES.

Mr. Maskew moved for judgment, under Rule 329d, for the sum of £50, being the purchase price of certain property at Wynberg, with interest at the rate of 6 per cent. from September 15, and costs of suit.
Granted.

Mr. Nathan made application for the rehabilitation of G. Davidson and Co. The estate was voluntarily sequestrated on the 20th September, 1898. There was a deficiency of £443 17s. 4d. The report of the trustees was favourable.

The application was granted.

HENRY V. HENRY.

This was the petition of the wife for a divorce. Mr. P. S. Jones applied for a postponement *sine die*.
Granted.

VILJOEN V. VILJOEN.

This was an action instituted by Charles D. Viljoen against his wife for a divorce, on the ground of her adultery.

Mr. Joubert appeared for the plaintiff.

The defendant was in default.

Evidence was given to the effect that the parties were married on the 30th July last year. In November the wife confessed to adultery with a man named Du Toit, the confession being made to the petitioner, and to a member of the Dutch Reformed Church at Hanover, where the parties lived, and in a letter written by respondent to the petitioner. They were married in community of property.

The Court granted a decree of divorce, with forfeiture of the benefits of community arising from the marriage.

IN THE MATTER OF THE PETITION OF MARIA HOFFMEESTER AS CURATOR OF THE ESTATE OF HER HUSBAND HUSBAND HENDRIK HOFFMEESTER.

Mr. Benjamin applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

WILSON V. WILSON. } 1901.
} Feb. 1st.

This was an application for an order on the respondent, James Wilson, to pay £30, to enable the petitioner, his wife, to institute proceedings against him for a judicial separation on the ground of his cruelty, and also to pay £2 a week as alimony pending the trial.

The affidavit of the applicant was to the effect that they were married in community of property at St. George's Cathedral in 1880. There were five children of the marriage—all daughters—the eldest being 19 and the youngest 7. She had commenced an action against the respondent for separation on the ground of cruelty, and they were now living apart. The respondent was a builder and contractor, and had property at Wynberg.

The respondent made an affidavit that his wife had two older children by one Jacob

Gable before his marriage with her, both being over twenty. He had supplied money and provisions to the applicant, who would not accept the latter, and had thrown them out. Two of the applicant's daughters were school teachers, and earned £10 per month. Two others were employed as dressmakers. The applicant had recently obtained £150 from Australia. He (respondent) had property which he was willing to sell for £1,200, but the highest bid obtained when it was put up for auction was £900, and there was a mortgage of £750 on the property. Applicant lived in one of his houses and collected rent from the other property amounting to £6 5s. per month. He (respondent) was now employed as a brick-maker at 1s. 6d. per hour.

In a replying affidavit, the applicant said that the respondent had occasionally given her small and wholly inadequate sums of money. The combined earnings of the four daughters were £9 10s. per month. The respondent had been offered £1,600 for the property, which was sold for that sum, but she (applicant) did not know whether the sale was cancelled or not. It was mortgaged for £750, but £250 had been paid off the mortgage. She lived in one house, and last month collected the rent of another—£2 15s.

out of which she paid £1 9s. for water rate.

Mr. Benjamin, for the applicant.

Mr. Buchanan, for the respondent.

Buchanan, J., said there was not sufficient information in the affidavit to make the order asked. The summons had been issued, and the case would be tried this term. The application would be refused, but no order would be made as to costs.

IN THE ESTATE OF THE LATE SAMUEL WEBSTER.

Mr. Rowson applied for leave to make certain payments out of the capital of the estate towards the cost of educating the four minor children. Counsel said the Master's report was favourable.

An order was granted in terms of the Master's report.

ACKLAND V. COLONIAL ASSURANCE COMPANY.

Mr. Schreiner applied for an award to be made a rule of Court.

The order was made subject to proof of service.

HUGHES AND ANOTHER V HENNING.

Mr. P. S. Jones applied for an order authorising the High Sheriff to transfer certain property purchased by plaintiff from defendant, whose whereabouts are unknown.

A rule *nisi* was granted, returnable on the 14th instant, calling on defendant to show cause why he should not pass transfer, or failing that, why the High Sheriff should not be authorised to transfer.

LAMPART V. UNION-CASTLE STEAMSHIP COMPANY (LIMITED).

On the motion of Mr. Close, a rule *nisi*, returnable on Thursday next, was granted for leave to sue *in forma pauperis*.

GREENFIELD V. FRIESLAAR.

Mr. Gardiner applied for a rule *nisi* for leave to sue *in forma pauperis*.

Granted, the rule being made returnable on Thursday next.

IN THE ESTATE OF THE LATE ANDRIES S. FOURIE.

Mr. P. S. Jones applied for leave to mortgage certain property. It appeared that a claim of £126 19s. 7d. had been filed against the estate, for which the trustee had signed a promissory note, which fell due on September, 1900. The creditors agreed to stay execution of judgment against the estate on consideration that the debt should be secured by mortgage on the property. The trustee now asked to be allowed to mortgage the property, but the Registrar of Deeds refused to registrar the mortgage without an order of Court, as the will under which the property had been left allowed the said property to be sold, but not to be mortgaged.

Order granted as prayed.

IN THE INSOLVENT ESTATE OF PIETER G. M. HERMAN.

Mr. Benjamin applied for an interdict restraining the sale of certain property, for removal of insolvent as executor testamentary of the estate of his late mother, and for an order authorising the Master to take the necessary steps for the appointment of an executor dative in the place of the insolvent.

Mr. Burton appeared for Mr. Charles Friedman, who held a mortgage bond on the property in question and a power of attorney for certain others. Counsel said Mr. Friedman had not had notice.

Mr. Benjamin said that under the terms of the will, the consent of certain parties would be necessary.

A rule *nisi*, operating in the meantime as an interdict, was made, returnable on Thursday next.

IN THE MATTER OF THE PORT ELIZABETH MALAY COMMUNITY.

Sir Henry Juta applied for an order confirming a sale of property. The Court had previously ordered a sale by auction, but a tender for the property had now been received, and the members at a meeting unanimously favoured the sale.

The order was granted.

IN THE MATTER OF THE PETITION OF ANN ELIZABETH VAN HEERDEN.

Mr. Buchanan applied to have a rule *nisi* authorising the sale of certain property without the petitioner's husband's assistance made absolute.

Granted.

IN THE MATTER OF PETRUS JACOBUS VANDER WALT.

Mr. Buchanan applied for an order for the cancellation of a certain mortgage bond. A person named Pinneer was the lessee of the property.

A rule *nisi*, returnable on the last day of term, was made, calling on Pinneer and all interested to show cause why the mortgage should not be cancelled, the rule to be published in the Colesberg paper.

IN THE ESTATE OF THE LATE ENGELA FREDRIKA GRIMBEEK.

Mr. Schreiner, Q.C., moved for an order for the removal of the executor, and to authorise the Master to take the necessary steps for the appointment of an executor *ad litem*.

A rule *nisi* was granted, calling upon the defendant to show cause why he should not be removed, and the Master authorised as asked, the rule to be published in the Beaufort West "Courier," in English and Dutch, and to be returnable on the last day of term.

KEOWN V. KEOWN.

This was an action for divorce instituted by the husband against his wife for adultery.

The plaintiff, in his evidence, said he was married in 1895, and in 1896 went to Johannesburg, from where he sent the respondent money for her support. He returned

in 1897. There was one child—a girl—of the marriage, and witness desired the custody of this child. He did not live with his wife after 1896.

Georgina Green, a midwife, said she attended the wife in confinement in August or November of 1898.

Adam Bredican was called, and said he had lived with the respondent in Longmarket-street for about six weeks. They lived together as man and wife, and the woman afterwards told him she was married.

A decree of divorce was granted, plaintiff to have the custody of the child, the defendant to forfeit all the benefit of the community.

CARTWRIGHT V. CAPE TIMES, LTD.

Mr. Burton, who appeared for the plaintiff, applied to fix a day for trial by jury. The action was one for £5,000 damages, for defamation.

Mr. Searle appeared for the respondents.

The Court fixed February 22 for the trial.

IN re THACKER (MINOR).

Mr. de Villiers applied on behalf of the father and natural guardian of his minor daughter for an order confirming the sale by him of certain immovable property registered in her name, and for an order authorising the transfer by him of such property.

The Registrar of Deeds raised no objection.

Granted.

IN THE ESTATE OF THE LATE IZAK VANDER HEYSTE AND OTHERS.

Mr. De Villiers moved for an order authorising certain transfers.

Granted.

Ex parte HUGH G. LEGG. (1.01. Feb. 1st.

Trade Mark—Removal—Leave to sell—Rule *nisi*.

On application made a rule nisi was granted calling upon the absent registered owner of a trade mark, to show cause why the trade mark should not be removed from the register.

This was an application for an order calling on the respondent to show cause why the trade-mark "Irish Crown" registered by him in 1897 in regard to soap should not

be removed, and for leave to sell soap bearing this mark in the interim, as the applicant had a shipment of soap bearing the mark "Irish Crown" made by a different manufacturer. The trade-mark was registered by the owner thereof in 1897, at a time when the applicant was the respondent's agent. The respondent, when dispensing with the applicant's services, told him that he could sell soap described as "Irish Crown." There were affidavits by several merchants in Cape Town stating that the word "Crown" was a description of quality, and was not such a word as should be registered for exclusive use.

Mr. Schreiner, K.C., for the applicant : A similar application was granted in the case of *Wright, Crossley and Co. v. The Royal Baking Powder Co.* (8 Sheil, p. 11). The exclusive use of the description cannot be claimed. "Irish Crown" is an indication of quality, such as "Crown" and "Pale Crown." Geographical words and words of quality cannot be registered.

Buchanan, J. : A rule *nisi* will be granted calling on the respondent to show cause why the trade-mark should not be removed, the rule to be returnable on the 12th April. The leave to sell prayed for is not necessary. The question having been raised by the applicant will be proof of *bona fides* in case any action is taken against him.

The rule was subsequently made absolute after opposition on April 12, 1901.

ABRAHAMS V. ABRAHAMS.

Mr. Molteno applied for an extension of the return day, and for substituted service. On the 15th November the Court granted the petitioner's application to sue for restitution of conjugal rights by edictal citation. The Court then directed that there should be personal service. The last place of residence of the respondent was in London but although everything had been done to effect personal service the petitioner had failed to do this.

The application was granted, publication being ordered in the London "Daily News," and the return day being extended till the 12th April.

IN THE MATTER OF THE PETITION OF ELIZABETH ANN MINTO.

Mr. Close applied for leave to sell certain property.

Granted.

IN THE MATTER OF ROBERT JAMES OLIVIER.

On the application of Mr. Gardiner, leave was granted, in terms of the Master's report, to sell certain property.

IN THE MATTER OF JULIAN STEPHENS LIMITED.

Mr. Gardiner applied for the cancellation of a certain bond.

An order was made for the production and cancellation of the bond by a Mr. Yeoman, acting in the matter, and for the filing by him in the Registrar of Deeds office of certain powers of attorney.

INDUSTRIAL LIFE ASSURANCE COMPANY V. DENTON.

Mr. Howel Jones applied for leave to the defendant to defend *in forma pauperis*.

A rule was granted, returnable on Thursday next.

THE CAPE OF GOOD HOPE } 1901. BUILDING SOCIETY V. THE } Feb. 1st. BANK OF AFRICA.

Charter of Justice, section 50—Appeal to Privy Council.

The Supreme Court has no power to grant leave to appeal to the Privy Council where the application for such leave has not been made within fourteen days from the judgment as required by section 50 of the Charter of Justice.

This was an application for leave to appeal to the Privy Council in the above case against a judgment delivered by the Supreme Court. The plaintiffs against whom the judgment was given failed to make application for leave to appeal within the fourteen days prescribed by the 50th section of the Charter of Justice, and now applied for such leave on the ground that there was a misunderstanding, but did not set out in their application what the actual misunderstanding was.

Mr. Schreiner, K.C., for the applicants : The language of the section is not imperative, and does not mean that if the time has elapsed a party cannot obtain the leave of the Court to extend that time.

Mr. Searle, K.C., for the respondents : The Court has no jurisdiction in the matter.

Mr. Justice Buchanan, in giving judgment, said: This application is for leave to appeal to the Privy Council from a decision of the Supreme Court. The Court is always anxious and ready to facilitate appeals from its decisions, especially in cases like the important one under consideration. The rules and regulations as to appeals to the Privy Council are set forth in the 50th section of the Charter of Justice. One of these regulations is that, within fourteen days after judgment was pronounced, the Supreme Court should be moved for leave to appeal. This requirement has not been complied with, and the parties, after they have allowed fourteen days to elapse, lose their right to appeal. Applicants now came to the Court, not as of right, but ask the Court, as an act of grace, to give leave to appeal. They merely stated that the required notice had not been given, through some misunderstanding, but they did not state what this misunderstanding was, or explain to the Court any cause for delay. Where an appeal is asked as a matter of indulgence, some special grounds should be shown. The absence of any such special grounds might of itself require the Court to refuse this application, but there is another and more important objection. In the matter of appeals as of grace, a distinction has always been drawn between the powers of the Court appealed from and the powers of the appeal Court. Even if this Court granted the leave now asked, it would not be binding on the Privy Council to hear the appeal. The passage cited from *Macpherson on the Practice of the Judicial Committee* (2nd Ed., p. 38), supported by the cases referred to, is very strong. He says that where the Court below has granted leave to appeal in a case which, for any reason, is not appealable under the Charter, or has granted leave in contravention of the orders regulating the appeal practice, the permission is a mere nullity. The Privy Council, however, may grant the leave if sufficient grounds are shown, and if the applicants are desirous of pressing their case, it will be more in accordance with the Charter of Justice and of Privy Council practice for them to apply to the Appeal Court. This application must be refused, with costs.

The declaration alleged that the parties were married at Victoria West in 1888 by antenuptial contract. A year after the marriage plaintiff's father died, leaving her a large sum of money, and later her mother's decease brought her in another large sum, the two sums amounting to £2,780 9s. 10d. These sums the husband administered. At the time of the marriage she was possessed of £100 in cash, 200 sheep, 24 head of cattle, 1,000 ewes, a cart and horses and furniture. By the antenuptial contract the husband settled on her a life policy and other property. The two farms which had been attached belonged to her husband, and the declaration claimed that these were executable for the amount claimed by her,

Mr. Schreiner, K.C. (with him Mr. Buchanan) for the plaintiff.

The respondent in default.

After the proof of the marriage,

Jacobus Johannes Jordaan certified to the correctness of the liquidation and distribution account of the estate of the late parents of the plaintiff. From her father's estate, the plaintiff was awarded £1,041 3s. 8d., and from her mother's £1,739 6s. 2d.

Cathleen Elizabeth Steenkamp, the plaintiff, said her parents resided in their lifetime in the Victoria West district. Her father was a man of considerable estate, and out of his estate she had received large sums. She was married to defendant at Victoria West, and before the marriage an ante-nuptial contract was executed, under which certain property was settled on her. Her father died a year after the marriage. Her husband administered all the property. The farm Deelfontein was bought and partly paid for out of witness's inheritance, and was worth now about £6,000. It was purchased for £3,500, some of the money paid, witness believed, being the proceeds of farming operations. They lived at Albert, and her husband, shortly after the war broke out, joined the Republican forces. The district was occupied by the Boers, who afterwards crossed the river, and witness, by order of a commandant—Schalk Burger—also crossed. She did not go voluntarily. The farming stock, etc., were removed to another farm, across the river, which was afterwards cleared by the military.

Judgment for £4,470 was given for plaintiff, with costs, and leave to execute such judgment against the defendant's immovable property was given.

TABLE BAY HARBOUR BOARD } 1901.
V. NEW ZEALAND SHIPPING } Feb. 4th.
COMPANY. } „ 8th.

Salvage—Danger and risk—Tender.

This was an action instituted by the Table Bay Harbour Board for the recovery of £1,000 claimed for salvage services rendered in respect of the steamship Papanui, belonging to the New Zealand Shipping Company, the agents for whom were Messrs. Wm. Anderson and Co.

The plaintiff's declaration was as follows:

1. The plaintiff is the Table Bay Harbour Board, which is incorporated by Act No. 36 of 1896.

2. The defendants are a joint stock company, incorporated by the English Companies Acts, carrying on business as common carriers by sea. The one represented in this colony by William George Anderson and Alfred Lagden Blackburn, trading together as in co-partnership as William Anderson and Co.

3. On or about the 26th December last the Papanui, a large steamer, the property of the defendant, drifted on to the Table Bay breakwater.

4. Two tugs, the property of the said Harbour Board, properly manned, went to the assistance of the said steamer, and towed her into Table Bay.

5. At the time the said tugs rendered assistance as aforesaid, the said steamer was in a position of imminent danger, lying along the south side of the said Breakwater, the wind blowing a gale from the southward with hard squalls.

6. The services rendered by the officers and crew of the said tugs were rendered with great difficulty and danger to themselves, and the said Board are entitled to claim for the said services as for salvage services.

Wherefore the plaintiff claims:

(a) The sum of £1,000 for such services as aforesaid;

(b) Costs of suit.

Defendant's plea:

1. The defendant admits paragraphs 1 and 2 of the declaration.

2. The defendant denies that the Papanui drifted on to the Table Bay breakwater, that she was in imminent danger, that the wind was blowing a gale, with hard squalls, and that the services rendered were rendered with great difficulty and danger to the officers and crews of the tugs, but he admits that the plaintiff rendered certain services to the said Papanui in towing her with tugs manned by officers and crews.

3. For the services rendered by the tugs and officers and crews thereof, the defendant tendered to the plaintiff, before action brought, and hereby again tenders the sum of £500, but the plaintiff refuses to accept the same.

4. Save as aforesaid the defendant denies the allegations in paragraphs 3, 4, 5, and 6.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

Plaintiff's replication:

1. The plaintiff admits that the defendant tendered the sum of £500 before action brought for the services rendered by the

plaintiff's tugs, and the officers and crews thereof, but he denies the sufficiency of the said tender.

2. Save as to the above admission, and save in so far as the defendant's plea admits the allegations contained in the plaintiff's declaration, the plaintiff joins issue with the defendant on his said plea.

The evidence for the plaintiff showed that the vessel arrived in Table Bay on the night of December 26, 1899. The Port Captain was called out during the night in consequence of a ship being in distress. On his arrival at the Breakwater he found the Papanui lying alongside the Breakwater, outside the East Pier, which was unfinished, and was then a wooden stage. Her bow was towards the East Pier. The vessel was in a dangerous position. The night was dark, the sea "jobbled." The vessel was in danger of being pierced by some of the sharp rocks about the Breakwater. The tugs hauled her off. It would have been impossible to haul the vessel out of her dangerous position by means of the anchor, nor would it have been wise or prudent to have left her there. The captain of the Papanui was warned of the danger of the position of the vessel. The wind during the night blew in strong gusts from the south-east.

The evidence for the defence was all taken on commission, and showed that in the opinion of the officers and others on board the Papanui the vessel was in a perfectly safe position, and that the commander had her tugged away out of consideration for the passengers, otherwise he would have allowed her to remain until he could get her off without the assistance of the tugs. The vessel sailed away next day without requiring any repairs. She was as safe where she lay as if in London docks. She had been there two hours prior to the arrival of the tugs. The value of the ship, freight, and cargo was £234,000.

Mr. Schreiner, K.C. (with him Mr. McGregor), for the plaintiffs: This is a case of salvage, and not towage. The keeping of tugs for salvage purposes is to be encouraged. See *The Glengyle* (78, Law Times, 201). From quarter to half the value of the ship and cargo has often been awarded for salvage services.

[Buchanan, J.: Sometimes even the whole.]

That is so; but mostly in small cases. The salvors are entitled to more than a "quantum meruit." The value of the vessel must be taken into account. The fact that the

tugs are kept ready for the purpose is a feature in favour of higher payment. See *Blackburn v. Mitchell* (14 S.C.R., p. 338); *Kennedy on Civil Salvage* (p. 147); *The Princess Alice* (3 W. Rob., 138); *The Phantom* (L.R., 1 A. and E., 58); *The Glenduror* (L.R., 3 P.C., 589—cited at p. 147 in Kennedy). In the latter case Dr. Lushington said the value of the property salvaged was some guide as to the salvor's remuneration, though it would not be fair to be guided by that alone in the case of a very valuable ship. The value of the tugs, too, must be considered. *Currier on Carriage by Sea* (pp. 327, 336, 337). The principle of salvage and maintaining tugs for that purpose was that the rich should pay for the poor.

Sir Henry Juta, K.C. (with him Mr. Searle, K.C.), for the defendants: The "poor" in this case are the "Harbour Board." If tugs are necessary it is only a duty on the part of the Harbour Board to keep them, for they have to make the port safe and popular. See *East London Landing Company v. Birmingham* (2 E.D.C., 399), where the chief conditions which entitle salvors to remuneration are laid down. The first is danger to the salvors, entirely absent in this case. There must be some risk. The ship rescued must have been in danger. The evidence is clear there was no danger. The amount of work must also be considered. On the facts there was no immediate danger. See *The Guglielmo D* (6 Juta, 134.)

Mr. Schreiner, K.C., in reply:

Mr. Justice Buchanan, in giving judgment, said: In this action the Table Bay Harbour Board sue the defendants, the owners of the steamship Papanui, for £1,000, which they allege they are entitled to for salvage services rendered. To this declaration a plea has been filed tendering £500, the tender having been made before the action was brought. The sole question is the sufficiency of the tender, because in this case the defence has not been set up that salvage services were not rendered, the dispute being solely as to the amount to be paid. The principles which guide the Court in salvage cases have been repeatedly laid down, and are well summed up in *Kay on Merchant Shipping* (section 720), where it is said that in estimating the amount to be paid the Court will take into consideration a number of things, viz., the value of the property saved, the actual peril from which it had been saved, the possibility of assistance from elsewhere, the state of the weather at the time the services were rendered, the degree of risk and peril incurred

by the salvors, the degree of labour and skill exerted by them, the value of the ships, boats, etc., employed in the salvage, the time occupied, the injury or loss of any kind to the salvors, and the fact of human life being saved. This authority goes on to say, and in this he agrees with the other authorities, that where all these conditions concur, a large and liberal reward should be given, and not one merely measured by the amount of work and labour done; and conversely, where none or scarcely any exist, the compensation granted would be little more than mere payment for work and labour. I quite agree that the considerations which should guide the Court are considerations in the general interests of commerce and navigation. After reviewing the facts of the case as disclosed by the evidence, his lordship continued. The first question we have to consider is whether the vessel was in danger, and I take it that that was admitted by the tender made in the plea, for if the ship had been in no danger, only a *quantum meruit* for services rendered would be given. It is true that the second officer expressed an opinion that the vessel was in as safe a place as if she were in the docks, but this is one of those exaggerations one expects from sailors. The ship was lying against the rubble of the breakwater, in such a position that without assistance by towage or other means she could not have got away, but she was not otherwise in imminent peril. The tugs came promptly, and did their work promptly, but it was not proved that they ran more risk than in an ordinary case of towage. They were not long employed on the work, and if this had been a mere question of towage, a £10 note would have been amply sufficient to cover the services rendered. Looking at all the circumstances, what is there to induce the Court to give a very liberal compensation for the services rendered? The only thing in favour of plaintiffs is the value of the vessel and the danger she was in. There is no other consideration present. There was no enterprise on the part of the salvors in going out into the open sea and running any risk themselves; and no life was in danger. The services were effectual certainly, but not more than any ship required in being towed out of dock. I quite admit that the value of the ship is, as the authorities say, one of the main elements to be taken into consideration in these cases, but there are the services rendered and the risk incurred to be considered also. The

mere fact that the ship was of considerable value does not of itself entitle the salvors to claim a very large portion of its value as salvage. I think that in this case the tender has been as amply sufficient a tender as might be expected, especially by a body like the Table Bay Harbour Board, whose duty it is to see to the safety of the harbour. Under these circumstances, judgment will be for the plaintiffs for £500, as tendered, with costs to date of tender, the plaintiffs must pay the costs subsequently incurred.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. J. and H. Reid and Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

ALEXANDER V. TRIGAUX. { 1901.
Feb. 6th.

This was an action instituted by James Alexander against the defendant Trigaux to recover the sums of £25 and £100, and costs, being the refund of certain passage money and damages for breach of contract.

The declaration set out that the plaintiff was the landlord of the Queen's Hotel, Sea Point, and engaged the defendant to serve him as principal chef for a period of two years from the 28th August, 1900, the contract being signed before the Resident Magistrate of Cape Town. That the contract provided that, if the defendant failed to carry out his contract, the plaintiff would be entitled to a refund of the passage money (£25) of the defendant from England, and to claim such damages as he may have sustained by reason of the breach. That in or about December, 1900, the defendant left the service of the plaintiff, and failed to fulfil his contract.

The plaintiff accordingly claimed £25, as above, and £100 as damages and costs.

Mr. Benjamin, for the plaintiff.

The defendant was in default with his plea, but appeared in person at the trial.

John Alexander, proprietor of the Queen's Hotel, Sea Point, said defendant entered his service on the 28th April, 1900, on an agreement to remain two years. His passage money (£25) was paid from England, and he received a salary of £16 a month. It was especially provided in the agreement (produced) that in the event of a breach of agreement by the defendant, he (plaintiff) would be entitled to claim the return of the £25, and such damages as he might have sustained by such breach. Defendant was in his employ for eight months. In July

witness had complaints to make to defendant, who thereafter absented himself for a week. Witness agreed to take him back. After that witness had complaints to make about the hours at which he came to the hotel. On the evening of December 17 witness complained to him, and he left, and did not return. Witness was indebted to the defendant in the sum of £9 when he left, and would forego any claim for damage beyond £9.

The defendant gave evidence, and said that he left because he was assaulted and sworn at by the plaintiff. He prosecuted the plaintiff for assault, but the Magistrate dismissed the case. He then offered to go back to the plaintiff's service.

The Court gave judgment for £25 (passage money) and £9 damages, with costs.

BEUKES V. KLEYN. (1901.
(Feb. 6th

Summons—Service—Sale by auction
—Cancellation.

Where summons was served on defendant's clerk at his place of business which was built on the same erf as his residence, the services was held to be good.

Where on certain goods being knocked down by an auctioneer to B., the owner immediately objected to the price, and the auctioneer then told the highest bidder "the sale was off" and the latter acquiesced,

Held, on the facts that there had been no sale [although the falling of the hammer, and the acceptance by the auctioneer of the bid ought strictly to constitute a sale].

This was an appeal from a decision of the Resident Magistrate of Caledon in an action in which Beukes sued Kleyn for the recovery of certain iron rails, valued at about £3, which were alleged to have been wrongfully and unlawfully removed by Kleyn from the premises of one Le Roux, where they had been placed by the plaintiff.

The Magistrate gave judgment for the defendant, and the plaintiff appealed.

There was also a cross-appeal by Kleyn (the defendant), on the ground that the

summons was served on the defendant's clerk at his business establishment.

It appeared that the rails were offered for sale by public auction by a third party. At the sale the plaintiff and present appellant Beukes made the highest bid, and the auctioneer, acting on behalf of the seller, knocked the goods down to the plaintiff. The representative of the seller, who was Kleyn, immediately proceeded to the auctioneer, and told him the price was insufficient, and the auctioneer thereupon declared the sale off, saying to the plaintiff, "Old man, the sale is off." The plaintiff did not demur, and said nothing. The goods were not again put up to auction. After the sale, however, the auctioneer sold the rails to Kleyn for a price more in accordance with the value of the articles, and Kleyn's name was entered on the vendue roll. Kleyn then took possession of one of the rails, leaving the others on the premises. The plaintiff afterwards removed the rails to the farm of one Le Roux, from where they were removed by order of the defendant.

The plaintiff claimed the recovery of the rails, and maintained that they were his property, he having bought them at public auction, and was not asked to consent, nor did he ever consent, to the cancellation of the sale.

At the trial the defendant excepted to the summons, on the ground of improper service, alleging that the summons was served on his clerk at his business premises during his absence, and not at his house. The Magistrate overruled the exception, knowing that the business premises and residence of the defendant were one and the same. Judgment was on the facts, however, given for the defendant, the Magistrate stating that the case depended on the credibility of the witnesses as to whether the sale was cancelled or not.

Mr. Schreiner, K.C., for the appellant: The sale was complete as soon as the hammer fell. *Matthaus de Auctionibus* (1, 10, 40, and 1, 10, 46) holds that in voluntary sales the property passes as soon as it is knocked down and then the sale is completed. See *De Smidt v. Steytler* (1 Searle, 136). The Magistrate held that the sale was complete, for he held it had been cancelled; and there can be no cancellation of a sale unless it has been completed. Now this cancellation was invalid, as there was no agreement by Beukes to cancel; without his (Beukes's) consent the seller could not declare the sale off after the

property had once passed. On the evidence there was no cancellation.

Mr. Searle, K.C., for the respondent on the merits: The service of the summons was bad, even though no prejudice was caused to the defendant. See Act 20 of 1856, Schedule B, Rule 10, and Act 17 of 1886, section 12. In the case of *Scott v. Clark* (13 S.C.R., p. 15), a summons was held bad although there was no prejudice. See also *Bank of Africa v. Kimberley Mining Board* (2 H.C., 12); *Green v. Hertridge and Co.* (4 E.D.C., 358); *Clarke v. Jim Bros.* (2 E.D.C., 165); *Stretton v. Francis* (6 E.D.C., 195). There is nothing on the record to prove the fact that the same erf contained the defendant's place of business and his residence.

Mr. Schreiner, K.C., in reply.

Buchanan, J.: The record of the proceedings in this case are most confused. As to the technical objection as to wrong service of summons, according to the return of the messenger, this summons was served at the place of business of the defendant. The rule of Court on that point is clear, i.e., that the summons must be served at the place of residence and not at the place of business. But the Magistrate knew the circumstances, and knew that in this instance the place of residence and place of business were practically one and the same. To construe the terms of the rule so strictly as Mr. Searle has urged would necessitate one going through a man's shop or to the rooms above his shop, should he reside behind or above his shop, in order to comply with the strict letter of the rule. The Magistrate said in this case that the same erf contained both the residence and the shop, and that service in the shop was substantially service at the residence. On the merits there is great force in Mr. Schreiner's argument, that the falling of the hammer and the acceptance by the auctioneer of the bid constituted a sale, but it was shown in this case that the seller immediately said, "I cannot sell at that price," and the auctioneer then said to the buyer, "Old man, the sale is off," and that the buyer acquiesced. In all the circumstances, I think that the finding of the Magistrate was correct finding, that there was no real sale, and that it was unwise of plaintiff to bring his action. The appeal will be dismissed with costs, costs in the cross-appeal being excepted from the judgment, and to be borne by the respondent.

Maasdorp, J., concurred.

[Appellant's Attorney, Gus. Trollip; Respondent's Attorney, Paul de Villiers.]

VAN NIEKERK V. BROWN AND (1901.
THE COLONIAL GOVERNMENT.) Feb. 6th.

Leave to appeal—Good and sufficient cause—Section 24 of Act 35 of 1896—Section 11 of Act 5 of 1879—Prosecution of appeal.

Judgment was given in favour of the plaintiff in an action on August 14, 1900, against which judgment he noted an appeal, but did not prosecute it. On February 6, 1901, he applied for leave to prosecute the appeal on the ground that the records of the case could not be printed within the three months.

Held, that in all the circumstances this was not such good and sufficient reason as would induce the Court to extend the time.

Semble, an application will not necessarily be refused if made after the lapse of the three months.

This was an application made by the plaintiff in the above-named action in whose favour a judgment of the Eastern Districts Court was given on August 14, 1900, for damages, for leave to appeal to the Supreme Court. The application was rendered necessary by reason of the fact that the appeal, though noted on August 14, had not been prosecuted within the three months allowed by section 24 of Act 35 of 1896. The affidavit filed by the applicant's attorney was to the effect that the appeal was not prosecuted owing to the delay in printing the records connected with the case. The records were very voluminous, and it was impossible to get the printer to complete them in time. The respondents' attorneys were communicated with on the subject, and knew that the appeal could not come on. Application had also been made direct to the defendant, Hannah Brown, for an extension of the time. The applicant had obtained damages for trespass, but wanted further an interdict against future trespass. There was an affidavit by Hannah Brown to the effect that no application was made to her until the three months allowed by the Act 35 of 1896 had expired.

Mr. Searle, K.C., for the applicant (plaintiff): The Court has power to extend the time by Act 35 of 1896, section 24, and Act 5 of 1879, section 11. See *Hiscock v. De Wet* (1 Appeal Cases, 35).

Mr. Schreiner, K.C., for the defendant Brown: The case has already been decided in favour of the appellant. *Saayman v. Le Grange* (Buchanan, 1878, p. 110) applies in this case. The application must be made within the three months' limit. In *Hiscock v. De Wet*, the fact that the application was made within three months was a special feature of the argument.

[Maasdorp, J., referred to *Smith v. Pinto* (Buchanan, 1868, p. 105).]

A time which has already lapsed cannot be extended: it can no more be extended than past time brought back: the case of *Smith v. Pinto* went very far, but can hardly be an authority for interpreting either the Act of 1879 or that of 1896. The rule is somewhat different in criminal cases. See *Snyders v. Theron* (10 Juta, p. 309); *Regina v. Mofokisi* (8 E.D.C., p. 162); *Regina v. Bruyns* (9 Sheil, 389); and *Brink v. Attorney-General* (8 Sheil, p. 33).

[Buchanan, J., referred to *Regina v. Botha* (9 Sheil, 429).]

The Court will go very far in criminal cases. Not so in civil cases, for there the maxim is "*expedit ut sit finis litium*." It must be noted in this case that the three months expired during the November term (i.e., November 14, 1900).

Mr. Ward, for the Colonial Government, to the same effect.

Mr. Searle, K.C., in reply: The Court can extend the time at any time when application is made. The Act of 1879 is very strong in its terms: so is Act 20 of 1856, section 33. Yet in spite of this the time was extended in *Smith v. Pinto*.

Buchanan, J.: This is an application for leave to appeal against a judgment pronounced by the Eastern Districts Court on the 14th August last year. Under the 24th section of Act 35 of 1896 unsuccessful suitors are entitled to appeal, provided they give 21 days' notice next after judgment to the Registrar and to the opposite party, and they are also bound by this section to prosecute the appeal within three months after judgment. The applicants in this case, who are the proposed appellants, gave the notice required, but did not comply with the further requirement of the section to prosecute the appeal within three months. To the section there is appended a proviso to the effect that it shall be lawful

for the Court of Appeal for good and sufficient cause shown, to extend the time within which the appellant shall prosecute his appeal. This extension of time is not as of right, but an act of grace, upon good cause being shown. With this proviso before the Court, looking at what has been said in previous cases by the Court, I am not inclined to limit the time absolutely to three months. The Court might not be sitting, or the circumstances might be such that the Court should, although three months have elapsed, exercise the right to give leave to appeal. I must confess that from the affidavits filed in this case there appear to be no good grounds for granting leave. Now, six months after judgment has been pronounced, the Court is asked to allow the appeal to be heard, without any reasonable explanation of the delay being shown. If the injury were serious and the parties were without other remedy, the Court would feel inclined to stretch a point, but in this case the appellant has a judgment in his favour for damages, and now wishes to appeal because he did not also obtain an interdict against future trespass. If the grievance complained of is repeated, the appellant will have his remedy. Under the circumstances, I do not think there is sufficient to induce the Court now, after such a lapse of time, to condone the negligence shown by the plaintiff. The application must be refused, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Van der Byl and Van der Horst; Respondent Brown's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Attorneys for the Colonial Government, Messrs. J. and H. Reid and Nephew.]

BEN V. MULVIHAL. { 1901.
Feb. 6th.

Summons Injury to property —
Necessary averment—Magistrate's Court.

When claiming civil damages for injury done to property it is not necessary to aver in the summons that the injury was "wilfully and maliciously" done, and any such averment will be taken as mere surplusage, not being of the essence of the claim.

This was an appeal against a decision of the Assistant Resident Magistrate of Cape

Town, in an action in which the present respondent (plaintiff below) sued the present appellant for the sum of £20 damages. The summons set out that the defendant below did, while in tenancy of the premises of the plaintiff below, "wilfully and maliciously damage" certain fixtures in the premises, and thereby caused damage to the extent of £60, reduced to £20 to bring it within the Magistrate's jurisdiction. The Magistrate gave judgment for the plaintiff for the sum of £10, and costs. Against this judgment, the defendant appealed.

The evidence showed that the plaintiff let to the defendant a certain soda-water factory, to be used as a laundry. During his tenancy the defendant converted shelves into tables, damaged an engine, and destroyed bottle racks and other appliances. There was nothing in the evidence to show that the damage was done "wilfully and maliciously." The Magistrate, in his reasons, said that the damage done to the shelving, etc., he estimated at £10, in accordance with a tender made by the defendant.

Mr. Schreiner, K.C., for the appellant (defendant below): There is no evidence of any tender. The summons is bad, and has not even been proved. There is nothing in the summons to show what damage was done; no particulars are given. Then the words "wilful and malicious" have not been proved. Having been inserted in the summons, the plaintiff should have proved them. See *Regina v. Shangan* (2 H.C., 433). The malice must be proved.

Mr. Gardiner, for the respondent (plaintiff below), was not called upon.

Buchanan, J.: The evidence shows that certain of the fixtures have been removed from their places, and used by the appellant for carrying on his business. Shelves have been converted into tables, and bottle racks and other appliances which were in their places when the property was let, were gone when the defendant came to give up possession. The summons claimed damages for injury done to this property. True, the injury was alleged to have been done "wilfully and maliciously." These words were put in the summons, probably as a sort of aggravation, but they were not essential. It was sufficient to allege that damage was done. Mr. Schreiner has quoted a case to show that it is necessary to prove the allegation of wilful and malicious damage, but that was in a criminal charge, where wilful and malicious injury was of the essence of the offence, and there could be no conviction for the crime without such proof. This was

a civil action for injury, and if the defendant was otherwise liable, it was not necessary to prove that the damage was wilfully and maliciously done. The Magistrate was justified in his judgment by the evidence, and the appeal must be dismissed, with costs.

Maasdorp, J., concurred.

[Appellant's Attorney, C. Brady; Respondent's Attorneys, Messrs. Scanlen and Syfret.]

ADMISSION. { 1901.
Feb. 7th.

[Before the Hon. Mr. Justice BUCHANAN (presiding) and the Hon. Mr. Justice MAASDORP.]

On the application of Mr. Buchanan, Cornelis Johannes Venter was admitted as an attorney and notary, the oaths to be taken before the Resident Magistrate of Colesberg.

COLLISON LIMITED V. DYKMAN.

Mr. Benjamin applied for provisional sentence on a promissory note for £300.

Granted.

SMITH V. GLOSTER.

Mr. P. S. Jones applied under Rule 329d, for judgment for £27 8s. 9d. for board and lodging.

Granted.

MANN AND CO. V. HORNE.

Mr. Upington moved for judgment, under Rule 329d, for the sum of £106 12s. 4d. for goods.

Granted.

EATON, ROBINS AND CO. V. WHEELER.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £99 1s. 11d., being goods sold and delivered.

Granted.

REGINA V. FRANCIS { 1901.
Feb. 7th.

Leave to appeal—Criminal charge—

Lapse of time—Act 21 of 1876, section 4.

F. who was convicted on 6th December, 1900, for contravening the Liquor Laws, noted an appeal,

but did not prosecute it within the 41 days prescribed by the Act 21 of 1876. He applied on February 7th for leave to prosecute his appeal.

The Court under the special circumstances of the case granted the application.

This was an application for leave to appeal against a conviction after the 41 days allowed by section 4 of Act 21 of 1876 had elapsed.

The applicant stated in his petition that he was a dealer in wines and spirits at Ugie, Maclear. That on the 6th December, 1900, he was convicted by the Resident Magistrate of Maclear of contravening sections 5 and 11 of Proclamation 343, dated 25th September, 1894, and sentenced to pay a fine of £20, or undergo three months' imprisonment with hard labour. An appeal was immediately lodged with the Resident Magistrate of Maclear, but owing to the remoteness of the district in which he resided, the disturbance of business by reason of the Christmas holidays intervening, and the pressure of business on his local and Cape Town attorneys, no communication took place with his Cape Town attorneys until January 10, 1901. His Cape Town attorneys thereupon on January 14, 1901, applied to the Registrar of the Supreme Court to set the appeal down for hearing on February 1, 1901, but the Registrar informed them that the notice of setting down the appeal for the 1st February could not be accepted, as the time would by 1st February have elapsed within which the appeal should have been prosecuted, namely, 41 days after notice of appeal was given. The petitioner proceeded to say that the 41 days would have expired on the 16th January, 1901, and that notice of set down tendered on the 14th January was within the proscribed time. That the petitioner was anxious to appeal, as he believed the evidence insufficient to warrant a conviction.

Sir Henry, Juta, K.C., for the applicant : Nearly all the servants in the Transkeian Territories are natives, and if it be held that natives cannot carry liquor, they could not be employed in the hotels in taking liquor into the different rooms. The point is of great importance to the licensed dealers in the Transkei. There was no sitting of the Court except for provisional work during the 41 days.

Mr. Ward for the Crown : The appeal could have been set down for January 12.

[Buchanan, J. : The Court sat on that day to hear motions. Criminal appeals are occasionally taken then, but only as a matter of courtesy and in the interest of the subject. There has been no term since the date of the conviction.]

The applicant shows us good and sufficient reason why the appeal should be heard after the lapse of the 41 days. See *Regina v. Mofokisi* (8 E.D.C., 162) ; *Snyders v. Theron* (10 Juta, 309).

Buchanan, J. : The 4th section of Act 21 of 1876, which regulates appeals in criminal cases, is emphatic, and requires the appeal to be noted within four days, and to be prosecuted within forty-one days after giving notice, and if not prosecuted, the conviction and sentence become final, and it is not competent thereafter to the party to bring the same in appeal or review. In several cases which have come before the Court, it has been pointed out, however, that though the right of appeal had lapsed, the Court would, under special circumstances, allow an extension of time. The Court has refused leave in several cases where there had been negligence or unnecessary delay, or no good reason shown for the extension. Here there are good grounds shown for some indulgence being given. The trial took place after last term, and this is the first term after conviction. The district is very far removed from town, and owing to the disturbed state of the country, the papers could not be sent down quickly. The only sitting of the Court within the forty-one days was on the Provisional Day, during vacation. This application was set down for the first sitting of the Supreme Court in the next term after conviction, and under these circumstances the appeal might fairly be allowed. The case, however, must be set down at once.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

PARSONS V. KUHR. (1901.
KUHR V. PARSONS. (Feb. 7th.

This was an application to have a rule *nisi* restraining Kuhr from interfering with Parsons, and disturbing him in his occupation or tenancy of the licensed premises known as His Lordship's Larder, situate at the corner of Loop and Longmarket streets, made absolute.

There was a cross application by Kuhr for an order restraining Parsons from trading or carrying on business at His Lordship's Larder.

From the affidavit filed by Parsons, it appeared that he purchased from Kuhr all the right, title, and interest that the latter had under a lease from Ohlsson's Breweries. That a promissory note was given for the purchase price, and that while he was lawfully in occupation of the premises Kuhr called and created a disturbance on the premises, using violence towards Parsons.

Kuhr, in his affidavit, said that Parsons had not carried out his part of the contract in failing to pay portion of the price in cash. He denied the violence or threatening language alleged to have been used.

Scott, the broker who negotiated the sale, made an affidavit in reply, stating that Kuhr received £325 in cash, and not £70, as alleged by him.

Sir Henry Juta, K.C., for the applicant.

Mr. Schreiner, K.C., for the respondent.

Buchanan, J.: It is impossible to come to any conclusion on these affidavits, as the evidence is extremely conflicting. Seeing that an action is about to be instituted by Kuhr against Parsons, the rule *nisi* will be continued pending the action, the question of costs meanwhile standing over. It will be better to make no comments on the affidavits until the action has been brought.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinne; Respondent's Attorney, C. Brady.]

BAMBANI AND OTHERS V. THE
OFFICER COMMANDING NO. 1 { 1901.
REMOUNT DEPOT, LESSEYTON. { Feb. 7th.

Commonage—Regulations—Grazing of military horses—Martial Law.

This application was before the Court on a previous occasion, to wit, January 17, when it was ordered to stand over. It was an application on notice calling upon the respondent to show cause why he should not be ordered to remove from the Lesseyton Commonage all camps, kraals, buildings, erections, and horses, or other animals now illegally remaining thereon. The petition set forth that the applicants were erf-holders in the village of Lesseyton, which was under the operation of the Village Management Act, and regulations for the management and allocation of the commonage

had been duly promulgated according to law, by which the erf-holders had a right to graze a certain number of cattle on the commonage. Some months ago, the military authorities placed on the said commonage a large number of horses, between 1,000 and 2,000. Owing to various causes, the commonage had been for some time past in a poor state, and that the petitioners had not enough grazing for their own animals, so that while anxious to assist the military authorities as far as possible, and place no obstacles in their way, yet the grazing of 2,000 horses on the commonage would do them (the petitioners) great damage. Therefore they were compelled to fall back upon their legal rights, and try to get the horses, or a large number of them, removed.

Sir Henry Juta, K.C., who appeared for the applicants, said that there had been answering affidavits filed, but he might at once say that it now appeared that martial law had been proclaimed in the district, and, as he presumed, that under martial law these horses were still being grazed there, he took it that the Court would not, under these circumstances, compel the removal of the horses, and the question of what damages had been sustained would have to wait until such time as martial law had ceased to exist in the district. Still, there was the question as to whether they were not entitled to come into court, and as to whether they were not entitled to one portion of their prayer, viz., that asking for costs of the application.

Mr. Searle, K.C., who appeared for the respondent, said that the matter had been before the Court on a previous occasion, when an affidavit was put in by Mr. Buissinne, to which was annexed a copy of an agreement which had been entered into between the Village Management Board of Lesseyton and the Imperial Government. Under this agreement, the Board agreed to hire to the Imperial Government the whole of the grazing on the commonage, about 7,500 acres, for 2,000 horses at a monthly rental of £15, the Imperial Government having the right to renew the lease from month to month. In the agreement there were also conditions as to the erection of buildings, etc., and also that in case of any differences between the lessors and the lessees, the matter should be referred to the Resident Magistrate of Queen's Town for arbitration.

[Buchanan, J.: I suppose the petitioners say that the Board had no right to enter into this agreement.]

It appears so. The matter has, however, been considered not only by the Board, but also by the erf-holders.

[Maasdorp, J.: Do you say that the Board had a right to make this agreement?]

I say the petitioners have no right to come before the Court now; there was a meeting of erf-holders.

[Maasdorp, J.: Were the petitioners at that meeting?]

That I cannot say. But the petitioners are not excluded from the right of grazing their animals on the commonage. This is an unheard-of application independently of the fact that the Imperial Government cannot be sued if it raises an objection thereto.

[Maasdorp, J.: As there might yet be an action the whole thing might be allowed to stand over until then.]

I do not know that I can object to the matter standing over. The position the Imperial Government takes up is that it cannot be sued at all. The officer who has been brought into court as the respondent was only acting under instructions from the Imperial authorities, as the agreement clearly showed.

[Buchanan, J., said that as martial law had hung up the case, this matter might stand over.]

Sir Henry Juta, K.C., said they only withdrew the application for an interdict because while martial law existed there was no use going on with the case.

[Buchanan, J.: And are you to proceed for damages after martial law has been withdrawn?]

I don't know, but I think we might settle the question of costs at once.

An affidavit by Major Etheridge, the Officer Commanding the Remount Depot in question, was then read, showing that in accordance with instructions he had received from the Imperial authorities, he had entered into negotiations with the Lesseyton Village Management Board for the lease of the commonage for the grazing of a number of debilitated horses. At first there was a verbal agreement, which was afterwards superseded by the written agreement put in, and which was the result of resolutions of the Village Management Board and the erf-holders. Under the conditions, the erf-holders had perfect freedom in grazing their animals on the commonage alongside the Imperial horses. It was also denied that the grazing was poor, and besides it was pointed out that the horses were fed in the kraals, receiving each 7 lb. of mealies and 7 lb. of hay per day.

Sir Henry Juta, K.C.: We are not suing the Imperial Government. That can only be done by a petition of right. We are suing the Officer Commanding the Remount Depot, and there is no law under which they could not sue an individual who committed a tort. Under the regulations, which are *intra vires*, no one, except the erf-holders, has a right to graze animals on the commonage. If they do it is trespass, and we can sue them. Only those who gave their consent will be debarred from suing for the tort committed. The simple legal position is that these erf-holders were entitled to the use of the commonage.

[Buchanan, J.: And the affidavits show that they get it.]

That is no answer. If a man puts a horse into my field, it is no defence to say that there is sufficient grazing for my horse. The Board may not let the commonage.

[Maasdorp, J.: The Court ought to have the grant of the commonage before it. Possibly the regulations are *ultra vires*.]

Buchanan, J.: This matter cannot be settled on motion, and an action will have to be brought, and that is the reason why I asked the petitioners' counsel whether they were prepared to go on with their action. The Court will make no order on this application, which will stand over pending the petitioners proceeding with their action, and the question of costs can then be settled. The matter will have to stand over until after martial law had ceased to exist in the district. The notice of motion will stand for summons if the action is proceeded with, if not, respondents can apply for costs.

Maasdorp, J., concurred.

[Applicants' Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. Van Zyl and Buissinne.]

THE SOUTH AFRICAN NEWSPAPER COMPANY V. THE ACTING POSTMASTER-GENERAL. 1901. Feb. 7th.

Newspaper—Prohibited circulation—
Postmaster-General.

The Military Authorities having prohibited the circulation of the "S.A. News" in all districts of the Colony in which Martial Law was in force an intimation to that effect was sent to the proprietors of the paper by the Postmaster-General, whereupon they moved

the Court for an order removing the prohibition.

The application was refused.

This was an application on notice calling on the Acting Postmaster-General to show cause why he should not be ordered to remove the prohibition placed against the free circulation through the post of the "South African News."

The petition of the applicants set forth that they were the proprietors and publishers of a newspaper named "The South African News," printed in Cape Town, having a large circulation in the Colony and elsewhere; that for reasons unknown to the petitioners the circulation of the paper had been stopped in all districts where martial law was in force; that numerous subscribers to the paper in those districts had complained because of the non-receipt of the paper owing to its stoppage; that during the last session of Parliament on the 1st August, 1900, a resolution was adopted in the House of Assembly as follows: "That in the opinion of this House, it is desirable that all newspapers published in this colony should be allowed to circulate among the subscribers of the said newspapers in districts where martial law is at present in force"; that other newspapers printed in Cape Town were allowed freely to circulate in the districts where martial law has been proclaimed; and that the stoppage of the circulation of the "South African News" was hampering and seriously injuring the petitioners in their business.

Frederick James Centlivres, the managing director of the company, made oath as to the truth and correctness of the facts and allegations contained in the petition.

Attached to the petition were notices from the Postmaster-General to the applicants to the effect that a notification had been received from the military authorities that the circulation of the "South African News" was prohibited in all martial law districts, and in all districts proclaimed subsequent to the letter.

The Acting Postmaster-General filed an affidavit to the effect that he had no control over the circulation of papers in any parts of the Colony subject to martial law, and would not be in a position to remove the prohibition complained of if he were ordered to do so. He was not aware whether the "South African News" was still posted at Cape Town for districts in which martial law prevailed, but all papers posted at Cape Town were forwarded in the ordinary course, but

were liable to be censored and stopped by the military authorities in martial law districts. He had written the applicants, communicating to them the receipt of the information notifying the prohibition of the "South African News" in martial law districts, deeming it right to let the applicants know the paper had been stopped.

The affidavit of General Sir Forestier-Walker, General Officer in command of the Lines of Communication in South Africa, was as follows: "Upon the proclamation of martial law in various districts of the Colony, during December last and the present month, I decided that it was necessary in the state of public feeling to prohibit the circulation of certain newspapers, among them the 'South African News,' in all martial law districts, and the Military Censor was informed accordingly."

Mr. Burton appeared for the applicant company, and informed the Court that a notice of motion had been served on the General Commanding the Lines of Communication. He therefore took it that the affidavit was filed in connection therewith.

Mr. Innes, K.C., A.G. (with him Mr. Ward), stated that the military were in no way made parties to the application. The affidavit was filed to support the position of the Acting Postmaster-General.

Mr. Burton submitted that the applicants had made out a clear case for relief. There was not the slightest doubt as to the Court having jurisdiction. To show this he referred the Court to the cases of *Regina v. Fourie* (10 Sheil, 195), and *Regina v. Naude and Bekker* (10 Sheil, 407, 443). He did not know whether it would be argued that the Court had no jurisdiction, but he submitted that the Court had clearly the power to make an order such as was asked. The question to be considered was not, therefore, whether the Court had jurisdiction, but whether under the circumstances and upon the merits of the case, such an order should be made. He submitted that the applicant had made out a clean *prima facie* case for relief. There had been an interference with the rights of the company, a grossly arbitrary and utterly illegal interference. The stopping of the circulation of the "South African News" in the proclaimed districts was very serious in its effects and meant practically the suppression of the paper, and the Court would see that the business of the applicants was interfered with to such an extent while the prohibition continued, that it would be very difficult indeed, he presumed, to carry on

the business. The Postmaster-General said he was not responsible; he screened himself behind the military, and from the affidavit of General Forestier-Walker, they found the military hiding themselves behind the by this time familiar shield of necessity, a necessity which knew no law at all. It was pleaded that the Postmaster-General had nothing to do with the prohibition, that it was a military matter. He (counsel) contended that the applicants were only concerned with the Executive Government, the officers of which were responsible. It must first be supremely and paramountly necessary for the safety of the Colony to stop the circulation of the paper. When the Executive interfered with the right of the subject, whether under cover of martial law or anything else, the Government or officials responsible must be called upon to show that the action was necessary. The position of the Executive was the same whether there was or was not martial law, and the Executive had the power to direct necessary steps without the aid of a proclamation. The Court would see it was dangerous to merely take the word of the Executive that an action they might like to take was necessary, and he (counsel) submitted that the Supreme Court was the authority to judge whether any arbitrary action was necessary or not.

[Buchanan, J.: You argue that the Court should say whether lights should be put out in martial law districts at nine o'clock or half-past nine?]

The question of putting lights out is very different to the one now before the Court.

[Buchanan, J.: It is just the same. It is an arbitrary act. Are we to decide whether it is necessary?]

In one case it is merely a local, practically a municipal, prohibition, which may have been put on by the municipality. In a matter of that sort, the Court was not in a position to inquire at what time lights should be put out. Counsel held that the question in the present case came within the jurisdiction of the Court, who should determine whether the action complained of was necessary. There were two courses open to the Court. Either it must be declared that the Court was alive and able to act in regard to matters occurring in martial law districts, or it must be said that the Supreme Court functions were suspended while martial law existed. No reason was given why the prohibition was necessary. The Court was quite as able to

judge as the military as to what was the supreme necessity for the stopping of the circulation of this paper. One could well understand the action if the paper were treasonable or seditious, but that was not alleged. No prosecution had been taken, and no complaint or allegation of this sort had been made, and if this were the actual cause, the Crown would have done its duty and prosecuted. What then was the cause? Was it because the political opinions of the paper were not quite agreeable? If that were so, the Court would hesitate to confirm an action based on such a reason. No explanation had been tendered, and it was difficult to come to any other conclusion than that this word "necessity" was being abused. The word "necessity" might easily be translated into the word "convenience." It might be very convenient for the circulation of this paper to be stopped, but that was not the question. The Court must be satisfied, not merely that it was convenient and desirable, but that it was necessary. There was no attempt to satisfy the Court that it was necessary. There was nothing more than a bald statement that it was necessary. He submitted that this was a clear case for relief.

Mr. Innes, K.C., Attorney-General (with him Mr. Ward), said that it was contended that there had been gross arbitrary interference, and that no reason had been alleged. The reason why no cause was alleged was because the petitioner had not brought it before the Court. When it was brought before the Court the respondents then would give such reasons as they thought made the action necessary. It had not been shown to the Court, and it had not even been argued that the Postmaster-General had stopped one copy of the "South African News" from going through the post. He could not remove a prohibition which he had not himself imposed. There was no allegation that the Postmaster-General stopped the circulation of the paper and there was no allegation that any copy of the "South African News" had been posted in Cape Town and stopped by the Postmaster-General since the prohibition was made. Under these circumstances, it was not necessary to lay before the Court the reasons which led the military authorities to take the action now complained of. The applicants could have taken other procedures. They could have called to account the postmaster in any district who had failed to comply with the regulations. The

commandant of any district under martial law who had stopped the circulation could be proceeded against, or the General responsible. When the proper respondents were brought before the Court, the whole question could be gone into, but it was highly irrelevant to call upon the Postmaster-General to ascertain the reasons of the military.

Mr. Burton submitted that the objection was not a good one. It was not for the Court to say who was the agent in stopping the circulation. The Postmaster-General was the responsible officer of the Executive Government.

Buchanan, J., in giving judgment, said: Very interesting arguments have been addressed to the Court, but the questions which the Court have to decide are limited to the application put before it. The applicants called upon the Acting Postmaster-General to show cause why he should not remove the prohibition complained of. The notification that the military authorities had stopped the paper in certain proclaimed districts was sent by him to the applicants as an act of courtesy. If the proper persons were before the Court, or anyone upon whom they could make such an order as could be carried out, it would be quite proper to go into the case and give such an order as the justice of the case would demand. But that was not so in this case. The Postmaster-General was called upon to undo a thing he had not done. He had not imposed the prohibition, and could not remove it, and he had therefore done nothing which he could be asked to undo. The application will be refused, with costs. The other part of the case the Court need not go into.

Maasdorp, J., concurred. None of the legal arguments, said his lordship, called for decision. It appeared that no application had been made to the military authorities, who stopped the circulation, and it also appeared that the Postmaster-General was prepared to forward, and had forwarded all papers posted. Beyond that, he had no responsibility. He was in no way responsible for the prohibition of the circulation, and the Court was now asked to order him to do something which he could not do.

[Applicant's Attorneys, Messrs. Sauer and Standen; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.]

In re VAN VELDEN. { 1901.
Feb. 7th.

Will — Construction — Survivor — Liquidation account — Posthumous child—Kinderbowys.

A. and B., married in community of property executed a mutual will appointing each other executor and administrator, and providing that if A. died first B. should remain in full possession of the estate until her death, but that if she married again she should sell or value the estate and then award herself one-third, the remaining two-thirds to be divided between the "children born of our marriage," their portions to be secured by kinderbowys. A. died first and B. remained in possession of the estate. On wishing to re-marry she drew up an account awarding herself half of the whole estate and one-third of the remaining half but omitted to provide for the portion of a posthumous child, since dead. The Master refused to accept the account and called for one in which she was to receive one-third of the whole estate and the children the remaining two-thirds. She lodged this under protest, and then put in a third account in practically the same terms as the first except that the share of the posthumous child was brought up. A kinderbowys had been executed in terms of the second account.

Held, that as the will consolidated and distributed the whole estate the second account was to be amended so to include the share of the posthumous child and the kinderbowys was ordered to be amended accordingly.

This was an application by a surviving spouse, who was also executrix and administratrix of her late husband's estate, for an

order authorising the Master to accept an amended distribution account filed by her on her second marriage.

The petition of Magdalena Maria Langehoven (born Hugo) set forth that she was the surviving spouse of Antony G. E. van Velden, to whom she was married in community of property, and was the executrix testamentary of his estate. That she was at the time of the petition married to C. J. Langehoven out of community of property. That she and her late husband made a joint will on May 3, 1888, and a joint codicil on November 6, 1888. Her husband died on the 10th December, 1893, leaving four minor children, who were still alive. Thereafter, on the 19th June, 1894, a posthumous child was born, who died on 19th June, 1895. That the petitioner took out letters of administration, and adiated under the said will, administered and remained in possession of the estate. Being desirous of marrying in January, 1897, she had the estate appraised, and afterwards framed a distribution account, in which she awarded herself one-half of the joint estate and one-third of the other half, in terms of the will, and the other two-thirds of that remaining half to the four surviving children. The Master refused to accept the account, holding that the distribution provided by the will was intended to affect the joint estate, and not only the half of the first dying. She thereupon filed a second account, under protest. That she thereupon executed a *kinderbewys* in terms of the account required by the Master. That in framing both the accounts the deceased posthumous child was inadvertently omitted. That on 25th September, 1900, she framed another amended account, it being in intent the same as the first rejected account, but making provision for the posthumous child's share. This account the Master rejected. She accordingly asked for an order authorising the Master to accept the amended account, and an order authorising the Registrar of Deeds to amend the *kinderbewys*, in terms of the distribution of the amended account.

The will provided that "in case the testator shall die before the testatrix, she shall remain in full possession of the estate until her death, provided she does not marry again." If she were to marry, she had to, prior to such marriage, "have the estate appraised by two impartial men, or otherwise have it sold by public auction, and the proceeds shall then be divided into three equal parts, one part of which the testatrix

shall inherit, and the other two parts of which the children born of our marriage shall inherit, their portions to be secured by *kinderbewys*. The testatrix, however, shall have the right to the usufruct of the portions until the children shall have reached the age of twenty-one years, at which time to each of them such sums shall be paid out as they are entitled to. In case the testatrix shall die before the testator, he will be the sole heir to the entire estate." The will then proceeded to reciprocally appoint the appearers executor or executrix, administrator or administratrix, "of our estate," and guardian of the minor heirs.

Mr. Schreiner, K.C., for the applicant: The wife is clearly entitled to her half of the common estate, also a third of the remaining half. The estate was not massed. If she had not married again, she could have made a new will disposing of her half, and would have had a life usufruct of the whole estate. The deceased child certainly had a vested right in the father's half, which right, on the child's decease, was divided by intestacy between the mother and the brothers and sisters.

Sir Henry Juta, K.C., as *curator ad litem*: The question involved is not merely the construction of the will, but also the setting aside of the *kinderbewys*. I can find no case in which a bond once entered into was set aside on the ground that there was a doubt about the law. In the case of the *Kimberley Share Exchange v. Hampton* (1 Laurence, p. 340), some such argument was advanced, but the Court would not entertain it. A *kinderbewys* is an acknowledgment of debt, and I can find no case where such a notarial deed can be upset on the ground that it was executed under a mistake of law. It is evident that the whole estate was being dealt with in the will, otherwise the will is meaningless. The survivor is appointed administratrix "of our estate." The will did not contemplate dead children, as is shown by the provision that the children were to get their portions on coming of age. See *Oosthuizen v. Oosthuizen* (Buchanan, 1868, p. 51), which shows that there was a disposition of the whole estate.

Mr. Schreiner, Q.C., in reply, cited *Klopper v. Smit* (9 Juta, 167), where a survivor, acting under a mistake, was allowed to elect. A mistake of title is a mistake of fact, and not one of law.

Buchanan, J.: The will in this case is somewhat obscure, but I think we can discover the intention of the parties. To ascertain this the Court will, of course, in the

first place, look to the actual words used by the parties, and there are also some principles of construction which may assist the Court in discovering the intention of the parties which is the main object in view in these cases. It is evident from this will that the parties meant to consolidate and distribute the whole estate. The account filed in accordance with the Master's reading of the will must accordingly be amended, but only with respect to the posthumous child, and the kinderbewys will be amended to agree with the account. An order will be made to this effect, costs to come out of the estate.

Maasdorp, J., concurred.

[Applicant's Attorney, C. W. Herold.]

GEDULD V. GEDULD.

Mr. Rowson applied on behalf of Mrs. Geduld for leave to sue her husband *in forma pauperis* for divorce, by reason of his malicious desertion and adultery.

A rule *nisi* was granted, calling upon the husband to show cause on February 14.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

Ex parte THE IMPERIAL GERMAN
CONSUL-GENERAL FOR SOUTH
AFRICA. { 1901.
Feb. 8th.

Evidence — Commission — Criminal
case—Germany.

Mr. Benjamin applied for leave to take the evidence on commission of certain witnesses in Cape Town in connection with a charge of dangerous wounding on board a ship of the German Navy. The case was pending in Germany. The Ambassador at the Court of St. James certified that the case was not of a political nature. Counsel quoted 19 and 20 Vict., chapter 113, and 33 and 34 Vict., chapter 52, section 24.

The Court granted an order as prayed, the evidence to be taken by the Vice-Consul, or in the alternative by the Consul-General.

VAN AARDT V. BEKKER AND (1901.
MAYNIER.) Feb. 8th.

Power of attorney—Unstamped—
Transfer of property—*Locus
Standi*—Act 10 of 1879.

This was an application for an order on the first-named respondent restraining him from passing transfer of certain property to Maynier pending the result of an action to be instituted by the applicant against the first-named respondent in respect of the said property. It appeared from the affidavits that the applicant was the brother of one J. G. van Aardt, to whom the respondent was alleged to have sold the property in question, and who acted as a commandant of the Orange Free State forces during the invasion of the Colony by them, and left the Colony with them. The applicant produced as his authority to act a power of attorney drawn by his brother, but not stamped according to law. The respondent Bekker admitted having sold the property to Van Aardt, but had not passed transfer to him nor intended doing so, because he said that the sale was cancelled by mutual consent when the applicant's brother went away.

Mr. Burton, for the applicant, moved for an order.

Mr. Schreiner, K.C., for the respondent Bekker: The applicant has no *locus standi*; the power of attorney is not stamped, and is a nullity according to Act 10 of 1879. The evidence shows clearly that there was a cancellation of the sale.

Mr. Burton: The applicant does not claim personal rights. He does not ask to be allowed to pass transfer to himself. He merely wants an interdict to restrain transfer to Maynier.

[Buchanan, J.: Are you entitled to come into this court? Is the applicant not a hostile enemy?]

The applicant's brother is still a British subject, and as such, although he has committed high treason, is entitled to come into this Court. The sale is good and still holds. If the applicant were an alien enemy he would not be allowed to sue in this Court. There is nothing to show that the contract has been broken. In *Edwards v. Pollard and Chester* (9 Sheil, p. 31) a rule *nisi* was granted on the affidavit of the applicant's attorney.

Buchanan, J.: The order must be refused on the ground of the want of authority.

[Applicant's Attorneys, Messrs. Van der Byl and Van der Horst; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

GILL V. WOOD } 1901.
Feb. 8th.

This was an application to have a rule nisi granted on an *ex parte* application made absolute. The applicant alleged that the respondent had excavated beneath the surface of a road adjacent to the properties of the parties at Muizenberg, and belonging to the applicant, and had removed stones therefrom, thereby making the road dangerous. The respondent denied any encroachment. Affidavits were filed on behalf of each party, and ultimately, by consent, the Court ordered that, without prejudice to either side, the interdict should be discharged, and that the question of costs should stand over for consideration at the hearing of a case pending in regard to the matter.

Mr. Searle, K.C., for the applicant.

Mr. Schreiner, K.C., for the respondent.

Ex parte HARRIS AND HARRIS.

Mr. Close applied for an order authorising the cancellation of a mortgage bond made by the applicants in favour of one Turner, who was now dead. It appeared that the amount due on the bond had been paid off on July 26, 1886, but by some oversight the bond was never cancelled. Turner's wife and executrix said she knew nothing about the bond, and did not object to the cancellation. Counsel quoted *Ex Parte Human* (1 Roscoe, 284).

The Court granted a rule nisi, returnable on February 21.

In re ELLIOT.

Mr. Benjamin applied on behalf of W. G. Elliot for leave to transfer certain property at Uitenhage to the estate of his late father in terms of his mother's will. The applicant was the executor of both estates.

Granted.

MANNERING V. MANNERING.

Mr. Buchanan moved, on behalf of Frederick Mannering for leave to sue his wife, Julia Mannering, by edictal citation, for restitution of conjugal rights, or, failing that, divorce. The allegations were that the applicant left his wife in England, after having arranged that she should come out later. She had declined to do so.

An order was granted, returnable on the 12th April, personal service to be effected.

LAMPORT V. UNION-CASLE MAIL STEAMSHIP CO.

Mr. Clare applied for a rule for leave to sue *in forma pauperis* to be made absolute.

Granted.

INDUSTRIAL LIFE ASSURANCE CO V. DENTON

Mr. Benjamin moved that a rule for leave to defend *in forma pauperis* be made absolute.

Granted.

GREENFIELD V. FRIESLAAR. { 1901.
Feb. 8th.
Feb 22nd

Mr. Gardiner moved that a rule nisi for leave to sue *in forma pauperis* in an action for damages for negligent driving be made absolute.

The rule was made absolute, Mr. Gardiner being appointed counsel and Messrs. Fairbridge, Arderne and Lawton attorneys for the plaintiff. The Rev. Thomas Cullen, of Simon's Town, was appointed *curator ad litem* for the plaintiff, who was a minor.

Ex parte GERDS (MINOR).

Mr. Close applied for authority to the Master to pay out the sum of £64 9s. 1d., and £250 per annum, to be devoted to the education of the minor, who wished to qualify for an electrical engineer.

Granted.

In re EVERY.

Mr. Close applied for the cancellation of a certain mortgage bond passed by the late Eliza Every in favour of the Standard Bank. The amount due on the bond had been paid off. The bank raised no objection.

A rule nisi, returnable on March 12, was granted, calling on all persons interested to show cause why the bond should not be cancelled.

The rule was made absolute on March 12.

In re SERRURIER

Mr. Buchanan moved for leave to pass transfer of certain property in the estate of the late Serrurier to one of the executors of the estate. The co-executors approved, and were desirous that transfer should be passed.

Granted.

Re PIETER CORNELIS DU TOIT. { 1901.
Feb. 8th.
Feb. 22nd.

Mr. Buchanan moved for the appointment of a *curator ad litem*, with a view to take legal proceedings against Du Toit to have him declared a prodigal.

There were two affidavits filed by the sister of the alleged prodigal and her attorney, stating that since the Court had on a previous occasion declared that he was not of unsound mind, he had asked them to assist him in the management of the large estate to which he had recently succeeded.

Maasdorp, J., pointed out that the affidavits were made by persons who were concerned in the previous application to have him declared of unsound mind. Affidavits from disinterested persons must be produced.

Later, on the production of an affidavit by Du Toit himself, asking to be placed under curatorship, the Court appointed Dr. Watson as his curator.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
and the Hon. Mr. Justice MAASDORP.]

VAN KOTSHEREN V. WADE. { 1901.
Feb. 11th.

This was an application for an order restraining the officer in charge of Pay Department of Her Majesty's Forces in South Africa from paying over to H. Kloofman, S. Kloofman, and H. Herron, a certain sum of money due to them by the Pay Department for certain saddles sold to the military authorities. It was agreed between the applicant and the Kloofmans and Herron that in the event of the saddles fetching a certain price the applicant was to receive 5 per cent. of the proceeds of the sale. This amounted to £109 7s. 6d. The applicant stated that he was informed, and verily believed, that payment was to be made by the Pay Department to the persons mentioned that day, and consequently applied as above.

Sir Henry Juta, K.C.: Will your lordships make the order on Colonel Wade, who is at the head of the Pay Department.

The Court granted a rule *nisi*, returnable on Thursday, February 14, to operate meanwhile as an interdict, it being understood that Colonel Wade need not appear personally on the return day.

WEAKLEY V. FISHER.

Mr. Gardiner applied to have a rule *nisi* made absolute.

Granted.

HENRY V. HENRY. { 1901.
Feb 11th.

This was an action for divorce, instituted by the wife against her husband, on the ground of his adultery with one Phillie Harries, with whom he was living as husband.

The declaration alleged that the parties were married at Swellendam in 1883 in community of property, and that there were two minor children, issue of the marriage. That since the year 1898 the husband had been continuously living in adultery with one Phillie Harris. The plaintiff therefore claimed a decree of divorce, and the custody of the minor children, together with costs.

Mr. P. S. Jones for the plaintiff.

Defendant in default.

Mrs. Henry deposed to having left her husband in 1892 on account of his ill-treatment of her, and having since resided in Cape Town, where she supported herself and the two children, whom she had brought with her.

Martha du Plessis stated that she knew the parties at Swellendam. Henry used to ill-treat his wife, and she left him in 1892. Since 1898 Henry lived with Phillie Harries in the same house and occupied the same room.

Buchanan, J.: In all such cases there should be some explanation of the delay in suing. The Court will grant a decree of divorce, with costs, the plaintiff to have the custody of the minor children.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

HOLT AND HOLT LIMITED V. { 1901.
THE UNION-CASTLE COMPANY { Feb. 11th
LIMITED. { „ 12th

Delivery—Bill of Lading—Handing
over ship's side—Dock agent—
Regulation 31 of Harbour Board.

H. delivered to U. certain 11
cases of cigarettes to be delivered
at Table Bay, under a bill of
lading which provided in its 4th sec-
tion that the handing of the goods
over the ship's side to the person
authorised to receive them was to
be considered delivery. U. ap-
pointed M. under the 31st Regula-

tion of the Harbour Board to receive the goods on behalf of the consignees and handed them to M. over the ship's side.

Held, that the 4th section of the bill of lading constituted a binding contract between H. and U., and that the delivery over the ship's side to M. was a valid delivery such as would relieve the ship from any liability for the loss of the goods.

Held, further that an agent appointed by the ship under the 31st Regulation is the agent of the consignee.

Plaintiff's declaration:

1. The plaintiff is a joint-stock company, having its head office at Johannesburg, but having a branch office and carrying on business at Cape Town, in this colony.

2. The defendant is the Union-Castle Mail Steamship Company (Limited), which is a joint-stock company duly registered in this colony, and formed, amongst other purposes, to take over by amalgamation the undertakings, assets, and liabilities of the Union Steamship Company (Limited), and is the proper party to sue in this action.

3. On May 11, 1900, the Union Steamship Company received at Southampton, on board their steamship the German, for and on behalf of the plaintiff certain eleven cases of cigarettes, the receipt whereof was duly acknowledged by two bills of lading whereof the plaintiff is the legal holder.

4. It became and was the duty of the said company duly to carry and convey the said cigarettes, and duly to deliver the same to the plaintiff at or off Table Bay.

5. The German arrived in Table Bay, and the said company duly delivered to the plaintiff through its agents nine of the said eleven cases of cigarettes.

6. As to the two cases of the said cigarettes of the value of £80, the said company and the defendant company, as successors as aforesaid to the said company, wrongfully and unlawfully failed to make delivery to the plaintiff.

7. All things have happened, all conditions have been performed, and all times have elapsed and passed necessary to entitle the plaintiff to demand delivery of the said two cases or payment of their value, but though the said company on or about

the 23rd day of July, 1900, admitted that the said cases had been short landed at Cape Town, the defendant company wrongfully and unlawfully refuse to deliver the said cases or pay their value.

Wherefore the plaintiff company prays for:

(a) An order compelling the defendant company forthwith to deliver the said two cases of cigarettes,

Or failing compliance with such order,

(b) Judgment for £80, the value thereof, or that it may have such further or other relief in the premises as to this Hon. Court may seem meet, together with costs of suit.

Defendant's plea:

1. The defendant admits paragraphs 1 and 3, and admits that he is the proper person to be sued in this action, but denies the other allegations in paragraph 2.

2. By the said bill of lading, the defendant agreed to deliver, subject to the conditions hereinafter mentioned, at or off False Bay, to the plaintiffs or their assigns, the said cases of cigarettes. By the said conditions, it is provided that at all ports and places of delivery the goods may be landed at the consignees' risk and expense, and that the ship's responsibility is to cease when the goods are over the ship's side, and that in every case the consignee shall bear all expense and risk incurred after the goods leave the ship's deck.

3. By the regulations of the Table Bay Harbour Board, all landing of goods shall be done by and under the superintendence of persons designated dock agents, and only one firm of dock agents shall be permitted to land cargo, and such firm of dock agents shall be appointed by the agents of the ship on behalf of their consignees. The said regulations were known to the plaintiffs, and were valid and binding upon the plaintiffs.

4. In pursuance of the said regulations, the agents of the said German, when she arrived in Table Bay, appointed the firm of A. R. McKenzie and Co., duly authorised dock agents, to be the dock agents on behalf of the plaintiffs to land the said cases of cigarettes.

5. The defendant duly delivered over the ship's side to the said dock agents, acting as aforesaid on behalf of the plaintiffs, the said eleven cases of cigarettes.

6. The defendant admits that on the 23rd of July he admitted that two cases had been short landed at Cape Town, but says he did so in error, and under a misapprehension, and in ignorance of the true facts, which are,

that the two said cases were duly delivered over the ship's side as aforesaid.

7. Save as aforesaid, the defendant denies the allegations in paragraphs 4, 5, 6, and 7, and specially denies that the said firm of McKenzie and Co. were his agents, as alleged by the plaintiffs.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

Plaintiff's replication:

1. As to paragraphs 2 and 3 of the plea, the plaintiff begs to refer this Honourable Court to the bills of lading and regulations therein referred to when the same are produced in court.

2. As to paragraphs 4 and 5 of the plea, the plaintiff admits that the agents of the German appointed the firm of A. R. McKenzie and Co., who are duly authorised dock agents, to land and deliver to the plaintiff the eleven cases of cigarettes, but specially denies that the defendant delivered over the ship's side to the said dock agents, or that the said dock agents delivered to the plaintiff eleven cases of cigarettes. The cases so delivered were nine in number, and no more.

3. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, the plaintiff denies all allegations of fact and conclusions of law in the said plea, joins issue thereon with the defendant, and again as before prays for judgment with costs.

The rejoinder was general.

The evidence led for the plaintiff company was to the effect that on the 11th May, 1900, eleven cases of cigarettes were laden on board the S.S. German at Southampton, for Cape Town. There were two bills of lading, and the plaintiffs were the consignees of the cigarettes and holders of the bills of lading. The defendant company, on the arrival of the German, delivered, through Messrs. McKenzie and Co., agents, nine of the eleven cases. The other two cases had never come into the plaintiffs' possession. On the 23rd July, after Messrs Southern and Co. had written as agents for the plaintiffs, the defendant company wrote, admitting the short landing, and Holt and Holt sent in their claim. On the 23rd of October the Union-Castle Company wrote to the plaintiffs stating that they were satisfied that the cases had been landed, and they declined to entertain the claim. The tallies of Messrs. McKenzie showed only nine cases of the cigarettes to have been landed, but the clerk who made the tallies had left. A clerk for the plaintiffs said,

during the hearing on the previous day, that the plaintiffs had given the numbers of the two cases missing as 931 and 932. These, he explained, were given from memory, as the defendants required numbers. The missing numbers according to the tally of Messrs McKenzie's clerk were 930 and 932, and the tally of Messrs. Glynn and Co., the plaintiffs' agents, showed numbers 926 and 930 to be missing. Counsel mentioned that there was some confusion about the numbers, but it was supposed Messrs Glynn and Co.'s tally showed the correct ones.

The evidence for the defendant was to the effect that one W. H. Homer was acting on behalf of the Customs in regard to goods landed from the German on the 8th June. It was customary for the Customs officer to tally all goods for the purposes of revenue. The Dock was very congested at that time, and the German was moved from three different berths while unloading. Witness took the tally of the goods from the German, and was assisted by a man named Foreman. Witness tallied eleven cases of cigarettes landed for the plaintiffs. The numbers of the cases were 958, 923, 924, 930, 931, 929, 926, 925, 932, 927, and 928. Witness had no means of ascertaining the numbers except from the cases as they were landed. He had no ship's manifest, nor any other documents. If there had been any short landing, witness would have endorsed the entry accordingly.

Mr. Schreiner, K.C. (with him Mr. Close), for the plaintiff: The onus lies on us to prove that the ship received the goods, and then it is for the ship to prove delivery. The ship did receive the goods. The consignee is bound to allow the delivery agent appointed by the ship to handle the goods. The consignee has no control over this agent of the ship, and so the ship must prove delivery to the consignee or his own agent, and not merely to the delivery agent. See *Lister v. McKenzie* (Aug. 22 and 23, 1900, 10 Sheil, Part 3, p. 480). McKenzie in the present case was the ship's agent. The ship, after landing the goods, was bound to see that her statutory agent, McKenzie, sorted and delivered the goods.

[Maasdorp, J.: Was it not held in *Epstein v. East London Harbour Board* (10 Sheil, p. 696) that the Harbour Board was responsible for the delivery?]

Yes, because the Harbour Board undertook to land the goods. The delivery was not effected in this case until the goods were actually pointed out to the plaintiffs, who were not entitled to have an agent at the

ship's side. The crucial point is: "Did plaintiffs receive the goods?"

Sir Henry Juta, K.C. (with him Mr. Buchanan), for the defendants: The claim itself admits the correctness of Homer's evidence, including as it does the duty payable. The Court does not now know what cases are missing. All the numbers said to be missing have been seen by some witness or other. McKenzie was not the ship's agent; he was appointed under Regulation 31 of the Harbour Board. The regulation has not been attacked in the pleadings as being *ultra vires*. The landing of the eleven cases over the ship's side dissolves all liability on the part of the ship. On the evidence all the cases were so landed, and handed to McKenzie.

Mr. Schreiner, K.C., in reply: the liability of the company does not cease after the goods have been handed over the ship's side. The plaintiffs deny all conclusions of law in the plea, and that includes the conclusion that McKenzie was lawfully appointed the agent of the consignee. The appointment of McKenzie by the ship as the agent of the consignee was prejudicial to the consignee. He has had an agent dumped down on him without his consent, by whose omissions he is to be prejudiced.

Buchanan, A.C.J.: This is an action to recover two cases of cigarettes (or their value) which were delivered to the defendant company for conveyance by the ship German to Table Bay. The plaintiffs produced two bills of lading from the company, one for one case of cigarettes, and the other for ten cases. As to the one case, that was duly received, and is now out of the question. Each of the ten cases on the other bill bears a distinctive mark. According to the bill of lading, they bear consecutive numbers running from 923 up to 932. There are two questions raised, one of fact and one of law, and it is desirable before dealing with the law, to express an opinion on the facts. None of the tallies produced before the Court are in perfect agreement. McKenzie and Co.'s tally shows eight of the ten cases to have been received, the German's own tally clerk gives nine cases as having been landed, and the Customs tally shows that ten cases were landed. It is significant that at first the two cases said to be missing were said to be numbered 931 and 932. McKenzie's, Nelson's, the Customs, and the German's tally books show case 931 to have been duly delivered. As to number 932, McKenzie's tally clerk has not entered it as delivered, nor has the German's clerk,

but as a fact it was landed, because number 932 is shown to have been at Thomson, Watson and Co.'s bonded warehouse, so in this respect McKenzie's and the ship's tallies are wrong. The Customs tally clerk is the one person outside the parties in this case. If his evidence is credible, all the ten cases were landed. If the other books had agreed as to the two cases said not to have been landed, there might have been something to say against the tally of Homer, the Customs officer. McKenzie's tally clerk is a person who had only just been employed and had had no experience in the work, and has now left the employment, and cannot be found. Judging from the books, his tally is not to be relied upon, for, acting upon that tally book, McKenzie at first returned three cases as missing. I must confess that I had some difficulty in coming to the conclusion that it has been clearly shown that all the ten cases were landed, especially in view of the admission by the defendant company that two cases were short landed. That admission is strong evidence against them, but if these two cases were landed, it would be a fraud on the ship not to allow this admission to be rectified on proof of the actual fact. The Court has come to the conclusion, on the whole evidence, that the ten cases were landed from the ship. As to the question of law as to whether the handing of the goods over the ship's side to McKenzie was a valid delivery, we find that by the 79th section of the Act, wider power is given to the Table Bay Harbour Board than to other Harbour Boards. The section provides that no goods should be landed, shipped, or delivered except by persons authorised by the Table Bay Harbour Board. Consequently, with this law in force, it is not competent for any consignee to go and get his goods; he can only take them through the person appointed. The 31st regulation provides that only one such dock agent should be appointed, the appointment to be made by the ship. The person so appointed is not an agent for the ship. He was appointed on behalf of the consignees, and acted on their behalf. There is also a distinct contract between the parties by the 4th condition of the bill of lading, by which it was specifically provided that the handing of the goods over the ship's side to the person authorised to receive them was to be considered delivery. The Court has therefore the fact that the ten cases were landed, that they were handed over the ship's side to the person appointed under the regulations to receive them on behalf of the consignees,

and we have further the contract between the parties in the bill of lading. As a question of fact, the Court finds that the goods were handed over the ship's side, and as a question of law, that the handing over was a valid delivery. In these circumstances, the action must fail, and judgment will be given for the defendant company with costs.

Maasdor, J.: I am of opinion that the only reliable list is that of the tide-waiter (Homer), who seems to have kept a very careful and authentic record of every article received.

[Plaintiff's Attorneys, Messrs. J. and H. Reid and Nephew; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

HEYDENRICH V. VAN DRIEL. { 1901.
Feb. 13th.

This was an action to recover the sum of £35, the proceeds of a certain promissory note, made and signed by one P. P. du Toit, collected and received by the defendant, and of which note the plaintiff was legal holder.

The declaration set out: (1) That the plaintiff was a financier, and the defendant an attorney and notary, residing at Green Point.

2. In or about the year 1896 the defendant was practising as an attorney-at-law and notary public at Cape Town in co-partnership with one H. C. du Preez, under the style of H. P. du Preez and Co.

3. The South African Loan, Mortgage, and Mercantile Agency (Limited) was a limited liability company, then carrying on business at Cape Town, and the said Du Preez was indebted to the said company in a large sum of money, for which he gave the company certain securities.

4. Amongst the securities mentioned in the foregoing paragraph was a promissory note for the sum of £35, due 4th January, 1886, made by one P. P. du Toit in favour of the said Du Preez, which said promissory note was endorsed over to the said company by the said Du Preez.

5. On or about 8th February, 1886, the said promissory note was handed over for collection to the said firm of Du Preez and Co.

6. The amount of the said promissory note was recovered by the said firm of Du Preez and Co., but was not paid over to the lawful holders.

7. The said firm of Du Preez and Co. subsequently dissolved, and certain matters

in dispute between the partners were submitted to the arbitration of Mr. Advocate Searle.

8. It was provided in paragraph 3 of the award upon the said submission that defendant, Van Driel, should satisfy outstanding debts, and recover outstanding claims of the late firm of Du Preez and Co. for his own benefit, except as thereafter mentioned.

9. The said Du Preez and Co. was indebted to the said South African Loan, Mortgage, and Mercantile Agency in the amount of the promissory note which they had recovered.

10. The claim of the said Loan Company was not satisfied, and this claim was ceded to the plaintiff.

11. All times have elapsed and all conditions have been fulfilled, entitling plaintiff to receive payment from the said defendant of the sum of £35, but the defendant rejects and refuses the said sum.

The plaintiff accordingly claimed the sum of £35, with interest at the rate of 6 per cent. *a tempore morae*, and costs of suit.

The defendant in his plea admitted paragraphs 1, 2, 3, 4, and 5 of the declaration. He admitted that the firm collected the £35, but denied that it was not paid over to the lawful holder. That, acting on the instructions of the said Du Preez, he placed the amount to the credit of Du Preez, with the knowledge of the manager of the South African Loan, Mortgage, and Mercantile Co. and of the plaintiff.

He admitted paragraph 7, and said that the settlement included the amount now sued for, and this the plaintiff knew, the said amount having been credited to the said Du Preez. He admitted paragraph 8, and denied paragraph 9, saying the present claim was not an outstanding one. He denied paragraph 10, and said that Du Preez's estate was sequestrated on May 15, 1883, and that the Mercantile Company aforesaid proved against the insolvent estate for the amount of £35, mentioning as their security the promissory note. That on the 23rd November the trustee sold all the claims due to the insolvent Du Preez, and pledged to the said company, and one of the claims so sold was the promissory note, which the plaintiff purchased. He denied paragraph 11, except that he refused to pay the amount.

And for a further plea, he said that the plaintiff's right of action (if any) accrued more than eight years before the commencement of the action, and so opposed the defence of prescription.

Mr. Nathan for the plaintiff.

Mr. McGregor (with him Mr. Burton).
for the defendant.

Benjamin Heydenrych said he was the plaintiff. During 1886 he had transactions with H. P. du Preez, who was indebted to him in a large sum of money. He gave witness a special bond over his business for this money, the bond to rank after that of the Loan and Mortgage Company's. In 1889 there was an arbitration between Du Preez and Van Driel. He was a party to the arbitration. Afterwards the estate of Du Preez was sequestrated. Witness claimed in the estate as a creditor to the extent of £3,000. A sale was made of the assets of the estate. Witness bought a list of claims, including the present promissory note. This was to protect his claim in the estate. That was in April, 1889. The promissory note was for £35. At the time he bought it he had no knowledge that it had been collected by Du Preez. Witness heard afterwards that it had, as a fact, been collected. In 1897 he got the cession which had been read.

By Mr. McGregor: During the years 1886, 1887, and 1888 he had a very intimate knowledge of Du Preez' affairs. He was now suing on what he bought from the trustee in Du Preez' estate in 1889. It was at the same sale that he bought a claim against the estate by one Langerman. He sued on that claim, but did not recover it. He did not know that Van Driel went to the Transvaal. He did not know when he came back. He could not swear that the note was not sued on in 1886. He was informed that the note was paid in 1886. He did not know that for the last two and a half years Van Driel had had fixed property, otherwise he would have had a writ of arrest against him.

Cornelius Johannes Muller, a clerk in the insolvency branch of the Master's Office, put in the accounts in the estate of Du Preez and the proofs of debt.

Hercules Petrus du Preez said he was an attorney. In 1886 he had transactions with the Loan and Mortgage Company. He handed over his assets before leaving for England. One was a promissory note for £35 due by Du Toit. He left his general power of attorney with Van Driel. He found afterwards that the amount was collected by Van Driel during witness's absence on behalf of the Loan and Mortgage Company. It was placed to the credit of the partnership of Du Preez and Van Driel. He never paid the amount to the Loan and Mortgage Company.

Before leading evidence, Mr. McGregor applied for absolution from the instance with costs. He referred to *Heydenrych v. Langerman* (1 Sheil, 67). Du Preeze had been paid, and therefore had no debt to cede. The trustee had nothing to cede, nor had the Loan Company. There was no cause of action, and if there was a cause of action the further defence of prescription would apply.

Mr. Nathan: The Loan Company had to account for the £35, and as far as Van Driel is concerned the insolvency is immaterial. Van Driel is liable under the arbitrator's award. The amount was an outstanding debt at the date of the arbitration, and defendant is therefore liable.

Buchanan, A.C.J.: The Court must remark on the antiquity and staleness of this claim. The plaintiff bases his claim on a transaction of fifteen years ago, and notwithstanding the fact that various actions have been instituted by the plaintiff during that time, this present one has never been mentioned. On the facts of the case, the Court has come to the conclusion that the plaintiff has utterly failed to make out any claim whatever against Van Driel. Absolution will therefore be given from the instance with costs.

[Plaintiff's Attorneys, Messrs. Van der Byl and Van der Horst; Defendant's Attorneys, Messrs. Dempers and Van Ryneveld.]

MCCARTHY V. DE BEEBS (1901.
CONSOLIDATED.) Feb. 13th.

Proprietary rights—Selecting and locating claims—Diamond mine—Area granted under an agreement—Application to extend area.

By deed of agreement between the applicant and the respondent company as owners of certain property the latter gave to the former the right to search for diamonds by underground working only, within a limited area, with the right of obtaining within a certain period a lease of a certain area. One of the articles of the agreement was as follows:
"The lessors reserve the right, in the event of surface ground being resumed by competent authority, to enter on and prospect such ground,

but so as not to interfere with the lessee in locating the claims he may select to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits." The applicant in the course of prospecting having found diamonds, claimed his rights under the agreement and the High Court gave him an order entitling him to make trial pits within a defined area in the neighbourhood of the place where the diamonds were found "for the purpose of selecting and locating the claims." This order was complied with. After the expiry of the agreement the applicant applied for an extension of the area granted, stating that as the High Court had intimated that they would be prepared to extend the area and the time allowed by the agreement if the diamondiferous soil extended beyond this area and the trial pits in the area granted were insufficient, he was entitled to an order extending the area.

Held, that as the agreement had expired, and the applicant had chosen the area granted when the judgment was given he was not entitled to a further area on the present application.

Vide McCarthy v. De Beers Consolidated Mines (10 Sheil, 687.)

This was an application for an order on the defendant company compelling them to deliver to the applicant the possession of certain land for the purpose of enabling him to sink trial pits on such land. It appeared that according to an agreement between the parties, the applicant was given the right to search for diamonds by underground working only, within a limited area, and with the right to obtain within a certain period a lease of a certain area. By another clause of the agreement it was provided that the lessors reserved to themselves the right, in the event of the surface ground

being resumed by competent authority, to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he might select to take on lease under the agreement, which claims the lessee was at liberty to select and locate by means of trial pits. In an action before the High Court, he claimed the right to make thirteen trial pits at different spots for the purpose of selecting his claims, after having made certain drives. The High Court and the Supreme Court agreed that this could not be allowed, as the thirteen spots indicated were not in the vicinity of the drives, where he was bound to sink his pits. By the consent of the parties, the judgment given in the High Court gave the plaintiff the right to sink his trial pits within a defined area within the vicinity of the drives. An opinion was also expressed in the High Court that if the trial pits within this area were insufficient, the Court might grant an additional area within which to sink pits. The Supreme Court practically approved of this judgment and order, which had been complied with by the defendant company. The plaintiff and applicant now said that he had tunnelled 20 feet underground beyond the space allotted to him by the order, found that the diamonds lay in that direction, and consequently wished to have the surface of the ground in that direction at his disposal, so that he might sink pits there.

The original trial of the issues between these parties took place at Kimberley on September 14, 1900, the judgment in that case coming on appeal to the Supreme Court on November 24, 1900. (See 10 Sheil, p. 687.)

Mr. Burton (with him Mr. Close) for the applicant: This is an entirely new application.

[Buchanan, A.C.J.: The Court has already gone as far as it possibly could in this case.]

This application is not for an extension or variance of the original order. This Court confined itself to the matter brought before it on appeal. We now come to Court on clause 9 of the agreement. We claim a further area by virtue of the expression of opinion of the High Court. The question of the extension of area was distinctly stated to have been outside the consideration of this Court on appeal.

[Buchanan, A.C.J.: The order of this Court was complied with, so any fresh claims you make must be by virtue of your agreement.]

No, we base our claim on the remarks of the High Court when judgment was given. Application has been made to

that Court, but it was refused, so now we come to this Court.

[Buchanan, A.C.J.: The agreement expired on January 2, 1900.]

The Court gave us a further six months from the date of its judgment, and now we want more land. We want to select our claims, to which we are entitled under the agreement, and we want the right to do so by sinking trial pits. We cannot do so by our underground workings. "Claims" mean "claims in a diamond-mine," and until we know the surface extent and direction of the mine, we cannot locate our claims.

Mr. Schreiner, Q.C. (with him Mr. Rubie), was not called upon.

Buchanan, A.C.J.: The plaintiff, Mc-Carthy, instituted an action in the High Court of Griqualand West against the defendants founded on an agreement entered into by the defendants' predecessors in title. This agreement was fully discussed in the case that came before the High Court, and in the appeal before the Supreme Court, so it is hardly necessary to go over the details of the case again. The cause of action was briefly as follows: The agreement between the parties gave the lessee for twelve months from January, 1899, the sole right of searching for diamonds by underground working only, starting from a place which was known as the Alice Mine. He was allowed to run underground drives from there in any direction, and within the twelve months was entitled to select 100 claims for the purpose of working a diamond-mine. The agreement contained several clauses, and in the last clause there was a stipulation that if any of the surface ground were resumed by competent authority the lessors were not precluded from themselves investigating and endeavouring to find a diamond-mine, and in the same clause they gave liberty to the lessee to select by means of trial pits all the claims of the diamondiferous ground discovered by underground working. Circumstances occurred which prevented the lessee from completing his work within twelve months and additional time was granted. In an action before the High Court of Griqualand West, he claimed, after having made certain drives, the right to make trial pits at thirteen different spots for the purpose of selecting his claims. The High Court and the Supreme Court held that this could not be allowed, and also held that he must sink his pits in the vicinity of the drives. By the judgment of the High Court,

given by consent of the parties, a specific area was selected for the sinking of the trial pits, this area being in the vicinity of the drives. An opinion was further expressed in the High Court that if the trial pits within this area were insufficient the Court might grant an additional area within which pits might be sunk. But that was a matter outside the judgment, and in the Supreme Court the learned Chief Justice said that that question could not be discussed. The order of the Supreme Court was substantially an approval of the High Court judgment, and was to the effect that the trial pits must be sunk within the area indicated, and within six months from September 14, 1900. That order has been complied with. The surface has been surrendered to the plaintiff, and he has been allowed to sink his pits on the area. He now comes to the Court, after the expiry of the agreement, and wishes to found a right to sink trial pits in an additional area. The plaintiff has chosen a certain locality within which to sink his trial pits. The Court assigned that locality to him. It would be going far beyond the justice of the case, far beyond the agreement, and far beyond the judgment of the High Court or of the judgment of the Appeal Court, if we were to select a considerable area on which plaintiff might go and sink trial pits. He still has the right to underground driving. He has a large area within which he may sink trial pits, and he must confine himself to that area, selecting his claims where the agreement allows. Therefore, as far as the present application is concerned, the Court is of opinion that it should be dismissed with costs.

Jones and Maasdorp, J.J., concurred.

[Applicant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Scanlen and Syfret.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

Ex parte DU TOIT. { 1901.
Feb. 14th.

Mr. Benjamin moved for the admission of Andries F. du Toit as an attorney.
Granted.

WILSON, SONS AND CO. V. VOGES.

Mr. Blake moved for judgment, under Rule 329d, for the sum of £33 10s. 4d. for goods sold and delivered, with interest and costs of suit.

Judgment as prayed.

SCOTT V. JOHNSON.

Mr. Benjamin moved for judgment, under Rule 329d, for the sum of £37 9s. 2d., goods sold and delivered.

Granted.

BEST V. HARRIS.

Mr. Gardiner moved, under Rule 329d, for judgment for the sum of £30 3s. 3d., cash advanced and goods sold.

Granted.

COLLISON AND CO. V. DYKMAN.

Mr. Benjamin moved for judgment, under Rule 329d, for the sum of £150 18s. 9d., for balance of account on goods sold.

Granted.

SCOTT V. PENBERTHY.

Mr. De Villiers moved for judgment, under Rule 329d, for the sum of £35 8s. 3d., goods sold and delivered.

Granted.

HAHNE V. JOSEPH.

Sir Henry Juta, Q.C., applied for the fixing of a day to hear the above case before a jury.

Mr. Schreiner, Q.C., appeared for the respondent.

The day of trial was fixed by consent at March 15, 1901. On a subsequent application by the defendant Joseph, the trial was fixed for March 27, 1901, on which date the case was tried.

In re* DAVIS (MINOR).**Ex parte* RUTHERFORD.**

Mr. Rowson applied for an order authorising the Master to pay £120 per annum out of the principal of the inheritance of the above minor towards the cost of his education.

[Buchanan, A.C.J.: Does the Master recommend the application?]

Mr. Rowson: Only to the extent of £84. He appears, however, to have overlooked certain items of expenditure.

Buchanan, A.C.J.: An order will be granted in terms of the Master's report. To go beyond the Master's report in these matters, the Court requires a very strong case to be made out.

***In re* VAN BREDA (MINOR).**

Mr. Benjamin applied for an order authorising the Master to make certain payments towards the maintenance and education of the minor.

The Master's report was favourable.

Order granted in terms of the Master's report.

***In re* HERMAN. { 1901.
Feb. 14th.**

Executor—Removal—Insolvency—
Power of attorney to act as
executor—Creditor.

H., one of the executors testamentary of an estate became insolvent and during the lifetime of his co executor granted in conjunction with him a power of attorney to one of the creditors of the estate, who alleged that he acted under the power after the co-executor's death, because he found H. did not manage the estate satisfactorily.

H. was removed from his office as executor on application made, and the power of attorney granted by H. and his deceased co-executor accordingly became of no effect, being a power granted by persons when in a fiduciary capacity and terminating when their office ceased to exist.

This was an application to have a rule nisi made absolute. The rule was granted calling on the respondent Herman to show why he should not be restrained from passing transfer of certain property situate in the Gardens and belonging to the estate of his late mother, of which estate he was the executor; further, why he should not be removed from his office as executor testamentary, and for an order authorising the Master to take steps for the appointment of another executor.

The application of the trustees of the insolvent, who were instructed by the creditors, stated that the respondent Herman was now insolvent, and has advertised for sale the property in the estate contrary to the terms of the will by which he was appointed. It was also alleged that he had handed over the administration of the estate to a creditor by a power of attorney.

There was an affidavit by one Freeman, to whom the property in question was mortgaged, and who had acquired the management of the estate from the insolvent executor. The advances made on the property by him were made for building materials, with which to keep the property in a fit state of repair, and under the condition that the control of the estate was placed in his hands. He at first left Herman to manage the property and collect the rents, but not being satisfied with his management, he took matters into his own hands, and thinking the present time a favourable one, advertised the sale of the property. The power of attorney given him was in the widest possible terms, and was consented to by the usufructuaries under the will, the insolvent's sisters.

The latter in a joint affidavit said that the property had been kept in good repair, was worth £15,000, had been greatly improved by money they had sunk in it, and was mortgaged to Freeman for £9,600. They were desirous of selling to realise sufficient to meet their creditors, and did not wish their brother to be removed, as he had always looked after the property well.

Mr. Benjamin moved.

Mr. Buchanan, for the sisters: The important point is the executor's removal. The applicants have shown no good grounds; insolvency alone is not a sufficient ground for removal. Section 25 of Ordinance 104 of 1833 gives no power to the Court to remove an executor for insolvency. There must be proof of misconduct against the executor. *Maasdorp on Succession and Executorship* (p. 87); *Trustees of Wright v. Executors of Wright* (2 Roscoe, p. 84); *Grobbelaar's Trust v. Grobbelaar's Executors* (Buch., 1879, p. 207); *In re Smit* (Buch., 1879, p. 121); *In re Wicht* (2 Menzies, 373). An executor has been removed from his trust for embezzlement. *Mathlabane v. Spogter* (11 Juta, 252). All the cases go to show that there must be some misconduct or incapacity. The will does not prohibit the sale of the property.

[Buchanan, A.C.J.: The ground of removal is stated to be that he has handed over the management of the property to another.]

He has placed it in good hands. He could not help doing this, because he was being pressed by his creditors. The object of the application is to get the estate out of his trust; that will not help the creditors. See *Furnivall v. Cornwall's Executors* (12 S.C.R., p. 6). There is a usufruct on the estate, so it cannot be wound up. The brother is an agent for the usufructuaries, to whom the estate has been handed under security.

[Maasdorp, J.: Can the creditors be estopped from claiming?]

No; they can force a sale, and this is just an opportune time.

[Buchanan, A.C.J.: But the creditors are not selling; only one of them is.]

Technically that may be so, but the creditor selling is in the executor's place, and acts with his consent.

Mr. Burton for the mortgagee Freeman: There is no allegation that the estate will suffer by the sale. The removal of the executor will not affect the mortgagee's power of attorney. The creditors over the quarter-share of the insolvent in the estate will not be prejudiced. Freeman is simply Herman's agent. The persons chiefly interested are the usufructuaries, and they consent to the sale.

Buchanan, A.C.J.: The 5th section of Ordinance 104 of 1833 regulates the proceedings to be taken for the appointment of a new executor to an estate in cases where the previous executor has died, or become incapacitated to act, or where he has been removed from office by any competent Court. The grounds upon which an executor may be removed are not specified in the Ordinance, but various decisions of the Court show that a person will not necessarily be removed from office for insolvency alone, if otherwise capable of administering an estate, the principle guiding the Court being a consideration of the interests of the estate entrusted to the care of the executor. In this case there were two executors appointed. One has died, and his executor has joined in the application for the removal of the other, who has become insolvent. Now this insolvent executor has failed to administer the estate, and has handed it over to a creditor for administration. This creditor himself states that he employed the surviving executor to administer the estate, but found the arrange-

ment was unsatisfactory, and had to be put an end to. The affidavits show that there was such a want of capacity on the part of the executor as will justify the Court in removing him, in the interest of those concerned in the estate. As to the power of attorney given to the creditor, he can no longer act under it, whatever may have been done in the past. This power was given to him (Mr. Freeman) by two persons in a fiduciary position, one of whom is dead and the other has now been removed. The order will be made absolute, as prayed, the costs to come out of the estate.

Jones, J., and Maasdorp, J., concurred.

[Applicants' Attorney, S. J. Mostert; Attorneys for the Insolvent, Messrs. Sauer and Standen; Attorneys for the Usufructuaries, Messrs. Fairbridge, Arderne and Lawton.]

COMBRINCK AND COMPANY V. ^{1901.}
THE BRITISH SOUTH AFRICA ^{Feb. 14th.}
COMPANY. ^{" 15th.}
^{" 18th.}

Contract—Sale—Delivery—Impossibility of delivery—Breach of contract—Damages.

C. and B. entered into an agreement by which B. was to deliver during a period of two years 10,000 fair prime oxen to C. at a cost of £2 per head. At the end of the two years C. demanded delivery and B. pleaded that it was impossible to carry out the contract in consequence of matters altogether beyond his control, e.g., the rinderpest, which had destroyed all the available cattle.

Held, that as there was no setting aside of specific cattle prior to the rinderpest B. was liable in damages on the contract notwithstanding that the rinderpest by destroying the cattle made delivery impossible.

The damages, were, however, assessed at a nominal sum sufficient to carry costs, the Court finding that the oxen, if delivered, would have been absolutely worthless to C.

Held, further, that where delivery is to be made within a fixed period the person who has to so deliver will not be liable for breach until the last day of such period has passed.

Plaintiffs' declaration:

1. The plaintiffs are David Pieter de Villiers Graaff and Jacobus Arnoldus Combrinck Graaff, carrying on business in Cape Town under the style or firm of Combrinck and Co. The defendant is the British South Africa Company, a company established by Royal charter, and carrying on business in Cape Town and elsewhere.

2. On or about 30th October, 1894, and at Cape Town, a contract was entered into between the plaintiffs and the defendant company, through its duly authorised agent, one Dr. J. W. Jameson, whereunder the defendant company sold to the plaintiff, who purchased from the said company, 10,000 slaughter-oxen, in fair prime condition, for the sum of £2 sterling each, the said oxen to be delivered by the defendant company to the plaintiffs at Bulawayo, in Southern Rhodesia, within a period of two years, reckoned from January, 1, 1895, the price to be paid for the same as the same were delivered.

3. The plaintiffs have always been ready and willing to perform their portion of the said contract, to receive the said cattle, and to pay for the same upon delivery; but although they have frequently called upon the defendant company to complete the said contract and make delivery of the said cattle, the said company has failed and neglected to deliver the same or any of them.

4. By reason of the failure to deliver the said cattle, the plaintiffs have sustained great loss and damage in their business, and have been compelled to purchase slaughter-oxen elsewhere, at great cost, and have lost large profits in connection with their business. The total amount of the damages sustained by the plaintiffs is the sum of £41,283 16s. 8d.

The plaintiffs claim:

(a) An order on the defendant company to complete their contract to deliver the said 10,000 cattle, within such reasonable time as to this Court may seem meet, the plaintiffs tendering to pay the purchase price upon such delivery, or in the other alternative, the sum of £41,283 16s. 8d. as damages,

(b) Alternative relief,

(c) Costs of suit.

Defendants' plea :

1. The defendant admits the first paragraph of the plaintiffs' declaration.

2. The defendant admits the second paragraph of the declaration, save that he says the sale was 10,000 head of cattle, and he denies that the words "fair prime" formed part of the said contract, but says that the cattle therein referred to were agreed to be portion of certain specific cattle, to wit, cattle in Matabeleland, which had been the property of the Chief Lobengula, which became the property of the defendant on the conquest of that country by the defendant.

3. All the cattle specified as aforesaid were early in 1895 attacked by the disease known as rinderpest, and died, and the defendant, through no default on his part, was unable to deliver to the plaintiff any of the said cattle.

4. The defendant further says that the removal of cattle in consequence of the said disease from any portion of Rhodesia was prohibited by law early in the year 1896, which prohibition continued in force until long after the period had expired within which delivery was to be made to plaintiff.

5. The defendant says that, in consequence of the said prohibition, the plaintiff would not have accepted delivery of the said cattle, even had they been tendered to him at Bulawayo, in terms of the said contract, and he could not have removed the said cattle out of Rhodesia.

6. The defendant says that the plaintiff has sustained no damage by reason of the said cattle not being delivered to him within the period specified in the contract.

7. Save as is admitted in paragraphs 4, 5, and 6 above, the defendant denies all the allegations contained in the third and fourth paragraphs of the declaration.

Wherefore he prays for judgment, with costs.

The facts appear sufficiently from the judgment.

Mr. Searle, Q.C. (with him Mr. Burton and Mr. Currey), for the plaintiffs: The first question is: "What was the contract between the parties?" The contract is set out in paragraph 2 of the declaration, which is admitted by the opposite party, though they have at the last moment amended 10,000 oxen to 10,000 head of cattle. The contract is embodied in the letters of 10th, 11th, and 12th of July, and accepted by the letters of July 14 and 16. The oral evidence does not take the case much further. A later correspondence occurred in October, by which the number was reduced from

50,000 to 10,000. Nothing is said about either the time or place of delivery. Also, the contract was varied by reducing the price (which was to have been between £2 5s. and £2 10s. per head) to £2. From the correspondence in October between Mr. Graaff and Drs. Harris and Jameson, the time for the performance of the contract is not fixed. The earlier correspondence, however, said that the cattle had to be fair prime slaughter-oxen and not a mixed lot of cattle. The contract shows that 5,000 cattle were to be delivered in each year. The delivery was to be spread over two years, 1895 and 1896.

[Maasdorp, J.: If the cattle were to be delivered at uncertain intervals, does not that mean when they should be asked for?]

The demand was not necessary. Assuming the company were bound to deliver 5,000 in 1895 and 5,000 in 1896, what was their remedy? The action is not an action for damages, but for specific performance.

[Jones, J.: The cattle were divided between the Government and the Loot Committee, and the Government gave the natives half the cattle.]

No, nothing was given back to them. The evidence shows that 250,000 to 400,000 head of cattle were in the country. Mr. Graaff said he expected the cattle from Matabeleland. It has not been proved that the company could not deliver the cattle now. It is no answer to say that they could not deliver them in 1896. We hold that the contract was never cancelled. We always insisted on the performance of the contract, as was clear from the plaintiffs' letter of August 22, 1898. It is for the company to show that they cannot make delivery now. Plaintiffs cannot claim damages if defendants showed they cannot now deliver. In *Stewart v. Ryall* (5 Juta, 146) the Chief Justice said that the Civil Law deemed a person to have contracted at the place where the contract was to be performed. In *Smith and Warren v. Harris* (5 H.C., 196) the Judge-President pointed out the distinction between English and Roman-Dutch Law as to specific performance. The rule is that specific performance can be decreed save where it is impossible. *Voet* (19, 1, 14); *Kettles v. Bennett* (8 E.D.C., 82). If a vendor cannot deliver all the purchase, he is bound to deliver what he can. It lies on the defendants to show not only that they could not have fulfilled their contract in 1896, but that they cannot do so now. I admit that the cattle must come from Matabeleland, and it is for defendants to show that the cattle were not

there. If the Court is against me as to specific performance, and holds it to be a case for damages, how are those damages to be assessed? It is admitted that 5,000 cattle should have been delivered in 1895 and 5,000 in 1896. Then why was Dr. Harris never examined? A commission was appointed to take his evidence. Rhodes referred to him for details, and yet we have not got his evidence. Mr. Graaff remembered the details of the contract; Mr. Rhodes did not. His memory was clearly not reliable. He could not even remember the date of the Raid. It was the duty of the Chartered Company to bring 5,000 cattle at some time in 1895 to Bulawayo, and deliver them without waiting for a demand from Combrinck and Co.

[Jones, J.: Did you have a representative in Bulawayo in 1895?]

Yes, but that is immaterial. If we had not had a representative, the Chartered Company would have been bound to make reasonable delivery and advise Combrinck and Co. of their arrangements. It does not matter whether they were anxious to get the cattle or not. As to the transaction with the Loot Committee, the object of that was to start ranching. This transaction was on quite a different footing. Goods are at the risk of the vendor if he is in default. *Van Leeuwen's Cus. Forensis* (p. 1, Bk. 4, C 19, sec. 7); *Faber on the Code* (Bk. 4, tit. 28, def. 3). This is so whether the goods are specifically appropriated or not. If the Chartered Company was in default in not delivering, the measure of damages would be the profit which could be made out of the cattle. As to the cattle which should have been delivered in 1895, the only defence which can be set up is that the cattle were never asked for. That is really no defence. The plaintiffs base their calculations on their books for 1897 and 1898. For 5,000 cattle they would have had to pay £35,000; from this £19,400 must be deducted for expenses of bringing the cattle down. That leaves £15,600. That is on the assumption that the Matabele cattle weighed about the same as Colonial cattle. Plaintiff's evidence shows they did, though defendant's witnesses do not agree with them. Even supposing that a Matabele ox weighed two-thirds of the weight of a Colonial, that would reduce the claim by about £5,000. Then the Court ought to allow about 5 per cent. for loss of cattle on the journey. That leaves about £10,000 damages for non-delivery in 1895. As to 1896, it is said all the cattle sold had died. Of course, if a specific thing perished, the loss would fall upon the purchaser. Here

there is no proof that all the cattle in Rhodesia perished. The rinderpest did not break out till March, 1896, but the company's officials seemed to know nothing about the contract. Neither Dr. Harris nor Dr. Jameson have been called. Plaintiff is certainly entitled to some damages for the some hundreds which defendants might have delivered.

Sir H. Juta, Q.C. (with him Mr. Buchanan), for the defendants: My learned friend has enunciated rather a novel doctrine as to specific performance. I have never heard that specific performance is a remedy on a breach of contract of sale. No authority has been cited, and such a novel doctrine would lead to many absurdities. In case of non-delivery of goods sold the measure of damages would be ascertained by reference to the time of the breach. It is admitted that if specific articles had been sold and they perished before delivery the loss must fall upon the buyer. Were specific articles sold in this case? Mr. Graaff said that he intended to contract for Matabele native cattle. He intended to buy some of the cattle, not all of them. So far the case is on all fours with *Howell v. Coupland* (1 Q.B.D., 258). The cattle bought were part of a specific thing, and if they had been set apart plaintiff would have to pay, and would have lost both his £20,000 and his cattle. The question then is (1) were all the cattle destroyed; (2) can the contract be split up? I submit it could not. If one is bound to deliver a thing within a certain time he cannot be sued for delivery until the last instant of that time has expired. Mr. Colenbrander said there were not 500 head of cattle in the country. Mr. Rhodes said that he had had to eat "bully" beef. There were no cattle, and they could not give cattle. Then as to the question of law. What is the law as to delivery? Plaintiffs based their claim for damages on what took place in 1897 and 1898. They clearly considered that the breach of contract took place in 1896. They dated their contract from the 30th October, 1894, and the contract was to deliver in 1895 and 1896. There is no stipulation that a certain number must be delivered each year. Mr. Graaff could not claim his cattle till the end of 1896. They never asked for them till the end of 1896. There is no case in which it has been held that a contract has been broken till the last day had expired of the period within which it is to be performed. See *Benjamin on Sales* (687). Dr. Jameson's letter distinctly mentioned two years as the time for delivery. The first mention of equal proportions is in

Mr. Graaff's letter. We never accepted the terms of that letter. In his declaration plaintiff never claimed to split up the contract. Graaff did not want the cattle all at once. If we had given him 5,000 cattle on January 2, 1895, what could he have done with them?

[Maasdorp, J.: Then you say you could have waited till the last day of 1896.]

Sir H. Juta: Yes, we were not bound to deliver in instalments. Then, again, plaintiff never demanded his cattle. He was quite willing to wait till the vendor was ready to deliver. It is amusing to hear a plaintiff come into court and ask for damages when his own evidence shows that not getting the cattle was his salvation. For the lost cattle he received £3,700 more than he paid, and yet he said he lost £3,000 on them. From the correspondence it is clear that mixed cattle and not oxen were bargained for.

[Jones, J., pointed out that in the plea 10,000 oxen were mentioned.]

Yes, that is a little unfortunate. What was meant was that the oxen among the mixed cattle were to be fair prime. Graaff was going in both for ranching and for slaughter oxen. He required both. As to the size of the oxen, the best test was the price, and whereas a Matabele ox cost £2 to £3, a Transvaal ox cost from £7 to £7 10s. If allowance is made for difference of weight, plaintiffs have sustained no damage. On 12,000 Matabele cattle plaintiffs lost £7,500. That was on account of the poor condition of the cattle, and the expense of bringing them from up-country. If plaintiff lost so heavily on these cattle how can he now be heard to say that if he had had more cattle he would have made a profit?

Mr. Searle, Q.C., in reply.

Buchanan, A.C.J., in giving judgment, said that the plaintiffs in this case, Messrs. Graaff, who formerly carried on business in Cape Town as butchers and cattle dealers, sued the defendants, the Chartered Company, on a contract which was set forth in the second clause of the declaration. This clause stated that on October 30, 1894, an agreement was entered into between the plaintiffs and the defendant company, through its duly-authorized agent, Dr. Jameson, whereby the defendants sold to the plaintiffs 10,000 slaughter-oxen, in fair prime condition, for the sum of £2 each, delivery to be made at Bulawayo within a period of two years, reckoned from January 1, 1895. To this section of the declaration the plea said, save that the sale was of 10,000 head of

cattle, and save as to the words "fair prime," that the defendants admitted the contract. There was no specific document containing the contract, but it was to be gathered from the correspondence between the parties. The first letter was from Dr. Jameson, who stated therein that Mr. Rhodes and himself quite agreed that there should be some definite understanding as to the number of cattle to be delivered, at all events within the next two years, and that he thought he could safely promise 10,000 within that period, which he did. Mr. Graaff replied the same day, and there was a further letter of the same date accepting the offer of 40s. per head for the 10,000 head of oxen. At the time this contract was entered into the defendants were possessed of a number of Matabele cattle, and were anxious to dispose of a number of these. Mr. Rhodes, who had been called, thought it was a dealing generally with these cattle, not a sale of oxen only, but he left all details to Dr. Harris. At about this time a number of these cattle were sold to various purchasers in mixed lots for 20s., 25s., and 30s. per head, and as the contract was entered into at 40s. per head, this supported the idea that the cattle contracted for were oxen only. In the earlier correspondence, Dr. Harris said that the oxen should be what was known as fair prime. With regard to this term "fair prime," it was not one in common use in this country. The plaintiff Mr. David Graaff, in his answering letter, written the next day, said that what he understood with regard to the condition of the oxen was that each lot should be fat. This was the only explanation given by the parties themselves as to what was meant by the term "fair prime." In subsequent correspondence, "oxen" were spoken of. He thought, therefore, that the construction of the contract was that 10,000 head of oxen were sold, to be in fair condition, at 40s. per head. The declaration went on to allege that the contract stipulated that the cattle were to be delivered within a period of two years, reckoning from January, 1895. During the year 1895 no demand was made for delivery, though some casual conversations took place between plaintiff D. Graaff and Dr. Harris and Mr. Rhodes. During 1896 no demand of any kind was made, but on the 31st December, the last day fixed by the contract, plaintiffs wrote inquiring when they could get possession, and immediately after—on the 12th January—the defendant company replied that owing to the ravages of rinderpest they had lost their cattle, and were

therefore quite unable to deliver. So far, therefore, there was a contract to deliver 10,000 head of oxen at 40s. per head during the period of two years. At the end of the period, when application was made for delivery, an intimation was given that the defendants were unable to comply with the contract. There was the contract, and that was the breach. The defendants set up the defence that in consequence of matters altogether beyond their control, the plague of rinderpest having swept through the country and destroyed the cattle sold, it was impossible to carry out their contract. Now, if there had been any making or setting aside of specific cattle, so as to fix the *periculum rei vendita* on the purchaser, the principles of our law exemplified in the cases of *Marais v. Deare and Dietz* (Buch., S.C. Rep., 1878, 168); *Poppe, Schunhoff, and Guttery v. Mosenthal and Co.*, and *Taylor and Co. v. Mackie, Dunn and Co.* (Buch., S.C. Rep., 1879, pp. 90, 166), might have been called in to assist the defendants. But there was nothing of the kind in this case, and the general rule must be held to apply, namely, that where a party has, either expressly or impliedly, undertaken without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control. The defendants must therefore be held responsible under their contract, notwithstanding that the cattle were destroyed by the rinderpest. There remains, then, the question as to what damages the plaintiffs have suffered in consequence of the breach of contract. The plaintiffs would be entitled to nominal damages at all events, and considering the circumstances, such nominal damages should be sufficient to carry costs. But the difficulty the Court had to deal with was to find that the plaintiffs had suffered any real and substantial loss through the breach. There was no date specified for the delivery of any particular number of stock at any time, and the plaintiffs claimed the right to demand the whole 10,000 head before the lapse of the two years stated in the contract. The cattle were bought as being captured stock, and were sold at the ordinary market price prevailing in the territory; they were to be delivered some 600 miles distant from the nearest railway-station; there was lung-sickness and other diseases prevailing in the country, and there was the difficulty and risk of driving so many cattle such a distance. After the outbreak of rinderpest the

cattle were practically worthless, and had the defendants called upon plaintiffs to take delivery then they would simply have lost the purchase price which they would have had to pay. Counsel recognised the difficulty, and ultimately confined the claim for damages to one-half the number, which he contended should have been delivered in the first year, and worked out the loss on these 5,000 head to amount to between £8,000 and £10,000. Had there been any demand during the first year and a failure to comply therewith, possibly there might have been some basis to work upon. But there was no such demand, and the abandonment of any claim for the half of the cattle to be delivered in the second year goes far to cover the whole case. But independently of this, he (the Acting Chief Justice) must confess that the circumstances disclosed in connection with the purchase from the Loot Committee of the other lot of cattle by the plaintiffs made him doubt whether the contract was a profitable one, even if rinderpest had not broken out. The purchase of the 10,000 head of cattle from the Loot Committee afforded a practical test of the value of the contract. These other cattle were, it was true, a mixed lot; they were purchased at 25s. per head, and notwithstanding the fact that upwards of 500 calves were thrown into the bargain, and 40s. per head was paid a'll round to the plaintiffs for as many as were destroyed in consequence of the outbreak of rinderpest, the plaintiffs sustained a loss of upwards of £3,000 on the transaction. These cattle, it must be remembered, were delivered at once to plaintiffs; yet in spite of all care they managed to get only some 830 or 840 of them to Cape Town. It was not a fair test of damages to take the value of cattle in the Cape Colony at the time of the alleged breach of contract. As jurors, the Court were inclined to the view that it was fortunate for the plaintiffs that they were demanded and never received delivery of the cattle at any time within the two years. There had been a contract, and there had been a breach of contract, but the plaintiffs had not shown that the breach had resulted in substantial loss to themselves. Judgment would be given for what was really a nominal amount, but it would be sufficient to carry costs. Judgment would be entered for plaintiffs for £25 damages and costs.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissinne; Defendants' Attorneys, Messrs. Scanlen and Syfret.]

**BIBBICK QUARRIES SYNDICATE) 1901.
V. MILLS. (Feb. 19th**

This was an action instituted to recover the sum of £34 10s. 6d., being the balance of an amount due on a contract, by which the plaintiffs supplied to the defendant a quantity of stone.

The declaration set out that from and after February, 1900, up to and including May, the plaintiff syndicate supplied to the defendant, who was a builder and contractor, a quantity of stone, the price of which was £343 10s. 6d. Of this sum the defendant had paid £303, and the plaintiff syndicate now claimed the balance.

The defendant filed a plea to the effect that the purchase price of the stone was £327 10s. 6d., and accordingly tendered £18 10s. 6d., the difference between £327 10s. 6d. and £303 paid on account.

The plaintiffs refused the tender.

Mr. Buchanan for the plaintiffs.

The defendant was in default.

Henry James Long, secretary of the syndicate, said that stone to the value of £343 10s. 6d. was delivered to the defendant. Several accounts had been sent to the defendant, and he never repudiated the amount. The witness never knew that the account was disputed until the plea was filed. The account was correct, according to the books of the syndicate.

Judgment was given for the amount claimed, with costs.

**LEGATE V. LEGATE (1901.
(Feb. 19th.**

This was an action for restitution of conjugal rights, or, failing that, divorce, instituted by John Michael Legate against his wife, Annie Angeline Legate.

The declaration set out that plaintiff resided in Cape Town, and the defendant in Kenilworth. They were married at Johannesburg in July, 1899, and in October, 1900, they were in Natal together. The respondent left her husband there with his consent, and then went to Kenilworth, where she resided with her mother. In January, when petitioner returned to Cape Town, his wife refused to live with him, and she still refused to do so, notwithstanding his requests to her to return. He had offered to provide a home for her to come to, but she declined.

John Michael Legate, the petitioner, said he was married to the respondent in July, 1899, at Christ Church, Johannesburg. They afterwards came to live at Claremont, where they remained until April, 1900. Witness then went on a visit to Natal. In June his

wife followed him there, and they stayed together there until October 13, when she went to her mother at Kenilworth. He was not willing that she should go, but she complained of the heat, and he allowed her to go. They were on perfectly good terms when she left, and had had no unpleasantness whatever. He had written letters to her from Natal, but they had been returned, one unopened, and he had caused envelopes to be directed in a strange handwriting to her afterwards. When he returned to Cape Town his wife refused to live with him. He wished to have his wife back.

Asked as to the reason why his wife refused to again live with him, the witness said: "The real reason why my wife will not return is from the simple fact that, while I was very fond of my wife, the family that I married into were quite uncongenial to me altogether. Before I married my wife I had an understanding with her that she would leave the family altogether, which unfortunately she did not do, because three weeks after we were married her family came up to my house to afternoon tea." The witness further said that when he got the letters returned he thought even then that there was only a misunderstanding. He knew the mother was cognisant of the fact that he wished to have nothing to do with her. Witness arrived in Cape Town on January 9, and went out to the mother's house to see his wife. He saw the mother, who, after saying she had her attorney, and he could get his, closed the door in his face. He had since tried to communicate with his wife. He had paid a bill for her after she left Natal, and had also paid Pearce, of Claremont, a bill of £10 15s. 5d. for her since. He sent her £5 at Christmas. He had received a communication from the attorneys accusing him of having done her injury, but there was no truth in that. He had a home for his wife, and wished her to return. He was now in the service of the Equitable Assurance Company.

The Court granted an order for the defendant to return by the 1st March, failing which a rule *nisi* to be granted calling on defendant to show cause why a decree of divorce should not be granted.

**KEAST V. ZWAIGENHAFT. (1901.
(Feb. 19th.**

Ejectment—Lease—Improvements.

This was an action instituted by Richard Collins Keast against Louis Zwaigenhaft for an order ejecting the defendant from

certain premises, consisting of a house, and shop, situate at the corner of Lee and Aspeling streets, Cape Town.

The declaration alleged that the plaintiff was the proprietor of the premises whereof the defendant had been in possession since July, 1899, at a monthly rental of £9. In August, 1900, the plaintiff gave the defendant notice to quit on September 30, but at the request of the defendant allowed the notice to lapse, and in October again gave him notice to quit at the end of that month. The defendant refused to quit, consequently the plaintiff claimed an order of ejectment against the defendant and rent at the rate of £9 per month from November, 1900, to date.

The defendant stated in his plea that he was in lawful possession of the place by reason of a lease entered into between the parties, by which the defendant was to have the premises for a period of five years. He claimed £40 in reconvention, being the amount alleged by him to have been spent in effecting beneficial improvements to the premises. The plaintiff in reply said that there had been no improvements made.

Mr. Schreiner, K.C. (with him Mr. Benjamin), for the plaintiff.

Mr. Nathan for the defendant.

Richard Collins Keast said he met the defendant through a broker, and that previous to the defendant taking possession, the premises were occupied by Indians, who sub-let the house to coloured people, there being seven families in the house. When he saw the defendant in May, they went to the place together, and the defendant inquired if witness would give him a lease. Witness said he wanted to sell the property, and offered it for £1,250. Defendant said he was not then in a position to buy, and witness agreed to a lease being drafted by defendant. He submitted a copy of the lease to witness, who returned it with certain alterations marked by his attorney, Mr. Steer. Witness did certain internal repairs at defendant's request. The defendant had put someone else in possession without witness's consent.

Witness (continuing) said the defendant came to him and begged him not to eject him from the premises. Witness agreed to let him remain until the date of the bill expired, in October. He had never known of the existence of a five years' lease. Witness could not complete the sale of the property until he could give possession. Respondent had not paid the rent since November.

By Mr. Nathan: He was introduced to

defendant at the Cape Town Station in June. He went with him and defendant's wife to view the property. It was agreed that they should take the property at the rate of £9 a month from July 1. No term was specified. Indians had been living on the property. It was in a very dirty condition. He promised to put the property in thorough repair. He first wrote to defendant on August 30, giving him notice to quit. The property was sold by the 30th of September. He allowed him to remain on on the strength of the promissory note for £40 due by the Indian. Respondent had no right to sub-let. Witness objected to his sub-letting, and he objected to coloured people being on the property. He had offered to sell it to respondent on several occasions. Once in February he gave him a written option for three months. He did not make any offer to defendant of £25 and two months' rent to cancel the lease. There was no lease. The Indian was not put into the shop with plaintiff's consent.

By Mr. Schreiner: He knew of no improvements being made by defendant. If had heard since that the improvements consisted of a deal mantelpiece, three deal shelves in the kitchen, and a glass Vpanel door. These were placed in the house without witness's consent. Witness heard in August that defendants had tenants of an objectionable class in the house, and he brought this to defendant's notice.

The plaintiff's wife corroborated his statement as to the defendant asking to be allowed to remain on after the first notice to quit had been given.

A builder and contractor said that he made a tender to the defendant to make certain alterations in the premises after the plaintiff had made some repairs. The tender was £4, but the defendant would not accept it, saying it was too high. The witness eventually put up some shelving for 18s.

For the defence, Louis Zwaigenhaft said that the broker who first approached him said that the plaintiff wished to let the premises for a period of five years. He went with the plaintiff and his (defendant's) wife to see the place, and when there agreed to take the place on a five years' lease, with the option of purchase at the end of the time. The place was in a very filthy condition. No less than forty people were living in the place. Witness had to pay £23 to a carpenter for repairs, also £5 to a paperhanger, and £4 10s. for other repairs. On many occasions he went to plaintiff's house and offices to get him to sign the lease. Witness

denied having gone to plaintiff and made the request in regard to the postponement of quitting until after October 24. The alterations in the lease were made by plaintiff in defendant's shop. Defendant's wife was present.

In cross examination, he said he knew nothing about having to go out if the property should be sold.

His wife and one Dyers corroborated his statements with regard to the letting for five years.

After hearing Mr. Nathan for the defendant,

Buchanan, A.C.J., said: This is an action for ejectment and for a sum of money equivalent to the rent from the last payment up to the day of ejectment. On July 1, 1899, the premises were let by the plaintiff to the defendant. At the time there was a discussion about entering into a lease for five years. However, no lease was then agreed upon, though there was an understanding come to that if the lease were entered into, there should be an option of purchase. In the meantime, the defendant took possession as a monthly tenant. A draft lease was drawn up by the defendant, but this was not approved of by the plaintiff. The draft was returned to the defendant, who stated that he then sent a fresh draft. Plaintiff denied that he ever received this second draft. However, it is clear that no lease was ever signed. This fresh draft did not contain two clauses which were in the first, and the plaintiff did not consent to their omission. There was no agreement as to the conditions to be inserted in the lease. Meanwhile the defendant remained in possession of the property from month to month. As an indication that no agreement was ever arrived at, it may be noticed that one of the conditions put into the draft lease was that there should be no sub-letting without the consent of the plaintiff. Notwithstanding this, there was sub-letting, whereupon plaintiff gave defendant a month's notice. Defendant having sold his business to an Indian, asked plaintiff to give him time until October 24 to get the money. Plaintiff agreed to allow defendant this time. Subsequently, he formally gave defendant notice to give up the premises on October 31. Defendant then set up the case that he had a five years' lease under which he held the property. If he had, then he broke it by sub-letting without written consent. There is also another condition in the draft lease which is against him, namely, the right to purchase during the tenancy. Notwithstanding this, he himself produces in

court a written option obtained by him from plaintiff, whereby he had the right to purchase at the end of the first three months. If there really was a lease, what necessity was there for such an option. This option was not exercised. Defendant was there as a monthly tenant. He had due notice to quit, and he had no reasonable grounds for continuing his tenancy. Judgment must therefore be given for the plaintiff for an order of ejectment, defendant to pay £9 a month up to the day of quitting. The onus was on the defendant to prove that he had a lease, and having failed to do so, he now tries to set up a claim in reconvention for beneficial improvements, but the evidence shows that there was no enhancement of the property at all. If there was, the principles laid down by the Court in the case *De Beers Consolidated Company v. L. and S.A. Exploration Co.* (10 S.C.R., p. 359), would apply. I consider that the defendant has not proved that he improved the property in any way. His alterations were not beneficial improvements, but had the effect only of giving him a more convenient occupation. They are of no benefit to the landlord. There can be no judgment for the defendant on the claim in reconvention, judgment will be given for the plaintiff as prayed with costs.

Jones, J., and Maasdorp, J., concurred.

[Plaintiff's Attorney, A. W. Steer; Defendant's Attorney, C. W. Herold.]

KNOOP V. BAM. { 1901.
Feb. 19th

Interpleader suit - Sale.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town. It appeared that on October 30, Bam sued one Ross for the delivery of a horse, or, failing that, damages to the amount of £20. The plaintiff alleged that on August 14 he purchased from Ross a certain horse for £5, on credit up to November 4. Delivery of the horse was made, and subsequently, while he was using the animal, Knoop, the present appellant, and Ross appeared and forcibly took possession of it without any lawful cause or reason. At the hearing of the suit between Bam and Ross, the former stated that the animal was his, and offered to pay the purchase price at once, although the money was not yet due. Ross did not appear to defend the case, having left for England a day or two before, the 30th October. The Magistrate gave judgment for the plaintiff, a writ was issued, and the messenger of the

Court seized the horse which was then in the possession of Knoop, the present appellant, and the plaintiff in the interpleader suit, which he instituted immediately after the seizure. At the hearing of the interpleader suit, Knoop said that the horse was sold to him by Ross prior to October 23, and that he paid Ross £4 as the purchase price. He also said that Ross told him he had only lent the horse to Bam.

In giving judgment, the Magistrate said that he was of opinion that since Knoop knew at the time of the purchase alleged by him that the horse was illegally taken out of the possession of Bam, and that Bam was about to institute proceedings against Ross for recovery of the animal, the subsequent sale was a fraudulent one, and he consequently decided that the horse was liable to attachment at the instance of Bam.

Knoop appealed.

Mr. McGregor, for the appellant: A peculiar feature of this case is the fact that Bam levied execution on what was "ex hypothesi" his own property.

[Buchanan, J.: The whole question is whether the horse was Knoop's or Ross's.]

The horse was originally the property of Ross. There is no proof that the horse was sold by Ross to Bam on credit, and failing such proof, the sale to Knoop by Ross is valid. The horse was only lent to Bam. Bam's offer to pay the purchase price before the due date is suspicious. The plaintiff ought not to have sued in the Magistrate's Court for specific performance. He should have come to the Supreme Court and claimed on a "spoliatio." This is not a case of *rindictio*.

The respondent Bam was in default.

Buchanan, A.C.J.: This is an appeal from a decision given in an interpleader case, in which the appellant claimed to have it declared that a certain horse attached by the Messenger was his (the claimant's) property. This horse was sold on credit by one Ross to Bam, and was delivered to him. The appellant Knoop was with Ross on an occasion when Ross went to Bam. Bam was using this and another horse in his cart, and Ross, with the assistance of the appellant, forcibly took it out of the cart and took it away. To this forcible taking of the horse Knoop was a party. Thereupon Knoop bought this horse from Ross, and, he said, paid him £4 for it. The merits of the case between Bam and Ross are not before the Court. In the circumstances, the appellant cannot set up any right as against Bam. I think the

Magistrate was perfectly right in his decision, and the appeal must be dismissed.

Jones, J., and Maasdorp, J., concurred.

[Appellant's Attorney, A. W. Steer.]

REID, OR KILLEN V. REID. } 1901.
Feb. 20th.

This was an action instituted by Elizabeth Reid, or Killen, against John Reid, to have an alleged marriage entered into between herself and John Reid declared null and void.

The declaration set out that the parties went through a form of marriage in July, 1831, at Port Elizabeth. The plaintiff was a widow, and the defendant represented himself to be a widower. Thereafter the defendant's first wife, Rebecca Reid, to whom he was married at Glasgow in 1875, appeared at Port Elizabeth. The plaintiff consequently wished to have her marriage with the defendant declared null and void.

Mr. Close appeared for the plaintiff.

The evidence, all of which was taken on commission at Glasgow and Port Elizabeth, was to the following effect.

The plaintiff stated that the defendant wrote to her from Port Elizabeth asking her to come from Glasgow to marry him. She came to this country, and the ceremony of marriage was performed. The defendant told her that his wife had run away from him while they were in Glasgow, and he afterwards said she was dead. He was an elder of the church and superintendent of the Sabbath-school. She left him on hearing his wife was still alive. Rebecca Reid's evidence was to the effect that she was married to the defendant at Glasgow in 1875, and left him in 1880 because she found him unfaithful. She went to Canada, and afterwards went to Port Elizabeth after his second marriage. The defendant, who is a storekeeper in the Government Railway service at Port Elizabeth, admitted, on his evidence being taken on commission, that he was married to Rebecca Reid, and afterwards went through the ceremony of marriage with the applicant. He said that his wife Rebecca Reid left him in Glasgow, and he did not hear of her again until after his second marriage. He had written letters, and had employed a detective, but could not discover anything of her. His wife afterwards came from Canada to Port Elizabeth.

A decree was granted as prayed with costs [Plaintiff's Attorneys, Messrs. Walker and Jacobsohn.]

O'REILLY V. LESSOR. } 1901.
Feb. 20th.

Lease—Expiry—Tacit relocation—
Notice of renewal.

O. leased certain premises to M. for a period of six years, who in turn sublet to L. The lease provided that the lessee could by giving the lessor written notice to that effect two months prior to the expiry of the lease, renew the lease for another six years. At the expiry of the term neither M. nor L. had given notice of renewal. L was, however, allowed to remain in possession of the premises for a further period of nine months, paying the rent monthly.

Held, that this did not effect a tacit relocation, such as would entitle M. or L. to claim a renewal of the lease for the remainder of the next six years.

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This was an action instituted by Thomas J. O'Reilly against J. Lessor for an order of ejectment from the establishment known as the Empire Cafe, 14, Shortmarket-street, Cape Town, and for £100 damages, caused by the defendant's refusal to give up the possession to the plaintiff.

The declaration set out that the plaintiff was the registered owner of the above-named premises. In November, 1893, he leased the premises to one Snelling for a term of six years at a rental of £264 per annum. With the plaintiff's consent, Snelling ceded his rights under the lease to the Mikado Creamery Company, who in turn sublet the premises to one De Jong, who carried on business in partnership with the defendant from February, 1898, to May, 1898, when the defendant took over the business, together with the rights and obligations of De Jong. That in accordance with the lease, the defendant's rights to the place ceased in November, 1899, but the plaintiff allowed him to remain until June, 1900, when notice to quit was given. The defendant, however, refused to go.

In his plea the defendant said that he was not aware that the plaintiff was the owner of the premises. He admitted having received notice to quit, but claimed that since the lease gave the lessee the right to a renewal for another period of six years, pro-

vided notice in writing was given to the lessor two months before the expiration of the lease, the plaintiff by continuing to receive rent until June, 1900, had caused a tacit relocation to be effected. He also said in the plea that there was now pending against him a suit brought by the liquidators of the Mikado Company, of which the plaintiff was aware, and that the plaintiff should have joined in that.

Mr. Searle, K.C. (with him Mr. C. de Villiers), for the plaintiff.

Mr. Schreiner, K.C. (with him Mr. Buchanan), for the defendant.

Thomas Joseph O'Reilly, the plaintiff, said he was the Mayor of Cape Town, and owned the premises in question. In 1893 he let the premises on the lease referred to to a person named Snelling. It was a lease for six years, commencing on November 1, 1893, the rental being £264 per annum. Under the lease, the lessee had the right to sub-let the premises subject to the approval of the lessor, to be obtained in writing. The lessee also had the right to renew the lease, provided notice in writing was given the lessor two months before the termination of the term of the lease. The lease expired on November 3, 1899, and no notice was given to renew it. Witness consented to the lease being transferred to the Mikado Company by Snelling, but he had never consented to a sub-lease to any person from that company. He had always had the rent from the Mikado Company, and received it from them up to the 31st August last. After December, 1899, when the lease expired, he continued to receive the rent, and in June, 1900, he sent a letter to the manager of the Empire Cafe—the premises in question—giving him notice to quit. He sent this under the belief that the man he had seen there was the manager of the Mikado Creamery Company. After interviews with the company's secretary, witness, on the 16th November, wrote through his attorneys, giving the defendant a month's notice to quit, and the defendant's attorneys then wrote stating that the Mikado Company was suing Mr. Lessor as their tenant. Witness had received no rent since the 31st August, although he had carefully tendered the account every month to the Mikado Company. In a conversation witness had with Mr. Lessor, the latter was rather inclined to take the premises, and witness said he could have a lease, with a saving clause in case the property was sold, at a rental of £30 per month. There was then some talk of Lessor bringing an action

against the Mikado Company. He did not know the defendant by name until the action was being brought, though he had seen him in the shop.

By Mr. Schreiner: Witness did not know when the Mikado Company went into liquidation. Witness heard that the company was bringing an action against defendant. He had had an interview with Mr. Maxwell, of the Mikado Company, in or about February, 1898. It was suggested that a licence should be obtained for the premises. Witness did not suggest this to Maxwell. He spoke to Lessor about it, but he told Maxwell that the licence should be obtained in his name as Lessor had been had up for smuggling, and it was impossible to get it in his name. Witness said that if the necessary memorials were got up, he would be prepared to work it. This was part of his business. He had never had money from Lessor direct. He would not have taken £22 for rent if it had been tendered to him. (Witness said afterwards that he did not know what he would have done if this amount had been tendered.) On the 31st August witness received a letter from Messrs. Sauer and Standen, the attorneys for the liquidators of the Mikado Company, stating that they were bringing an action against Lessor, and that they would guarantee rent at the rate of £30 a month until the decision. Later they wrote saying that certain facts had been brought to the notice of the liquidators, who found they could not continue the proceedings. They further stated that they must withdraw the guarantee, but would give every assistance in their power to have Lessor ejected. They had also undertaken to pay costs.

Re-examined: The Mikado Company had never taken up the position that they had a lease for six years longer.

Jacob Lessor, the defendant, said he was also defendant in a case which had been brought against him by the Mikado Company, but which had not been tried.

Mr. Schreiner reminded the Court that the defendant took the position in the pleadings that the plaintiff should have joined with the company in that action.

Witness said that a lease was granted to De Jong and Co. by the Mikado Company. The lease specified that they were to remain in possession until 1905, or until such date as the original lease expired. They did not have the original lease in their possession when the lease to De Jong and Co. was made out. Witness was a partner in the last mentioned company until May, 1898,

when they dissolved partnership, witness retaining possession of the premises and the lease. Mr. Rosenthal managed the cafe for witness. Witness was ready to pay the back rent at any time, and if it had been demanded, he would not have refused. The plaintiff told him one day that he ought to get a licence. Witness tried to get a memorial up, but failed, and told the plaintiff so. Plaintiff then said that if they got it in Mr. Maxwell's name they might get the memorial. He told witness to try and get Maxwell to stand. He said he would then get more rent. Mr. Maxwell would not stand. Witness did not know that the Mikado Company had to give notice to renew the lease. Witness relied upon his contract.

Mr. Searle said that the plaintiff never recollected seeing this man, and that he was not the person whom he understood to be the defendant.

In cross-examination, the witness said he had had the conversations with the plaintiff he had spoken of.

George Maxwell, partner in the firm of Maxwell Brothers, said he had been a director of the Mikado Creamery Company, and in this capacity had signed the document (produced) between the company and De Jong and Co. Witness had sold his interest in the company about 18 months before its liquidation. He went to Mr. O'Reilly and asked him if he had any objection to De Jong and Co. being tenants. He said he had not, but that he would hold the Mikado Company responsible. He also said the tenant of the company was good enough for him. When the contract with De Jong and Co. was drawn up, witness could not get the original lease, and did not exactly know the terms thereof. He understood the lease would run on right till 1905. Witness was not a director of the company when notice should have been given for the renewal. Mr. O'Reilly sent for witness several times, and suggested that witness should get up a memorial for a liquor licence, but witness took no steps. The plaintiff asked him several times to allow his name to be used, as he would then be able to get a licence.

By Mr. Searle: Witness took a list of Divisional Council voters from Mr. O'Reilly with the object of getting a canvasser to go round. Mr. O'Reilly gave him the list, and he gave it to Lessor, who was to employ a canvasser. The whole thing fell through. Witness had a wholesale licence. Witness never asked Mr. O'Reilly for the lease, but he believed Mr. O'Reilly was asked.

Mr. Shaw said he drew up the agreement between the Mikado Company and De Jong and Co. There was an interlineation put in at Mr. Maxwell's request, adding the words specifying that the lease was until the original lease expired. The original lease was not before them at the time.

Mr. Schreiner, K.C. (in response to a request by the Court): The case is based on the doctrine of tacit relocation. True, the plaintiff did not renew the lease, but the defendant was allowed to remain on for nine months, and thereby relocation took place. The subject is an obscure one, yet some of the authorities go very far. *Claridge v. Kellaway* (8 Juta, 140) shows how far the Court will go to protect the tenant. See also *Parkin v. Lippert* (12 Juta, 179) and *Green v. Griffith* (3 Juta, 345); *Grotius* (3, 19, 2); *Van der Kessel* (670, 671); *Foet* (19, 2, 11, and 19, 2, 2, 10) *in medio*.

[Buchanan, J.: Did not *Victor v. Courlois* (2 Menzies, 165) settle the question?]

No. It does not touch the point, as in that case there was no provision for renewal. *Foet* draws a distinction between leases with a renewal clause and those without.

[Buchanan, J.: The right to renew expired two months before the lease.]

By accepting rent after the expiry of the lease the plaintiff estopped himself from demanding a written notice of renewal. In our law this affects a tacit relocation of the lease for the term named in the lease. It is most prejudicial to the defendant not to have the present action settled together with the action of the Mikado Creamery. The plaintiff knew of that action. I would suggest at least the judgment should be stayed until the hearing of that action.

Mr. Searle, K.C., was not called upon.

Buchanan, A.C.J.: It is common cause that no notice of renewal was given. The lease, with the consent of the landlord, was transferred from Snelling to the Mikado Company, and up to the present time they are the only persons dealt with by the plaintiff. It is said that the original lease was not seen by the defendant, and that consequently he had no knowledge that notice must be given to renew the lease. No such notice has been given, or was intended to be given, and the lease expired. Plaintiff did not at once claim possession to be given up to him, but allowed the Mikado Company to continue to pay him rent the same as before. The plea alleges that the plaintiff waived notice, but there is no evi-

dence whatever to support this. The only evidence which is brought forward was that he allowed them to remain in possession for some months after. There was thus a tacit relocation for a period, and the whole question is what that period was. In the case of *Victor v. Courlois* (2 Menzies, page 165), this very question was there dealt with, and the authorities quoted by Mr. Schreiner all considered. It was there laid down that in the case of a house for which a monthly rental was paid, the relocation was from month to month. Mr. O'Reilly did nothing to induce the defendant to believe he would renew the lease. There was no dealing between them in any way; the dealing was with the company, and neither in law nor equity was the defendant entitled to remain. Defendant has been dealt with liberally by the landlord, as far as notice is concerned. As for the damages claimed, no special damages have been proved, and the only measure is the rent under the tacit relocation. Judgment will be given for plaintiff for the possession of this property, and for £100 damages, which is all that was claimed in the declaration, and the amount will go against the rent due. As to the dispute between defendant and the Mikado Company, it is undesirable to discuss a matter not before the Court.

Jones, J., and Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT

Ex parte ENSLIN. { 1901.
Feb. 21st

Mr. Buchanan moved for the admission of Johan Martin Enslin as an attorney and notary.

Granted.

SMITH V. EL' IS.

Mr. C. de Villiers applied for provisional judgment for the sum of £22 6s. 8d. and costs on a Magistrate's Court judgment, and also asked that certain landed property be declared executable.

Judgment as prayed and property declared executable.

WOLHUTER V. LIPPIATT.

Mr. Burton applied for a decree of civil imprisonment against the defendant. Judg-

ment was given against the defendant in the High Court of Griqualand for £250 and taxed costs, amounting to £197 6s. 10d.. A writ of execution had been issued, but no goods were found, and the defendant was now called upon to show cause why a writ of personal attachment should not be issued.

The defendant appeared in person, and said he was a refugee, employed by the military, and lived in Johannesburg, and not at Griqualand West.

Mr. Burton: No exception was taken to the jurisdiction of the High Court. The defendant appeared in answer to the summons, filed a plea, and defended the case.

The defendant said he had no money here, but could, if allowed an opportunity, obtain money from Johannesburg.

The matter was allowed to stand over until February 28 to enable the defendant to find security.

Postea (February 28).

The defendant agreed to pay £5 per month in liquidation of the £250, and the amount of the costs (£197 10s.) in two equal monthly instalments.

Decree of civil imprisonment was granted but execution stayed pending payment of the debt and costs in the manner agreed.

COLONIAL GOVERNMENT V. MARAIS.

Mr. Ward applied for provisional sentence for £56 16s., interest on a mortgage bond.

Granted.

VAN DER BYL AND CO. V. } 1901.
ABDULLAH KHAN. }
HASSAN KHAN V. THE MASTER. } Feb. 21st
Sequestration—Attachment—Sale—
Release from attachment.

This was an application made by Van der Byl and Co. for the final adjudication of the estate of Abdullah Khan as insolvent. There was also an application by Hassan Khan for an order releasing the possession of a certain shop situate at 18, Hanover-street, with the furniture and stock, from the attachment placed on it by the Master.

Mr. Burton appeared for the firm of Van der Byl and Co.

The respondent Abdullah Khan was in default, having absconded.

Mr. Benjamin appeared for the applicant Hassan Khan.

In his petition, Hassan Kahn, the appli-

cant, alleged that, on the 8th February, 1901, he purchased from Abdullah Kahn the contents of the shop and outstanding debts for the sum of £110, and a deed of sale was duly drawn up. The petitioner took possession, and took out a retail dealer's licence, and remained in occupation until the 15th inst. On that date a gentleman, whom he had ascertained belonged to the firm of Van der Byl and Co., came to the shop, accompanied by the messenger of the Master. They said they had come to take possession of the shop. Witness showed them the deed of sale, but one of them took it and put it in his pocket. They afterwards took the money from the till, and pushed the petitioner and his assistant out of the shop.

In the affidavits of the applicant Van der Byl it was stated that before possession of the premises was taken, the estate of Abdullah Kahn had, upon the petition of the company, been placed under sequestration, and a summons was issued for the final adjudication of the estate. Abdullah Kahn owed Van der Byl and Co. £246 odd, including goods to the value of £86 11s. 2d., which were delivered during the month of January. Abdullah was also indebted to other creditors for about £800. Hassan Kahn was his brother, and was formerly employed in the store. On the day after the deed of sale was executed, a case of tea was delivered at the shop, and was signed for by 'A.K.' The firm had never had any dealing with Hassan, and this case was sent to Abdullah. It was reported to the firm that Abdullah had absconded. It was denied that the shop or goods belonged to the applicant, Hassan Khan, and the respondent said that the alleged purchase was not *bona fide*, and was made with intent to defraud creditors of the estate of Abdullah Kahn. The property was valued at between £300 and £400.

There were replying affidavits, in which the applicant Hassan said that he paid Abdullah £110, which money he borrowed from another brother. He denied that he had any knowledge that Abdullah intended absconding. The affidavit of the applicant's brother was to the effect that he lent the applicant the purchase money. The goods in the shop was estimated by applicant at £170.

Mr. Burton moved.

Mr. Benjamin: The £110 represents the value of the goods to the applicant. The applicant's estimate of £170 was probably

the retail worth of the goods, and the £110 would be the value of them to him after making allowance for credit, and the uncertainty of trade. The applicant was entitled to the possession of the store and goods. The *bona fides* of the transaction between Hassan and Abdullah can only be impeached—if impeached at all—by action. From the affidavits of the respondent, it appears that there has been some sharp practice on the part of Abdullah, but there is nothing to show that the purchase was not *bona fide*.

Buchanan, A.C.J. : There are two applications before the Court. The first is for the final adjudication and sequestration of the estate on the ground that an act of insolvency has been committed by the respondent having absconded. The summons has been duly served, and there is no appearance for the respondent, and the estate will be finally adjudicated and sequestrated. There is also an application on behalf of Hassan to prevent the attachment of the goods which belonged to Abdullah, and which were in the premises where he carried on business; and the ground for this application is that shortly before Abdullah absconded, he (Hassan) bought the goods for £110. The circumstances disclosed in the affidavit are such that the Court cannot grant the application. The application will be refused, with costs. Applicant has his remedy by bringing any action he may think fit, and in that action he can claim the costs incurred in this application.

Jones, J., and Maasdorp, J., concurred.

LUDWIG V. KUHN.

Mr. De Waal applied for provisional sentence for £600 on a mortgage bond, with interest at 6 per cent. from November 4, 1900, and costs of the suit. He asked that the property specially hypothecated should be declared executable.

Provisional sentence was given as prayed, with costs.

HOME JUN. V. KUHN.

Mr. De Waal applied for provisional sentence for £300 on a mortgage bond, with interest at 4 per cent., the property specially hypothecated to be declared executable.

Provisional sentence was given as prayed, with costs.

MCGREGOR V. JACKSON.

On the application of Sir Henry Juta, K.C., judgment was given against defendant for a debt under Rule 319.

FORREST V. LUCAS AND ANOTHER.

On the application of Mr. Benjamin, judgment was given for £22 10s., rent and costs, under Rule 329d.

MENDELSON V. ALEX. KUHN.

On the application of Mr. Rubie, judgment under Rule 329d was given against defendant for £128 1s. 11d., for goods sold, with interest and costs.

SMUTS AND KOCH V. DE VILLIERS.

On the application of Mr. De Waal, judgment under Rule 329d was given against defendant for £55 and costs.

WIENER AND CO. V. ELLERT.

On the application of Mr. Benjamin, the defendant Ellert was allowed to purge his default and plead, the case to come to trial this term, and the question of costs to stand. Mr. Gardiner consented.

Ex parte LOUIS JOSHUA BESTER.

On the application of Mr. Burton, the insolvent was declared rehabilitated.

CILLIERS V. TREURNICH. { 1901.
Feb. 21st.

Provisional sentence—Promissory note.

This was an application for provisional sentence on a promissory note made by the defendant in favour of the plaintiff for the sum of £650.

The defendant made an affidavit to the effect that he was not liable on the note, it having been given by him to the plaintiff under the following circumstances: The defendant committed adultery with the plaintiff's wife, and on this becoming known to the plaintiff it was arranged that the defendant should give the plaintiff a promissory note for £650, payable six months hence, and should further destroy a liquid claim for £100 he held against the plaintiff. He said that he gave the note on the express condition that the plaintiff should not divulge the matter to anyone, and should forgive the defendant and the plaintiff's wife. The question of damages was not discussed, and the defendant alleged that he would never have signed the promissory note had not the plaintiff given the above-mentioned undertaking. He denied that he had re-

ceived any legal or valid consideration for the amount of the note. There were affidavits by two other persons to the effect that the plaintiff had divulged the matter to them, and showed them the promissory note.

The plaintiff denied the statements made by the last two deponents, and said that if he did mention the matter to one of them (Page) it was only after the latter in his capacity as an elder of the Dutch Reformed Church had interrogated him about the matter. The matter had been reported to the Kerkeraad by someone whose name the Kerkeraad would not divulge. He said further that the note was given in part payment of damages sustained, and denied having given any undertaking to keep the matter a secret.

Mr. Searle, K.C., for the plaintiff.

Mr. Schreiner, K.C., for the defendant.

The Court held that the case was not one for provisional sentence, and refused the application, but made no order as to costs.

HAUSSMAN V. HAUSSMAN. { 1901.
Feb. 21st.
" 22nd.
Mar. 12th.

Service—Rule *nisi*—Divorce.

Service of an order of Court calling on a husband to show cause why he should not return to his wife, was made on the attorney who entered appearance to the original summons, but who had dropped out of the case on the defendant being barred from pleading.

Held, that this was not sufficient service.

Mr. Buchanan moved that the rule *nisi* calling on the defendant to show cause why he should not return to or receive his wife, or failing that why a decree of divorce should not be granted should be made absolute.

[Buchanan, A.C.J.: There has been no service of the rule.]

It has been served on defendant's attorney.

[Buchanan, A.C.J.: The defendant was barred, and the attorney dropped out of the case.]

I am just informed that the defendant has returned from active service, and is believed to be at Claremont

The Court thereupon allowed the matter to stand over for further information as to the whereabouts of the defendant.

Postea (February 22).

Mr. Benjamin applied for an extension of the day for defendant's return, until February 28, and also asked that the return day of the rule be extended until March 12, personal service to be effected.

This was granted, and on March 12, on the motion of Mr. Buchanan, a decree of divorce was granted, the defendant having been personally served and not having returned.

GREENBERG V. GREENBERG.

This was an application for contribution towards costs and for alimony.

The applicant was the wife of the respondent and was the defendant in a divorce suit pending, and prayed for £30 as contribution to defray the costs of the action, and for £8 a month. The applicant said she believed her husband to be a man of substance. He had formerly had a livery stable in Bloemhof-street, and was now in partnership with his brother in a livery stable business in Buitenkant-street.

There was an affidavit by respondent to the effect that he had left his wife because of her alleged misconduct with a certain Davies, and he was not in a position to bear the expenses claimed.

There was a replying affidavit by the wife emphatically denying the charge of misconduct. She claimed further that there was £100 due to her under the antenuptial contract. The respondent alleged that he had paid this amount.

Mr. Rubie for the applicant.

Mr. Searle, K.C., for the respondent.

In reply to the Court, Mr. Rubie said the parties were prepared to go to trial this term.

Buchanan, A.C.J., said that the plaintiff in this case must pay to the defendant's attorneys forthwith the sum of £10, the defendant to plead within twenty-four hours, and the case to come to trial this term.

GEDULD V. GEDULD.

On the motion of Mr. Rowson, a rule for leave to sue *in forma pauperis* in an action for divorce was made absolute.

HUGHES AND ANOTHER V. VAN ZYL.

On the motion of Mr. Percy Jones, a rule *nisi*, granted for the transfer of certain land, was made absolute.

Ex parte CLOETE. { 1901.
In re CLOETE. { Feb. 22nd.

Executor—Transfer—Minors.

Where an executor purchased at public auction property from the estate, the Court refused to grant an order authorising transfer to him on the ground that there was not sufficient proof as to the value of the property, and also because they required a report from the Master, as certain minors were interested.

This was an application for an order authorising the Registrar of Deeds to pass transfer to the executor in the estate of the late Rykie Cloete of certain land purchased by him at a public auction. Two minors were interested in the price realised for the land. The Registrar of Deeds refused to pass transfer without an order of Court, since he considered that it was not quite clear that the sale was *bona fide* and to the highest bidder. The Divisional Council valuation of the property was £750, and the executor purchased it for £550. The executor filed an affidavit stating that he was obliged to realise the property as soon as possible.

Mr. C. de Villiers, for the applicant: See *Hofmeyr v. Louw* (Buchanan, 1869, p. 290).

Buchanan, A.C.J.: The executor must produce further evidence as to the value of the property and obtain a report from the Master. The Court will make no order in the meantime, but the applicant may apply again when he has further proof of the value of the property.

Postea (May 17), the order was granted.

JORDAN V. DREYER.

Mr. McGregor applied for leave to attach certain property to found jurisdiction, and to sue by citation.

The petitioner on the 22nd January, 1898, entered into an agreement with defendant for the sale of a certain farm at Maclear. Dreyer had paid nothing for the farm and owed for it £303, together with interest and £100 damages. Defendant was at present in the Transvaal; his brother was at Maclear and collected the produce from the farm. Petitioner wished to bring an action for recovery of the purchase price of the farm, or, in the alternative, the ejectment of Dreyer and his tenant Edwards.

The Court granted an order authorising the attachment of the property to found

jurisdiction, and leave to sue by edictal citation, notice to be published in the "Government Gazette" and the "Bloemfontein Post," the order to be returnable on April 12.

OHLSSON AND OTHERS V. THE } 1901.
CLAREMONT AND WOODSTOCK } Feb. 21st.
MUNICIPALITIES.

Municipality—Act 24 of 1898—Loan—Arbitration expenses—Act 45 of 1882.

By Act 24 of 1898 the Municipalities of Claremont and Woodstock were authorised to acquire by purchase the property of the Cape Town Districts Waterworks Company and failing an agreement as to the purchase price to have the amount to be paid fixed by arbitration. By section 3 of the Act they were authorised to borrow £500,000 "for the purpose of paying the purchase price as set forth in the first section of this Act."

They borrowed £300,000 and on being unable to come to an agreement as to the purchase the amount was fixed by arbitration. One B., who was Mayor of Claremont, did at the special request of the joint committee of the Councils undertake the duty of supervising and collecting evidence for the purpose of the arbitration and did during a period of two years without any stipulation as to compensation carry out the duties with great zeal and ability.

At the close of the arbitration proceedings the Councils unanimously resolved to and did hand to B. a cheque for 500 guineas as a recognition of the valuable professional and other services rendered by him to the Councils, making the amount chargeable against the sum borrowed under the Act.

Held, that the arbitration expenses, being incidental to the pro-

ceedings in connection with the payment of the purchase price, were payable out of the capital sum borrowed under the Act and that the payment to B. was a competent one to be made out of the capital of the loan.

Held, further, that as the expenses were incidental costs of the arbitration specially provided for in the Act 24 of 1898, the General Municipal Act 45 of 1882 had no bearing on the case.

This was an application for an order upon the Claremont and Woodstock Council and James Bisset to refund to the loan account opened by them with the Standard Bank of South Africa (Limited) the sum of £525, or otherwise to refund the said sum to such Municipal loan and water account, from which the same might have been illegally drawn. In support of the application there was the affidavit of the principal applicant, Anders Ohlsson, of Cape Town, managing director of Ohlsson's Cape Breweries (Limited), and an owner of property in both Claremont and Woodstock. In paragraph 2 of his affidavit he stated:

2. Under the power and authority given by Act No. 24 of 1898, and by the concessions and agreements referred to therein, the Municipalities of Claremont and Woodstock were empowered to take over the undertaking and assets of the Cape Town District Waterworks Company.

3. In pursuance of the said powers, the said Municipalities did declare to take over the said undertaking and thereupon in terms of the Act and agreements, the value of the said undertaking was referred to arbitration. Ultimately the award of the arbitrators was given on the 22nd day of February, 1900, and the same was duly made an order of this Honourable Court on the 12th day of March, 1900.

4. In pursuance of the said award and order, the said Municipalities have duly paid to the said company the purchase price or consideration, and the said company has duly ceded, made over, and transferred to the said Municipalities all its undertaking and assets,

5. During the arbitration aforesaid, Mr. James Bisset, one of the respondents, was, and he still is, Mayor of the Municipality

of Claremont. He was also chairman of a Joint Committee, constituted of members of both Municipalities, for the purpose of supervising the arbitration proceedings on behalf of the Councils.

6. By section 3 of Act 24 of 1898, the said Municipalities are empowered jointly to borrow a sum not exceeding £500,000 for the purpose of paying the purchase price payable to the said company, and of obtaining a further supply of water. Acting under the powers aforesaid, the said Municipalities had arranged with the Standard Bank of South Africa (Limited) a loan of £300,000.

7. After the award aforesaid, a joint meeting of the Municipal Councils of Claremont and Woodstock was held on the 28th of February, 1900, when it was resolved to recommend to the Joint Water Committee to vote a sum of 500 guineas to the respondent, Mr. James Bisset, as a recognition of services stated to have been rendered by him to the Councils during the arbitration proceedings. I annex hereto, marked A, a copy of the Mayor's minute of the Municipality of Claremont, dated 30th June, 1900, on pages 31 to 33 of which will be seen the minutes of the said meeting.

8. The aforesaid Joint Water Committee was a committee composed of certain members of the Municipal Councils of Claremont and Woodstock, acting jointly for the two Municipalities. It was not the committee of management referred to in section 8 of Act 24 of 1898, which committee was not appointed for a period of at least six months after the 28th of February, 1900, inasmuch as the undertaking of the Waterworks Company had not been transferred to the Municipalities.

9. I annex hereto the originals and copies of correspondence which has passed between my attorneys and the aforesaid Municipalities or their attorneys, from which it appears that the said sum of 500 guineas has been paid out of the funds or loans raised by the respondent Councils under the aforesaid Act.

10. The Municipalities of Claremont and Woodstock come, I am informed and believe, under the provisions of Act No. 45 of 1882.

11. A petition has been presented by ratepayers in the Municipality to the Mayor and Councillors of the Municipality of Claremont objecting to the aforesaid payment.

12. I am aware that the respondent, Mr.

James Bisset, was, while Mayor aforesaid, occupied on behalf of the said Municipal Councils in connection with the said arbitration proceedings. He was one of the aforesaid Joint Committee of Councillors appointed to act on behalf of the two Municipalities, and no doubt it was the duty of all the members of the said Joint Committee to use their best endeavours on behalf of the Municipalities of which they were members. Inasmuch as it was the duty of the said James Bisset to do all he could as a Councillor to forward the interests of the two Municipalities, I am of opinion, and maintain that there were not, and could not have been, any work or duties undertaken by him over and above those that were already incumbent upon him.

13. It appears clear also from the aforesaid minutes of the 28th of February, 1900, that no bargain, arrangement, or contract was entered into with the said James Bisset that he should render any services over and above those which were incumbent upon him as a Councillor, or which otherwise were voluntarily performed by him.

14. I believe that the payment of the said sum of 500 guineas, either out of Municipal funds or out of the said fund administered jointly by the aforesaid Municipalities, is illegal, and I desire that the respondents may be ordered to repay the said sum to the fund from which it has been improperly withdrawn.

15. The respondents have in some other matters taken a strict view of their duties inconsistent with the payment of the 500 guineas aforesaid. The directors of the Cape Town District Waterworks Company (Limited), after the award paid to the company's staff a bonus of £110 in respect of the past twelve months, in pursuance of a promise made provisionally.

16. Under the terms of the award, the work of the staff inured to the benefit of the respondent Councils, who received the large profits made during that period. Nevertheless, the said Councils refused to recognise this payment, on the plea that it was a payment which the company was not bound to make, in spite of the fact that a bonus had been promised to the staff, and that, therefore, the Councils were not bound to reimburse the company in respect thereof.

17. The payment to the said James Bisset is a gratuitous payment out of the same funds from which the £110 would have been paid, and there is even less justification for it than there would have

been for the said payment to the company's staff.

18. I say, lastly, with reference to the statements contained in the letter of the 5th of December, 1900, written by the attorneys of the Woodstock Council, that I deny explicitly that Mr. James Bisset was in any way in the position of an expert similar to that occupied by a gentleman of large experience in water arbitration, who came from England to advise the company in the arbitration. I am not in a position to know, and I do not believe that the services of Mr. Bisset in any way reduced the amount ultimately awarded to the company.

19. I am not aware that Mr. Bisset has any qualifications to assume the position of an expert in matters relating to waterworks.

There was a petition signed by 123 rate-payers, calling on the Claremont Council to restore the 500 guineas paid to Mr. Bisset to the Municipal funds.

On behalf of the first respondents there was filed an affidavit by Edward Spilsbury Steytler, for many years a member of the Claremont Council. He declared as follows:

2. That I was a member of the Special Committee of the Claremont and Woodstock Councils appointed to control the proceedings in connection with the taking over of the Cape Districts Waterworks Company.

3. That I attended the meetings of the committee throughout the whole period, and am fully conversant with the work done by the respondent James Bisset. At the special and urgent request of the committee, and in view of the extreme difficulty in procuring anyone with the requisite experience and knowledge for the work, the said James Bisset agreed to undertake the work of supervising the preparation of expert evidence in connection with the arbitration proceedings.

4. The attention of the committee was drawn to the necessity of obtaining some competent person by the counsel employed on behalf of the Municipalities, who represented that care and attention on these particular points would probably represent a very great saving to the Councils when the award of the arbitrators came to be published.

5. From my own personal knowledge, I am in a position to state that for some months the said James Bisset devoted practically the whole of his time and rendered immense services to the interests of the Municipalities by the procuring of profes-

sional witnesses, the direction of their researches and inquiries, and the devotion of much time and energy in the preparation of the case for the Councils. In my opinion the satisfactory result of the award was in a great measure attributable to the untiring energy and zeal displayed by the said James Bisset on behalf of the Councils, and I am quite satisfied that without the special and expert work rendered by him the case on behalf of the Councils could not possibly have been presented in the same complete form as it was.

6. At a joint meeting the Councils of Claremont and Woodstock unanimously recommended the Waterworks Committee to award the honorarium objected to in consideration of these special services, and as a mark of appreciation of the work performed.

There was a further affidavit by James Brunt, manager for Messrs. Garlick and Co., and a member of the Claremont Ratepayers' Association, to the effect that the large majority of the ratepayers approved of the payment made to the respondent James Bisset, and they had signed the petition under a misapprehension.

Affidavits made by the Mayor of Mowbray (Mr. Samuel Tonkin), the Hon. T. L. Graham, M.L.C. (counsel during the waterworks arbitration proceedings), and Mr. Councillor East (Claremont), were filed testifying to the value of Mr. Bisset's services.

The resolution whereby the Councils "unanimously resolved to recommend the payment of 500 guineas to Mr. Bisset for the valuable services rendered by him," was also put in.

In reply to Mr. Ohlsson's affidavit, Mr. James Bisset stated as follows:

1. That he has perused the affidavit of Anders Ohlsson, sworn to on the 8th day of January, 1901. As to paragraph 1 thereof, he says that he is aware that applicants are owners of landed property and ratepayers in the Municipality of Claremont.

2. Deponent admits the allegations in paragraphs 2, 3, 4, 5, 6, 7, 9, 10, and 11 thereof.

3. With regard to paragraph 8 thereof, deponent says that the joint Waterworks Committee appointed by the Councils with full powers to deal with all matters connected with the waterworks after the arbitrators held that the Municipalities had taken over the waterworks as from the 1st day of January, 1898, the committee was held by the Municipal Councils of Claremont and Woodstock to be the committee referred to in section 8 of Act 24 of 1898.

4. With reference to paragraph 11, deponent says that there are 3,080 ratepayers in the Municipalities of Claremont and Woodstock owning property to the value of £2,487,000. The value of the property owned by the ratepayers who signed the petition amounts to £149,000, including the property owned by the Ohlsson's Cape Breweries (Limited) of the value of £58,400, and by the said Anders Ohlsson of the value of £8,900.

5. As to paragraph 12, deponent says that at the special request of the joint committee appointed on behalf of the Councils to manage the business in connection with the waterworks, he undertook the duty of supervising and collecting evidence for the purposes of the arbitration. Deponent says further that he actually tendered his resignation to the committee at the commencement of the proceedings, as he found that the immense amount of work involved necessitated his devoting his whole time thereto, and that it was only at the urgent request of the members of the committee and on their representations that it was impossible for any other members of the Councils successfully to undertake the work or for them to procure, at that stage of the proceedings, any competent outside expert to supervise and control the preparations for the arbitration proceedings, that deponent consented. Deponent says further that, but for a long practical experience in arbitration work on behalf of the Colonial Government, as well as a long practical experience in engineering, architectural, and other matters, it would have been impossible for him to have undertaken the duties in question. Deponent is a member of the Institute of Civil Engineers, and has had an experience of over forty years in this colony, as well as having served under leading engineers in England.

6. As to paragraph 13, deponent admits that no agreement or contract was entered into, but that he undertook the special duties at the request of the committee acting for the Councils, whose attention was drawn to the urgent necessity for the appointment of a competent person for the purposes mentioned in the previous paragraph by the counsel who were advising them, and deponent has received assurances from both the counsel in question that the services rendered by him were invaluable during the course of the arbitration proceedings, and that it would have been impossible for them to have done full justice to the case for the Municipalities without the data and memoranda which were prepared and supplied by him to them.

7. As to paragraph 14, deponent says that before accepting the payment in question he was informed by the committee that they had been advised that they were within their rights in awarding him the amount in question.

8. As to paragraph 14, deponent says that in August of last year a claim was made upon the Waterworks Committee for the payment of the sum of £110, which the company had paid as a bonus to their secretary, engineer, and bookkeeper, for special services rendered by them. As however both the accountant and legal adviser of the committee, after inquiring into the same, considered that the payment was not one which should fall on the funds administered by the committee, the latter had no option but to repudiate responsibility.

9. As to paragraph 18, deponent says that the said Anders Ohlsson is not a competent person to judge the matter in question, and that the members of both the Claremont and Woodstock Councils, as well as the counsel and attorneys employed on behalf of the two Municipalities, who were well aware of the immense amount of work and labour entailed in the collection of evidence, procuring of expert witnesses, and direction of their examinations and inquiries, collection and preparation in proper form of data to assist counsel in cross-examining witnesses and in the presentation of the case for the Municipalities, have repeatedly assured deponent that the services rendered were of the utmost value, and the Councils have on several occasions passed votes of thanks to deponent.

10. Deponent says further that when he became aware that a small section of the ratepayers were dissatisfied with the payment, he drew the attention of the Claremont Council to the matter, and placed himself entirely in their hands, and that they unanimously resolved to uphold the payment, being satisfied that no ratepayer who was cognisant of the full facts would question the payment.

11. Deponent says, further, that in the month of October, 1900, the Rondebosch and Mowbray Municipalities applied to join the Claremont and Woodstock Municipalities in the waterworks undertaking, and were thereupon admitted to equal shares, and became equally responsible for all the expenses incurred in the arbitration proceedings. The Councils of the said Municipalities were fully aware of the payment in question, and have taken no exception there-

to, but on the contrary, have approved of the accounts, and accepted liability for an equal share of the indebtedness on the waterworks accounts.

12. Deponent says, further, that he has reason to believe that many who signed the petition did so on misrepresentations of the facts or from a want of knowledge of the full facts of the case, and have since notified to the Municipal Clerk and members of the Council that, having become aware of the full facts, they have withdrawn from all opposition to the payment in question.

13. Deponent says that the said Anders Ohlsson informed him, at the time that the arrangements for the completion of the transfer were being effected, that, unless the bonus of £110 referred to previously was paid by the Council, he would take action, if possible, to force deponent in some way to suffer for their action, being apparently under the impression that deponent was responsible for the refusal to pay the said amount.

14. Deponent says further that it is a usual practice among Municipal bodies to vote sums of money out of Municipal funds other than rates for charitable purposes and for testimonials.

Sir Henry Juta, K.C., appeared for the applicants.

Mr. Searle, K.C., appeared for the Claremont Council, the first respondents.

Mr. Schreiner, K.C., appeared for the Woodstock Council, the second respondents.

Sir Henry Juta, K.C.: The point in this matter is a simple and direct one. It is admitted that there was no contract and no agreement whatever entered into. Indeed there could not have been, because Mr. Bisset was at that time the Mayor of Claremont, and the Councils, at any rate as far as Claremont was concerned, could not have entered into any agreement with him. It is clear then that this was not intended as a payment for his services by reason of a contract, and that it is an honorarium to him for the trouble he took. No doubt Mr. Bisset got up the case for the Councils when they went to arbitration very thoroughly, but that is a very different thing from being entitled to any payment for the services he rendered. I think it will be admitted that Mr. Bisset cannot sue the Municipalities for any sums of money, and therefore this payment is simply nothing else but an honorarium given by the Municipalities to him, and there is no law which entitles Municipalities to make gifts of that sort. They

can make arrangements whereby they may give their officers or paid servants additional remuneration, but it cannot be said that Mr. Bisset was an official or paid servant of the Council. The opening sections of Act 24 of 1898, under which the power was given to the Municipalities to take over and carry on the Cape Districts Waterworks Company's business, and failing agreement as to the purchase price, to go to arbitration thereon settle this matter. While the Councils had the power to borrow £500,000 for the purpose of paying the said purchase price and for augmenting the water supply, provision was made for the costs of the arbitration and all other expenses by the levying and collecting of a sufficient annual rate over and above the ordinary rate the Council could levy. Therefore the amount voted to Mr. Bisset cannot come out of the £500,000.

[Buchanan, A.C.J.: But surely that amount was meant to cover the incidental expenses—the transfer and survey fees, etc.? Do you mean to say that the arbitration expenses do not come in the purchase price?]

Yes, I cannot see how the arbitration expenses can be part of the purchase price; they can only be paid by the special rate levied. The 4th section of the Act is clear on that point. The general powers of Municipalities to deal with and pay out moneys is left as regulated by Act 45 of 1882. Under section 104 of that Act municipalities may make contracts, and by the 106th section pay the municipal clerk and such other officers as may be necessary such salaries and allowances as the Councils might determine. As to the position of the Councillors, see section 17, which is as follows: "No person holding any office or place of profit under Government, or under or in the gift of the Council of any municipality, or concerned in, or participating in the profit of, any contract with any municipality, or concerned in or in the profit of any work to be done under the authority of any such Council shall be capable of being or continuing a Councillor of such municipality." If Mr. Bisset had been employed in this arbitration in getting up the case, and the work was being done under the authority of the Council, and there had been a contract entered into with him, he could not have remained a member of the Council. Therefore we must take it by his remaining Mayor of Claremont that he was doing work in the interests of the Municipality, and not for the sake of reward. There

is no authority that I can find which entitles municipalities to dispose of the rates in that manner. Mr. Bisset might have rendered very valuable services, and if the people of the district like to get up a subscription for him, no doubt it would be a very handsome one, but there is no authority for the Council doing so out of the rates.

Mr. Searle, K.C.: The onus is on the other party to show why the money should be refunded after the accounts have been audited and passed. There is, according to my learned friend, nothing in the Act 45 of 1882 to enable a municipality to commence a suit at all, or to go to arbitration at all. There is no provision in that Act for employing an attorney or paying professional people fees for services they might have rendered and yet the thing is done, and surely it could not be impeached if done *bona fide*.

[Buchanan, A.C.J.: The point is, has the Municipality the right to vote one of its own members money in this way?]

Yes, provided it acts *bona fide*. It can pay over to its own members or anyone else for meritorious services rendered. The Municipality must have power to disburse sums *bona fide* for work that had been done on its behalf.

[Maasdoorp, J.: It got the power to enter into contracts.]

A great deal of the work is not done under contract at all. The case might very well be decided in terms of Act 24 of 1898 as it stood, and I submit that the preamble to the Act shows that it is intended that not only the purchase price, but all expenses incidental to the arbitration, should come out of the £500,000. That is not stated in the section, but clearly we must read the section with the preamble. Therefore the expenses incidental to this arbitration can be paid under this Act, and not under the Municipal Act of 1882 at all.

[Buchanan, A.C.J.: I am rather inclined to hold with you that the expenses of arbitration can be paid out of the £500,000, as contended. The whole question now, however, is whether, Mr. Bisset being Mayor of Claremont at the time, it was legal for the Council to vote him that amount.]

There is no claim for Mr. Bisset as Mayor, but the claim is for the work he did as an engineer. The services Mr. Bisset rendered probably saved the Municipality thousands of pounds.

[Buchanan, A.C.J.: What authority had the Councils to give Mr. Bisset an honorarium?]

It was one of the expenses incidental to the arbitration.

[Maasdorp, J. : But could they have entered into a contract with Mr. Bisset to pay him £500?]

There was nothing to prevent them doing so.

[Buchanan, A.C.J. : Would he not have had to give up his office?]

He might have had to do so, but there would be nothing illegal in such a contract. However, I do not say that a contract was entered into, but that Mr. Bisset having performed meritorious service and saved the Councils great cost, they voted him £500.

[Buchanan, A.C.J. : The Court could only go into the question as to whether it was legal or illegal to do so.]

All I can say is that it was an expense incidental to the arbitration, and point out that no question as to the vote was raised until months afterwards. The matter lay by for four or five months, and it was only brought forward because of £110 which Mr. Ohlsson had promised some officials, and which I understand the Claremont Council agreed to refund him, but which the Council held it could not refund him. That is how the matter cropped up.

[Buchanan, A.C.J. : The vote might still be illegal, although nobody brought it to the notice of the Court.]

The Court has now to consider whether it was a reasonable expense, and if it was a reasonable disbursement the Court will not interfere in the matter. The expense was reasonable, and probably the Municipality would have had to pay double the amount of money if it had not been for Mr. Bisset's services.

Mr. Schreiner, K.C. : As regards the general revenue of the Municipality there is no restriction as to how it should be expended. If it were wrongfully expended in the opinion of the ratepayers, they had their remedy. It is impossible within the four corners of the Act to specify just what expenditure should take place. To pronounce any expenditure not distinctly provided for within the four corners of the Act as illegal is absurd. Suppose the Council chose to secure the services of an eminent hydraulic engineer for £1,000, it could be contended, according to my learned friend's theory, that such expenditure was illegal because it was not specified within the Act. Woodstock, Rondebosch, and Mowbray knew nothing of Mr. Bisset as Mayor of Claremont. They had

as much right to engage Mr. Bisset as any other man. If Woodstock had not taken Mr. Bisset's services they would have had to take those of someone else. It cannot be said that money spent, though not within the limits of the Act, was illegal expenditure. Numerous payments are made, to charities and hospitals, for example, which, according to that view, would become wholly illegal. It would not be possible to send a cable of congratulation or commiseration without it being declared that the expenditure was illegal. What Mr. Bisset did he did outside of his capacity as Mayor of Claremont. He was engaged on an amount of detailed and expert work which as Mayor he could never have been called upon to do. These expenses are incidental to the arbitration, and the Mayor is able lawfully to receive the money. By doing so he does not incur any further forfeiture or penalty.

Sir Henry Juta, K.C., in reply: The transaction was a gift, because if the work was done under a contract Mr. Bisset would cease to be a Councillor. The gift as such does not fall within the Act of 1898.

Curia ad vult.

Postea (February 28).

Buchanan, A.C.J. : The applicants, who are ratepayers in the Municipalities of Claremont and of Woodstock, apply for an order to compel the respondents, who are the Councils of the two Municipalities and Mr. James Bisset individually (Mayor of Claremont Municipality), to refund the sum of £525, which it is alleged has been illegally drawn from a sum of money borrowed under authority of Act No. 24 of 1898. Section 1 of this Act of Parliament authorised the two Municipalities to acquire the property of the Cape Town Districts Waterworks Company, and failing an agreement as to the purchase price, to have the amount to be paid fixed by arbitration. The Councils were by section 2 authorised, when necessary or expedient, to take steps to augment the water supply of their respective districts. Section 3 of the Act, which immediately affects this application, is in the following terms: "For the purpose of paying the purchase price as set forth in the first section of this Act, and of augmenting the said water supply, as in the second section set forth, the said Councils shall be authorised and empowered jointly to take up on loan, as may from time to time be required, by debenture or otherwise, a sum or sums not exceeding in all £500,000 sterling." etc. Under this au-

thority, the respondent Councils have raised a loan of £300,000. It will be seen that there are only two purposes for which this borrowing is authorised, the first for paying the purchase price of the property purchased, and the second for the augmentation of the water supply of the Municipal districts. Any diversion of this fund to any other purposes would be illegal, on the double ground of breach of trust and also *ultra vires*. To illustrate the strictness with which in England Acts authorising the payment of moneys to specific purposes are construed, may be cited, among others, the case of the *Attorney-General v. Corporation of Cardiff* (L.R., 2 Chy. Div., 1894, p. 337). There the Corporation were empowered by special Act to contribute £10,000 towards the purchase of a site for a college. The intended purchase remained in abeyance, and meanwhile the college was carried on at suitable premises rented for the purpose. It was held that the payment of the interest on the sum to the college pending the purchase of the site could not be justified under the special Act. In this case there has been no liability incurred for the second object named in the Act; but under the first section there has been a purchase of the property of the Waterworks Company, and an arbitration had to determine the price to be paid therefor. It has been contended for the applicants that the actual purchase price only of the property is by the third section authorised to be paid out of the loan, and that the expenses of the arbitration must be met out of other sources. If the Act had been altogether silent on the question of arbitration, there are certain English decisions which might be taken to support this contention. But seeing that the arbitration was necessary to effect the purchase, and that it is in the first section of the Borrowing Act coupled with the power to acquire the property, and also that the preamble of the Act declares that it is expedient to raise the loan for the purpose of paying the purchase price, including all costs of and incidental to the said arbitration, in my mind there is no doubt that the intention of the Act was to allow the payment of these expenses out of the capital of the money raised on loan. This brings us to consider what may be included among such expenses. At the conclusion of the arbitration, the respondent Councils unanimously resolved to vote a sum of 500 guineas to Mr. Bisset, chairman of the Joint Committee of the two Councils, as a recognition of the valuable professional and other

services rendered by him to the Councils during the arbitration proceedings, and appointed a sub-committee to wait upon Mr. Bisset to ask his acceptance of the sum in whichever way he might desire. From the letter of respondents' attorneys, it appears that the sum was afterwards paid to Mr. Bisset by cheque, and that the amount was drawn out of the borrowed money, and was not charged against the funds of the several Municipalities. These being the admitted facts, it seems to me that the statements in the affidavits as to the practice of municipal bodies to vote sums of money out of municipal funds for charitable purposes and for testimonials, and the arguments founded on the powers of municipalities, derived from the General Municipal Act, No. 45, 1882, are beside the question calling for decision. So also is any question as to the consequences of contravening the policy of that Act as set forth in the 17th section, which prohibits Municipal Councillors from continuing in office if concerned in or participating in the profit of any contract or work done under the authority of the Council. Unless this expenditure can be considered as part of the purchase price of the Waterworks Company's property, or, to use the words of the preamble, can be included in the costs of or incidental to the arbitration which has had to fix that price, it must follow that the money authorised to be borrowed by Act No. 24, 1898, for this specific purpose cannot be used in the manner proposed. That Mr. Bisset's services were of a professional character, and proved most valuable to the Municipal Councils, and afforded them great assistance in the conduct of their case before the arbitrators, may be taken as established. Had he been an outsider employed to give this assistance, I think the amount was a reasonable one to pay for the services rendered, and might, together with the expenses incurred in engaging other experts, fairly have been included in the incidental costs of the arbitration. It would have made no difference in principle whether or not there had been an express initial agreement for the payment of this amount, or whether the sum was to be assessed on a *quantum meruit*. The respondents themselves show some reluctance to have this amount considered as a payment for services rendered. The minutes kept at their meeting call it a bonus to the chairman of the Joint Councils, and it has also been referred to as a "honorarium"—a phrase of import specially soothing to

the professional ear. But I think the Court should look at the question to discover what the transaction was in reality, rather than to be bound by what the parties chose to designate it. Mr. Bisset is a member of the Institute of Civil Engineers, and has had a long practical experience in engineering and other matters, as well as in arbitrations, which rendered him especially competent to assist the Municipal Councils. He says in his affidavit that at the special request of the committee he undertook the duty of supervising and collecting evidence for the purposes of the arbitration; that he had actually tendered his resignation to the committee at the commencement of the proceedings, as he found that the immense amount of work involved necessitated his devoting his whole time thereto, and that it was only at the urgent request of the members of the committee and on their representations that it was impossible for any other members of the Councils successfully to undertake the work, or for them to procure, at that stage of the proceedings, any competent outside expert to supervise and control the preparations for the arbitration proceedings, that he consented. His labours lasted over a period of two years, and his zeal and ability proved very advantageous to the Councils. For this work and labour some compensation, though not actually stipulated for, was only fair and reasonable. He had at least equitably a right to expect that he would be requited for his time and services. Looking at the payment made in this light, I am prepared to consider it as a charge incident on the arbitration, and therefore a competent one to be made out of the capital of the loan. The application must therefore be dismissed with costs.

Jones, J., and Maasdorp, J., concurred.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinne; Attorneys for Claremont, Messrs. Tredgold, McIntyre and Bisset; Attorneys for Woodstock, Messrs. W. E. Moore and Son.]

SUPREME COURT

[Before the Acting Chief Justice (the Hon. Mr. Justice BUCHANAN) and the Hon. Mr. Justice JONES.]

GOLZHAUSEN V. VERHORNNA (1901.
AND OTHERS (Feb. 22nd

Sir Henry Juta, K.C., moved that the rule nisi restraining the Imperial Ordnance

Department from parting with certain moneys pending the result of an action to be instituted by applicant against respondents be made absolute.

Rule made absolute as prayed.

IN THE MATTER OF THE PETITION OF RICHARD RANDALL.

Mr. Benjamin moved for leave to the petitioner to transfer certain property. The petitioner and one Alfred Randall had agreed a number of years ago that their share, three-eighths and one-eight respectively, in a certain piece of perpetual quitrent land should be included in one diagram on the subdivision of the property. This was done, the land being transferred into the joint names of petitioner and Alfred Randall. About the month of April, 1886, the said Alfred Randall disposed of his share in the land to one J. B. Leach, and had since gone to reside in the Transvaal, and his present whereabouts were unknown. The petitioner now wished to dispose of his share of the property, but as it was registered in his name jointly with that of Alfred Randall, and as their respective shares were not set forth in the transfer, it could not be transferred without the consent of Alfred Randall unless by an order of Court.

After hearing counsel, the Court granted a rule nisi calling upon Alfred Randall to show cause why the remaining extent of the property should not be sub-divided so as to show ownership of three-fourths and one-fourth respectively, and to show cause why the applicant should not transfer his portion: the rule to be published once in the Johannesburg "Gazette" and once in the "Government Gazette," rule to be returnable on April 12.

The rule was made absolute on April 12, the respondent being in default.

CLINGEN V. CLINGEN.

Mr. Gardiner appeared for the petitioner, and moved that the rule nisi calling upon the respondent to show cause why the marriage bond subsisting between them should not be dissolved, be made absolute.

Rule made absolute as prayed.

IN THE MATTER OF THE PETITION OF FREDERICK JOHN HARRIS AND ANOTHER.

Mr. Close moved that the rule nisi for the cancellation of a certain bond be made absolute.

Rule made absolute as prayed.

**IN THE MATTER OF THE PETITION OF MARY
ELIZABETH MANN PALMER.**

Mr. P. S. Jones moved for an order authorising the issue of a certified copy of a certain mortgage bond, the original of which had been lost through the foundering of the R.M.S. Mexican in April last year, the bond being at that time in course of transmission in a registered letter to London.

The order was granted as prayed, the Acting Chief Justice saying that he did not see why it should be necessary to come to court at all in such a case, as he thought the rules of the Deeds Office would have been sufficient to have dealt with it.

WICHT V. GOLDBERG.

Mr. Maskew moved for leave to attach certain property to found jurisdiction, and to sue by citation.

Order granted as prayed, the citation to be returnable on April 12, and to be published once in the "Cape Times" and once in the "Government Gazette."

On April 12, on the motion of Mr. Maskew, provisional sentence was granted in respect of a sum of £500 due on a mortgage bond, with interest and costs. The property specially hypothecated was declared executable.

IN THE MATTER OF THE MINORS ERSKINE.

Mr. Benjamin moved for leave to sell certain immovable property belonging to the minors. The Master had reported favourably and recommended that, in the event of the order being granted, the proceeds of the sale be paid into the Guardians' Fund.

Order granted in terms of the Master's report.

[Before the Hon. Mr. Justice MAASDORP
and a Jury.]

**CARTWRIGHT V. THE CAPE } 1901.
TIMES LIMITED. } Feb. 22nd.**
Libel—Newspaper.

This was an action instituted by Albert Cartwright, editor of the "South African News," to recover the sum of £5,000 damages for libel alleged to have been committed by the Cape Times Limited, in their capacity as publishers of a weekly newspaper known as the "Owl."

The declaration set forth that on or about April 27, 1900, the defendants falsely and maliciously published, of and concerning the

plaintiff, in the columns of the "Owl" newspaper, the following defamatory words: "Of course the 'South African News' must have its little say about the Sunnyside rebels, and hints darkly that we do not imagine that the public have heard the last of the case, and that when the war is over there will be a strong public movement for all these cases to be reviewed and the circumstances fully investigated. I am afraid there will be nothing of the sort. For reasons apparent to all who have eyes and cannot see, our Albert will not be the one to stir up the matter, but will be otherwise pleasantly and more profitably employed. If it has been necessary to pass exemplary sentences on the ignorant, uncouth creatures, what measure shall be meted out to the amicable and cultured Albert for the amount of treason, sedition, and misrepresentation which has been diligently dished up every morning for the last six months. I am afraid nothing less than 15 months will meet the case." By reason of the said defamatory publication the plaintiff declared that he had suffered damages to the extent of £5,000, which amount he claimed, with costs.

The defendants in their plea admitted the publication of the paragraph complained of, but denied that such publication was false and malicious. They contended that the article was a fair criticism of many of the articles which had at different times appeared in the "South African News," and was justified by the language of the said paper. They denied that the plaintiff had sustained any damage.

The plaintiff joined issue.

Mr. Burton for the plaintiff.

Mr. Searle, K.C. (with him Mr. Buchanan), for the defendants.

Albert Cartwright said that he was the plaintiff in this case and the editor of the "South African News." He had been twelve years in South Africa. He came from England. In the first instance he came out under an engagement for the "Cape Times." That lasted three years. Then he entered the service of the Argus Company, and in the middle of 1892 he went to Johannesburg, where he became sub-editor, assistant editor, and acting editor of "Star." During his residence in the Transvaal he was correspondent for the London "Standard" and the "Glasgow Herald." He resigned his position on the "Star" at the time of the raid, and became editor of the "Diamond-fields Advertiser." He stayed in Kimberley until the paper was sold in 1898. Then he was offered an ap

pointment again by the "Cape Times." He did not accept that, but accepted the editorship of the "King William's Town Mercury." Then he became editor of the "South African News." He was now interested to the extent of £300 in the "South African News."

Counsel put in a copy of the "Owl" of April 27, 1900, and said the paragraph complained of was contained in a set of paragraphs described as "Society Vanities and Conceits."

Witness (continuing) said that that paragraph was brought to his notice. He consulted his legal adviser, and a letter of demand was sent on May 7 last to the manager of the Cape Times Limited, claiming an unqualified retraction and apology for the publication of the article.

Counsel put in the letter.

Witness (proceeding) said there was no reply to that letter. He had come into court in order to have removed the reflection on his character. He did not desire damages. He only wished to remove the stigma upon his name.

Cross-examined by Mr. Searle,

Witness said he would not say that the "South African News" had suffered by the publication of this one particular article, but by a series of articles.

Witness (proceeding), under Mr. Searle's cross-examination, said he was offered the second appointment by the "Cape Times" in 1898. He had been editor of the "South African News" for about twenty or twenty-one months. He had been editor of it the whole time, and was editor of it now. He had been consistently opposed to the war and the policy of the Imperial Government. He edited the "Star" for a month, having sole charge. He was on the "Star" for four years, from 1892 until the time of the raid. Then he went to Kimberley.

Mr. Searle: In this war you have regarded the Boers as being in the right?

Witness: The line that I have consistently taken up in many articles is this: I would be very glad if the Boers came into the British Empire, but I consider that they should not be forced into the Empire.

Mr. Searle: Yes, that is all very well, but you have taken up the line of policy that the Boers should not give in.

Witness: Yes, I think articles capable of bearing that construction have appeared in the paper, but not written by me.

Are you not strongly anti-English in sentiment?

Witness: Well, no, not that exactly. I have taken up the position that I believe the balance of right to be on the side of the Boers.

Mr. Searle: You have encouraged the Boers to continue fighting.

Witness: No, I have not encouraged them.

Mr. Searle: Well, at all events, you have not discouraged them.

Witness: No, I have not discouraged them. As I say, I have taken up the position that the balance of right is on their side.

Mr. Searle: But there has never been anything in your paper tending to show that the Boers should now give in?

Mr. Searle: No, of course not. What I mean is that the general policy of the paper as contained in the leaders and sub leaders has been that the Boers should continue the struggle, and not give in?

Witness: I would hardly put it in that way. The policy of the paper has been that the British Government should change its policy.

Mr. Searle: Certainly, and if the British Government does not change its policy the Boers must go on fighting?

Witness: No, I have not put it in that way. Of course, people can draw that inference if they like.

Mr. Searle: Yes, of course.

Witness (proceeding) repeated that he had not attacked the British people, but the policy of the British Government.

Mr. Searle referred to articles contained in the "S.A. News" of January 3 and March 15. The first was on "Peoples and Policy," and was with regard to settlers.

Witness admitted the article.

Counsel read the article, which spoke of the "killing of agriculturists by the British army, at the instigation of capitalists who sought after the minerals."

Witness admitted the article, but denied that the phrase "puppets of the capitalists" referred to the soldiers. He would be sorry to so refer to them.

Mr. Searle then referred to a letter in the same issue, headed "Briton and Boer," "An appeal from Philip Drunk to Philip Sober."

Witness admitted that "Philip Drunk" referred to the British public.

Mr. Searle quoted paragraphs from this article, derogatory to the British people and British Government.

Witness said that in fairness the whole

article should be read. The writer was a leading clergyman of Dundee, in Scotland.

Mr. Searle said he would give it to the jury to read afterwards. After further referring to the article he put in the newspaper of January 3.

Witness said he cordially supported the article. That was obvious by the publication of it in full.

Mr. Searle then referred to the article contained in the issue of January 4.

Mr. Burton said that he had had no notice of these articles. The other side had supplied them with voluminous quotations but there was no reference in these to the articles now quoted.

Mr. Searle regretted that they must have been overlooked. He proceeded to read portions of the article which referred to Mr. Chamberlain as Pontius Pilate, and said that if the war were persisted in the British people would bear on their brows the mark of Cain.

Mr. Searle: Do you approve of that article?

Witness said he approved of the article in the sense that he passed it for publication.

Mr. Searle: You go through papers like the "Speaker," the "New Age," "Reynolds's," and the like newspapers to get things of this kind?

Witness said that this particular article was sent to him for publication.

Mr. Searle then referred to a leading article of January 8, also to a letter signed by a Dutch Afrikaner containing "an appeal for peace"! In the issue of January 9, too, there was a letter of "Loyal Dutchmen," referring to the bayonetting of 81 Boers at Modder River.

Witness said that a contradiction of this was published in the "S.A. News."

Mr. Searle then read the letter in question, which suggested that various atrocities had been committed by the British troops at Modder River.

Witness said the story was later proved to be untrue. On January 17 there was an official contradiction. The story first came to him through two gentlemen of standing in Cape Town; one the chairman of a Joint Stock Company, and the other the head of a large financial house. They said that the story had been given them by an engine-driver who was present. Witness believed his informants as honourable men, and published the story, more especially as ~~Reuter's~~ agent had mentioned the inci-

dent, and it did seem as if something of the kind had occurred.

Mr. Searle referred next to a letter published in the issue of January 11, referring to the lancing of Boers at Elandslaagte after having thrown aside their arms.

Witness said the incident was first reported in the London "Times."

Mr. Searle read portions of a letter by "M. Rabinowitz," and then a letter "Blood and Boom" in the issue of January 22, signed by "British Anti-grab," drawing a parallel between the trouble in Armenia and that in South Africa, and suggesting that the failure of Britain to assist in preventing the massacre of the Armenians was due to the absence of gold-mines from their country, and that inferentially the presence of gold-mines in South Africa accounted for Britain's prosecution of the war in the latter country.

Witness: I am not aware that the letter is treasonable.

Mr. Searle referred next to a leader in the issue of January 29, in which Sir Alfred Milner was referred to as "a colossal failure."

Witness admitted the article.

Mr. Searle referred to a letter in which it was said that a Boer spy before being shot had been made to dig his own grave.

Witness said he had made no inquiry into the truth of the statement. He took it for granted, because it was written by a British soldier.

Mr. Searle: Have you ever had any article in your paper in which you blamed the Boers for treachery under the white flag? Is it not a fact you gloss such cases over, and simply pick out what is disparaging to the British?

Witness said that many times had there been reference to the misdeeds of the other side. He could for the moment only recall one. Early in the war it was reported that Mr. Reitz had ordered the shooting of six British officers in Pretoria if certain things were not done by the British authorities. Witness wrote most strongly against what he regarded as this act of barbarity, which subsequently proved to be untrue.

Mr. Searle: My point any way is that you take anything from the "New Age," the "Speaker," "Reynolds," and like papers that is atrocious and derogatory to Britain?

Witness said he never got a copy of "Reynolds" in the office.

Mr. Searle: How do you get these quotations from "Reynolds" then?

Witness said they were sent to the office. He had never bought a copy of "Reynolds" in his life. Nor had the office ever subscribed to the newspaper. Indeed, only the other day he had attacked "Reynolds" for some disgusting remarks it had made in regard to our late Queen.

Mr. Searle: Yes, that is the kind of newspaper "Reynolds" is. That is the paper you quote from.

Witness said as a fact they had few quotations from "Reynolds." He doubted if there had been twelve quotations from "Reynolds" in the "South African News" since the latter was started.

Mr. Searle quoted other articles, insisting on the necessity of the removal of Sir Alfred Milner and Mr. Chamberlain, questioning Lord Salisbury's veracity, and criticising both in South Africa and elsewhere.

Witness said he failed to see that these articles were treasonable. It was pure party criticism. He certainly adhered to those articles. As regards Lord Salisbury, witness as a free man exercised his right to criticism.

Mr. Searle referred to the alleged desecration of a Dutch church in Natal.

Witness said the report was published in good faith, and on the testimony of the Rev. Andrew Murray, the clergyman there. Proceeding, witness said he wished to observe that never since the war began had he published—except in one case—a statement alleging atrocities upon women and young girls by British soldiers, because he believed it almost impossible to prove such cases. He repeatedly had reports on such cases submitted to him, but he refused to publish them, unless he himself saw the woman here in Cape Town, and saw her own affidavits. The one case which he had referred to as an exception was that given in a letter over Mr. Michau's signature.

Mr. Searle said that, seeing witness had touched on that point, he would come to it at once. He proceeded to quote from a leader contained in the issue of November 6, 1900, in which it was alleged that barbarities and atrocities had "been committed upon women and young girls."

Witness said it would be found that that reference was made to natives.

Mr. Searle said that from start to finish there was no mention of natives.

Witness said he did not write the article—though he took full responsibility for it—but he knew that the idea in the mind of the writer was that it should refer to natives. The idea was that, by the devastation of the villages, the native women and young girls

were turned loose on the veld, and were most liable to violation at the hands of roving bands of natives.

Mr. Searle: There is no reference to natives in this article.

Witness: Nor is there any reference to soldiers.

Mr. Searle: Well, the inference is that British soldiers committed outrages.

Witness: I most strongly deny that that was the idea, or that the article bears that meaning.

Mr. Searle quoted other articles condemning British policy.

Witness said such condemnation was not treason, and it was by no means so severe as some that appeared in the English press; not so severe, for example, as that of Mr. Greenwood, one of the leading Conservative journalists in England.

Mr. Searle: At all events, you charge the British Government at different times with fraud, murder, lying, and other things. That is a pretty heavy indictment.

Mr. Searle referred to two articles published in the "South African News" of April 24 and 25, on which the "Owl" had had the article complained of by plaintiff. The two articles dealt with the proceedings in the Sunnyside rebels' case, and the tendency of these articles, Mr. Searle contended, being that these rebels had been wrongfully and unjustly treated, and that full and free facilities were not given to the accused.

Witness said the article spoke for itself. The central suggestion of the article was that the accused had asked for a postponement, in order to get additional evidence in their defence, and that it would have been better had their request for postponement been granted.

Mr. Searle referred next to a letter in the issue of the "South African News" of the 26th April, entitled "The Church of England and the War"; "W.W., Cape Town Wants More Bloodshed."

Witness: That headline is probably the correspondent's own.

Mr. Searle: But the letter is written by the Archbishop himself. It is unlikely that he would put such a headline.

Witness, after examining the issue of the paper, said that the letter had been taken over from another paper, therefore the "News" had had its own headlines. But it usually happened that when correspondents sent letters to the paper, they put their own headlines. This letter was not sent direct to the "S.A. News."

Mr. Searle read a leading article in the is

sue of the following day, commenting on the Archbishop's letter, and attacking the clergy of his communion.

Mr. Searle: Your attitude throughout the war has been one of constantly supporting the Republics?

Witness said that the attitude of the "News" had not been consistently the same throughout. At the beginning of the war they thought that the Republics had little chance, and that they would be overwhelmed by the force of Britain, and they wrote recommending the Boers to come voluntarily into the British Empire. But they always insisted that if they were brought into the Empire by force, they would seize the first opportunity of breaking away from it by force also. Throughout he had personally held that while there were wrongs on both sides, the balance of right was on the side of the Boers.

Mr. Searle wished to refer to an article of May 9, entitled "Kill, kill, kill."

Mr. Burton objected to this article being referred to, on the ground that it appeared after the alleged libel. He objected to anything being submitted dated after the publication of the alleged libel. These would be bound to influence the jury.

Mr. Searle contended that he was entitled in cross-examination to question witness on anything relative to his previous life.

[Maasdorp, J., said he would note Mr. Burton's objection, but Mr. Searle was entitled to question witness in regard to articles published after the alleged libel.]

Mr. Searle proceeded to quote from the article of May, attacking in strong terms the Archbishop of Cape Town for his attitude in regard to the war, and declaring that His Grace's dictum was "kill, kill, kill."

Witness said the article was a contributed article.

Mr. Searle read an article published in the "S.A. News" on November 8, headed "Sir A. Milner and the Uitlanders." It attacked Sir Alfred Milner owing to his action in regard to the refugees, and said while drawing £8,000 a year from this "impoverished and bleeding country," he spent his time in thinking what particular title he should assume when he was called to the peerage, and "his bloody work" in South Africa was done.

Witness: That was a contributed article also.

Mr. Searle: I'm glad you're ashamed of it

Witness: Oh dear me, no! Pray, Mr. Searle, don't think that. I merely say it was a contributed article.

Mr. Searle quoted a letter of November 13, entitled "The Hellish Panorama," containing an account of the Boer prisoners being sent down to Norval's Pont. He also quoted several other articles, representative of the policy of the "South African News," particularly in regard to the placing of troops and Maxims at Worcester during the Congress.

Mr. Searle then dealt with the curtailment various phases of British policy in the past, of Reuter telegrams in the "South African News," drawing attention especially to the message sent from Willowmore quite recently, wherein the correspondent stated that the Dutch Colonists were beginning to change their view and to realise what was really meant by the invasion.

Witness said that messages were never curtailed or left out except when such was absolutely necessary because of the lateness of their arrival or because of pressure of space. If it were necessary to condense a message, any expression of opinion was cut out and the fact was allowed to remain. In the case of the Willowmore telegram, what was excised was purely and simply the opinion of the correspondent. It was not a statement of fact.

Mr. Searle said it was strange that by no chance was anything excised that was advantageous to the Boers or derogatory to the British.

Witness said messages of both classes were treated alike. The "News" had published many Reuter messages, he might say hundreds, which had derogatory references to the Boers. As regards a Reuter message from Calvinia, which was left out, witness said that if he remembered rightly the message came in too late on Friday night to be published in full in Saturday's papers, and that on Monday it was too late to publish it, seeing it had appeared already in the "Cape Times" and the "Argus." The message was accordingly set aside as stale news. His instructions to the sub-editor in regard to telegrams were never other than that these should be treated fairly and impartially. He had no reason for thinking his instructions had been disregarded.

Re-examined by Mr. Burton: Witness read the conclusion of an article in the "South African News" dated April 18, 1900, published in the weekly edition of

April 25, declaring that barbarities on the part of British soldiers were not to be believed. He also quoted an article dated 15th December, 1900, and other articles (December 5, 1900, regarding the treatment of the women exiles at Port Elizabeth), and others in support of his contention that the attitude of the "South African News" was entirely loyal. He said that the policy of the paper all along had been in praise of the fighters on both sides for their heroism, but condemning the policy of the war as a policy. Witness said he was opposed to the policy of Sir Alfred Milner and of the Imperial Government, and had attacked both. He had never, in attacking the Governor, imputed anything against his character or suggested that he was animated by any but pure motives. He merely said that His Excellency was not acquainted with the circumstances of the country.

Mr. Burton closed his case.

Mr. Searle said he had no evidence for the defence.

After counsel had addressed the jury,

Maasdorp, J., in summing up, said that if it were true that the plaintiff had published matter which made him guilty of treason, sedition, and misrepresentation, it was in the public interest to say so. The only question which the jury had to consider was whether it was in the public interest that the matter published by the plaintiff should be exposed. For the purpose of this trial they had to consider what treason and sedition were. Treason was the crime of disturbing and endangering the safety or the independence of the State. Treason was a crime against the State, and not against this or that person. It was the crime of endangering the safety and security of the State. Sedition was a somewhat similar crime, but a crime of less magnitude than treason. Having read extracts from the matter published by the plaintiff, the learned judge remarked that they were rather strong in their expression, and it was not impossible that they might have had the effect, in the present state of affairs, of exciting public feeling, either in any portion or in the whole of the State, to such an extent as to endanger public safety; but they may have had no such effect. This was a matter for the jury to decide. The jury had also to bear in mind the intention in the mind of the publisher of the articles, and they had also to decide as to whether or not the plaintiff had not himself to blame, to a certain extent, and in the event of awarding

damages to him, whether this should not be borne in mind.

In reply to a juryman, his lordship said that an allegation of treason or sedition must be proved just as much as a criminal indictment must be proved.

The jury retired to consider their verdict, and on their return 33 minutes later, the foreman said the jury could not agree, stating, with some emphasis, that a very decided difference of opinion existed.

Maasdorp, J., stated that the verdict of the majority could not be accepted forthwith, until an hour had elapsed. Therefore they had to endeavour to come to an agreement within 25 minutes (the remainder of the hour.)

In reply to the foreman of the jury, his lordship further expounded the law as to intention as a factor in the gravity of crime, and at 6.45 the jury again retired. At five minutes past seven the jury returned.

Maasdorp, J., in reply to the foreman of the jury, stated that no verdict of the jury would govern the question of costs. Five minutes later the jury again retired, and at 7.15 the jury returned, the foreman announcing that they found for the plaintiff, damages assessed at one farthing.

Judgment was entered for the plaintiff for one farthing, each party to pay their own costs.

[Plaintiff's Attorneys, Messrs. Sauer and Standen; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

VAN HEERDEN V. MOFS. { 1901.
{ Feb. 22nd.

Costs—Magistrate's discretion.

Where, on the trial of a suit in a Magistrate's Court, judgment was given for the plaintiff but no order was made as to costs, and the plaintiff appealed on that question. Held, that although the question, of costs was in the discretion of the Magistrate, yet that discretion should be exercised in a judicial manner on good grounds, and that, as the plaintiff had done nothing to entitle the Magistrate to deprive him of his costs, the judgment should be altered so as to include costs.

This was an appeal from a decision of the

Resident Magistrate of Wodehouse in a case in which Van Heerden (present appellant) sued one Moss (present respondent) for the restitution of a mare, his property, or the value thereof, which was £12 10s., together with £7 10s., as and for damages sustained. The Magistrate, after hearing the evidence, gave judgment for the plaintiff for the return of the mare or the value thereof, but made no order as to costs. It was on the question of costs that the plaintiff appealed. It appeared that the defendant was at the time of the trial in possession of the mare. To the claim of the plaintiff he pleaded the general issue. The plaintiff alleged that the mare in question had previously belonged to his son, who was a member of a Volunteer corps. The son, finding the mare was not in a fit condition to do the work required of her, exchanged it with his father (plaintiff) for a pony. That the defendant thereafter having a claim for money owing to him by the son, came to the plaintiff's farm and obtained possession of the mare on loan to ride to a neighbouring farm, failing thereafter to return the mare. The defendant, though represented by an attorney at the trial, did not give evidence for the defence, but his attorney, during cross-examination, endeavoured to prove that the mare had been pledged to the defendant by the son, and that therefore the defendant was entitled to retain possession of her.

Mr. Schreiner, K.C., for the appellant: The Magistrate did not exercise his discretion in a proper manner. There must be some grounds for the exercise of his discretion, and it must be exercised judicially. There is nothing in the case to justify the Magistrate in refusing the plaintiff his costs.

Mr. McGregor, for the respondent: There is considerable doubt as to the *bona fides* of the transaction between the plaintiff and his son, and under the circumstances the Magistrate was justified in refusing the plaintiff his costs.

Buchanan, A.C.J.: The plaintiff in this case in the Court below sued for restitution of a mare, his property, or for the value thereof, and for damages. To this claim the defendant pleaded the general issue, but at the trial the evidence went to insinuate that there had been a pledge of this mare to the defendant by a son of the plaintiff, in whose custody it was. The evidence shows clearly that although the mare originally belonged to the son, he wrote to his father in con-

sequence of the condition of the mare, asking him to exchange the mare for the pony. The father did so, and sent the pony by another son, to whom the mare was delivered, as agent of the father. The Magistrate found that there was this exchange, and that the mare was the property of the plaintiff, and gave judgment for the restitution of the mare or its value, but withheld costs. Now it has been several times laid down that although the question of costs is as a rule in the discretion of the Court, that discretion is a judicial discretion, and must be exercised in a judicial manner. There must be grounds on which it is exercised. If in this case there had been any conduct on the part of the plaintiff which would lead the defendant to believe that the son had the right to pledge the mare, or if there were any collusion between plaintiff and his son, or some such ground, probably the Court would not interfere with the judgment as to costs. When it is considered that no pledge has been proved, that defendant did not go into the witness box and show how he became possessed of the mare, that he was represented by an attorney, and pleaded the general issue, I think that the Magistrate was justified in giving judgment for the restitution of the mare or the value thereof, but he was not justified in not granting costs to plaintiff. It is clear that the plaintiff was entitled to costs, as he did not misconduct himself in any way so as to deprive him of his costs. The appeal will therefore be allowed with costs, and the judgment in the Court below altered to judgment for the plaintiff for the restitution of the mare or the value thereof, £12 10s., and costs.

Jones, J., concurred.

REX V. FRANCIS. { 1901.
 { Feb. 22nd.

Transkei Territories—Liquor -
Native—Proclamation 343 of
1894, sections 5, 11.

Section 5 of Proclamation 343 of 1894 does not allow a holder of a liquor licence in the Transkei to supply liquor to natives on the authority of a letter from a white resident, but only on a permit signed by a Magistrate authorising the bearer of the permit to obtain such liquor. B. gave a

native a letter asking F., the holder of a licence, to supply the native with liquor for B., giving the native the money to pay for it. F. supplied the liquor in sealed bottles. The native broke the seals and poured the contents of the bottles into calabashes and was proceeding to his own house when he was arrested. F. was charged with contravening section 5 of Proclamation 343 of 1894 and convicted.

On appeal the conviction was sustained.

Held further, that the omission of the word "deliver" in the summons did not take the case out of the operation of the proclamation.

This was an appeal from a sentence of the Resident Magistrate of Maclear, in a case in which one Francis, a canteen-keeper at Ugie, was charged with contravening section 5 of Proclamation 343 of 1894 with unlawfully selling, giving, and supplying fifteen bottles of brandy to one Talese, a native residing at Umtata, without the production of a permit from the Resident Magistrate, as required by the 5th section of the proclamation, which provides that "No intoxicating liquor shall be sold, given, supplied, or delivered by the holder of any such licence to any native unless he shall produce a permit signed by the Magistrate authorising the bearer to obtain a specific quantity of such liquor."

From the evidence it appeared that the liquor was supplied on the authority of a letter and for money given to a native by one Bezuidenhout, a white man. The native to whom the permit was given was in the employ of Bezuidenhout. The former handed it to another native, who obtained the liquor in bottles sealed up by the canteen-keeper. The two natives then proceeded to open the bottles and pour the contents into calabashes. While on their way to the house of one of the natives, a policeman arrested them for being in possession of liquor. The defendant said that the money and permit were given to the native so that the latter might procure the liquor for Bezuidenhout. The Magistrate con-

victed the accused and sentenced him to pay a fine of £20, or in default, to undergo three months' imprisonment with hard labour. The accused appealed.

Sir Henry Juta, K.C., for the appellant, submitted that if the law meant absolutely that no liquor could be supplied to a native, then if pushed to its extreme, it would mean that it was impossible for a hotel-keeper to carry on business in the Transkei, where the servants were all natives, because it would mean that a native servant in a hotel could not take a bottle of liquor to a guest at that hotel. After arguing that the proclamation could not have been meant to affect the case of a servant going for liquor with a letter from his master asking the hotel-keeper to supply the same for his (the master's) use, especially in a case like the one before the Court, where the hotel-keeper took the precaution of sealing up the bottles, and warning the natives not to break the seals, he contended that even should that be held to be a contravention of the proclamation, in the present case there could not be a conviction, as the word "deliver" had been omitted in the summons, and it could not be said that the liquor had been sold to the natives as it was paid for with Bezuidenhout's money, nor had it been given to the natives, which meant a free gift, and it had been supplied for Bezuidenhout and not to the natives.

Mr. H. Jones, for the Crown, said that the word deliver was left out by an oversight. It was not even necessary to insert it, because "give" popularly meant the same thing. The object of the proclamation (section 6) was to prevent natives from being in possession of liquor. That was shown by paragraph 3 of Proclamation 454 of 1894. In *Regina v. Robertson* (9 Juta, 299) De Villiers, C.J., said that in proclaimed areas no person might "sell, give, or supply" to a native, and apparently held that to give or to supply meant the same as "deliver." In Act 23 of 1883 the word "deliver" was not used.

Sir H. Juta, in reply, said the whole policy of the proclamation was to keep natives from having liquor. Here the hotel-keeper had done all he could. If a bearer or messenger might not carry drink, a native waiter might not bring a drink from a bar to a dining-room.

Buchanan, A.C.J.: This is a case of con-

siderable importance to dealers in the Transkei, and it is desirable to get an expression of opinion from the Court on the Proclamation which governs the dealing in liquor as regards natives in that territory. The fifth section of the Proclamation says: "No intoxicating liquor shall be sold, given, supplied, or delivered by the holder of any such licence to any native unless he shall produce a permit signed by the Magistrate, authorising the bearer of the permit to obtain the specified quantity of such liquor." In this case the accused is the holder of a licence, and he is charged with selling, giving, or supplying to one Talese, a native, certain liquor. The defendant admitted that he did supply this liquor to Talese, but he says it was supplied on a letter sent by one Bezuidenhout, a white resident. Now the proclamation does not allow a holder of a liquor licence to supply liquor to natives on a letter from a white resident, but only on a permit signed by the Magistrate authorising the bearer of the permit to obtain such liquor. Sir Henry Juta, in his argument, wished to reduce the restriction to an absurdity by pushing it to extremes, and argued that a strict construction of it would prevent a licensed dealer from giving any liquor to his servant to be carried from a wagon to the cellar, or from one room to another. But that is not what was aimed at. The evidence in this case shows the policy of the law and the correctness of the conviction in this instance. The policy of the law is to keep the natives in the Transkei from obtaining liquor for consumption by them under any circumstances except on the special permit of the Magistrate. Here we have a permit given by a white man to a native; this native gave the permit to another native; the liquor was obtained and taken away by the natives; the bottles were sealed, but they were opened by the natives and the contents poured into calabashes, and were being taken away to the natives' own homes, when a policeman came along and arrested the natives. Being in possession of the liquor is in itself a crime on the part of natives in the Transkei. I think the evidence shows that the policy of this proclamation has been distinctly contravened by this selling liquor on a letter written by a white person, and given to a native to deliver to the canteen-keeper. The only other question is with regard to the omission of the word "deliver" in the summons, which only charges the defendant

with "selling, giving, and supplying" the liquor to the natives. Selling, no doubt, means selling to the person who is to pay. There is some evidence in this case that there was selling to this man Talese, who himself says that the money he paid to defendant was his own. However, I think we may take it for the purposes of this case that the evidence of Bezuidenhout is correct, and that he gave the letter and the money to the native, who gave it to the other native, but I think the words "giving and supplying" liquor to Talese without a permit would be sufficient in this case to bring the canteen-keeper within the operation of the Proclamation. For these reasons I am of the opinion the appeal must be dismissed.

C ETZEE V. BEUKES. } 1901.
Feb. 22nd.

Magistrate—Evidence—Discretion—
Fraud.

A Magistrate must decide a civil case on the evidence before him, and not import into it evidence from a criminal case which does not form part of the record. If fraud is to be relied upon it must not only be pleaded but proved.

Where the plaintiff's evidence was uncontradicted, the Court refused to uphold a decision of the Magistrate granting absolution from the instance and altered the judgment to one for the plaintiff with costs.

This was an appeal from a decision of the Resident Magistrate of Fraserburg in a case in which the plaintiff (present appellant) sued the defendant (present respondent) for the return of a donkey and its foal, or in the alternative, the value thereof. It appeared that a man named Mulder obtained from plaintiff the loan of some donkeys, and was afterwards found trespassing on the lands of defendant, who threatened to impound the donkeys and have Mulder arrested for trespass. Afterwards he said he would accept £3 for the damages caused by the trespass, but at Mulder's request he accepted one of the donkeys, which he understood belonged to Mulder, in lieu of the £3. Plaintiff afterwards demanded the return of the

donkey and foal, but defendant refused to give them up. After hearing the evidence, the Magistrate gave absolution from the instance with costs.

In his reasons for his judgment, the Magistrate referred to the evidence given by plaintiff in a criminal case against Mulder, which he said contradicted his evidence in the civil case. After referring to certain statements made in that case, which led him to believe that the donkey was not the property of plaintiff, or at least only the property of plaintiff jointly with Mulder, the Magistrate concluded by saying that his conclusions, summed up, were: (1) The evidence for the plaintiff is too unsatisfactory and unreliable, to conclude that the donkey in dispute is actually the property solely of plaintiff. (2) That the action should have been (if the donkey was plaintiff's property, which I hold it is not) against Solomon Mulder, and not against defendant. (3) That if the donkey was plaintiff's property, and he lent it to Solomon Mulder, the latter committed no crime when he pledged it—being in lawful possession at the time and honestly intending at the time of the pledge to redeem it—that before defendant could be compelled to give it up his pledge must be redeemed. (4) That defendant, a well-known and respectable farmer, refuses, and rightly too, to deliver up this donkey before an honest attempt is made to release it, especially seeing that plaintiff and Solomon Mulder, coloured persons of no repute, act in collusion with the object of defrauding him. This donkey in dispute is, of course, one of others that committed trespass.

Mr. Schreiner, K.C., for the appellant, said that the evidence left no doubt that the appellant was the owner of the donkey and foal. The case for the defendant was that these animals had been left with Mulder as a pledge. The question was, who was the owner of the donkey? His client was clearly the owner of the donkey. He was a prison guard, and yet he was told he "was a coloured person and a person of no repute." There was no ground whatever for a decision of "absolution from the instance." He took it that the donkey and foal were still in existence, and therefore if the Court ordered them to be handed over the order could be complied with. The donkey was worth £6 or £7, and the foal was worth something, and £2 was not too much for damages. He would admit that the donkey might have been impounded for trespass,

but this was what defendant had not done. There was no lien for agistment.

Mr. Molteno, for the respondent, said the question of the ownership of the donkey was a pure matter of fact. The Magistrate said he was not convinced that the donkeys were solely the property of the plaintiff. The Magistrate found that the property in the donkeys had not passed from Mulder. Mulder had not been called, and he could have given the best evidence. The Court could not find that the Magistrate was wrong on the facts. The witnesses for plaintiff were not consistent as to when the donkey was sold or what was paid for it. In August, when the donkey was taken for trespass, Mulder was quite ready to pay the £5 claimed.

Buchanan, A.C.J.: There is no doubt that defendant had possession of the donkeys, but the question is as to his right to retain such possession. He pleaded the general issue, but in evidence he said that the donkeys had been pledged to him by one Mulder. There is no evidence whatever on the record to show that the donkeys belonged to anyone else than the plaintiff. The Magistrate has imported into his judgment evidence which he took in another case, and which is not part of the record, but even on the face of that evidence, judging from what he has cited from it, it does not show that the statement made by the plaintiff was erroneous. The Magistrate certainly exercised a great deal of discretion in testing the credibility of witnesses, but it is not sufficient for him to say he did not believe the witness, and that he did not believe the facts proved. He must decide upon the evidence before him. In the present case there is no contradiction of any of the plaintiff's statements, and there is no question of conflict of evidence. The Magistrate should have found upon the facts proved. The Court is slow in interfering with magistrates' findings on pure questions of fact, but in this case the Magistrate's judgment cannot be supported, especially as his reasons for his judgment are so untenable. As to the fourth reason, I am surprised at a Magistrate giving such a reason as he had given in this case. There was no allegation of fraud, and one of the common rules of law is that, if fraud is to be relied upon in any case, it must be pleaded as well as proved, and here there is not only no allegation, but no evidence whatever upon which to found fraud. The Magistrate's reasons throughout are untenable, and the plaintiff is en-

titled to have his property returned. The appeal will therefore be allowed, with costs, and judgment entered in the Court below for the delivery of the donkey and foal, failing that, for £8 sterling, with costs.

Jones, J., concurred.

[Appellant's Attorneys, Tredgold, McIntyre and Bisset; Respondent's Attorneys, Van der Byl and Van der Horst.]

MCKENZIE AND CO. V. TUCHTEN, } 1901.
MOSS AND CO. } Feb. 22nd

Dock agent—Landing cargo—Harbour Board.

M. having been appointed by the Harbour Board as dock agent to land certain goods consigned to T., landed them in accordance with the regulations, and placed them in a shed on the quay, as directed.

Owing to the insecure state of the shed the goods were lost or stolen.

Held, that as M. was the agent of the consignee and appointed by the Harbour Board under the regulation to land the goods, he was not liable for their loss after having followed the directions of the Harbour Board.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the present respondents (plaintiffs below) sued the present appellants for the sum of £15 9s. 9d., the value of certain cigars, landed from the German on June 2, 1900, and handed to the appellants. It appeared that the plaintiffs, who were the consignees of the cigars, were unable to obtain delivery of the cigars, although they had been taken possession of by the defendants. The defendants, after the goods were landed, placed them in a shed on the quay in accordance with the Harbour Board regulations, being bound thereto by reason of their appointment by the Harbour Board as dock agents in this particular case. The shed in which the goods were placed was not locked, nor was any watchman placed there, with the result that the shed was entered by some person unknown and the goods taken away. The defendants said they had drawn the attention of the authorities to the unsafe condition of the shed. The plaintiffs claimed that

the defendants were responsible for the loss, since they were the agents of the Harbour Board for the purpose of landing the goods. The defendants contended that after they had, in accordance with the regulations, placed the goods in the shed, over which they had no control, they had no further liability for the goods.

The Magistrate gave judgment for the plaintiffs with costs. In his reasons for his judgment, the Magistrate pointed out that the defendants had no receipt from the Harbour Board for the goods placed in the shed, and that it was not until a certain time had elapsed that any charge was made for storage. In this case the time had not elapsed before the goods were lost, and he (the Magistrate) was of opinion that while the defendants might have, as agents, an action against the Harbour Board, judgment would have to be given for plaintiffs with costs.

The defendants appealed.

Sir Henry Juta, K.C., for the appellants, said that there were two classes of agents, viz., dock agents and forwarding agents. The latter only get bills of lading. Mr. McKenzie was a dock agent. He did not know whose goods he landed. And this was a distinction not found in any other Harbour Board. The dock agent was only consignee's agent for landing not for delivery. McKenzie had nothing to do with delivery. He could only put the goods where the Harbour Board told him, and that was just what he did. A store was pointed out by the Harbour Board. McKenzie objected to the condition of the store, but he was made to put them there all the same. Then as to the fines and rents in the regulations. No distinctions were made between warehouses and sorting warehouses. The Harbour Board looked to the consignee, not to the landing agent, for rent. He had nothing to do with it.

Mr. Wilkinson, for the respondents, said he presumed he need say nothing about negligence. The store was unsuitable, and the question was, were McKenzie and Co. liable? Some party must be liable to plaintiff for negligence. If the Harbour Board was exonerated, it did not follow that they might not be liable. The Harbour Board might be liable to McKenzie, with whom alone their contract was.

[Buchanan, A.C.J.: How long do you say McKenzie remains liable for goods?]

Until they have delivered to consignee's forwarding agent.

[Buchanan, A.C.J.: Suppose he does not come for a week or a month?]

He must keep them for a reasonable time in the warehouses.

[Buchanan, A.C.J.: The only question is whether the regulations under which McKenzie is appointed do not discharge the Board from liability?]

There is no privity of contract between the Harbour Board and the consignee. In *Lister v. McKenzie* (10 Sheil, 480) it was held that the Harbour Board landing agents were appointed by the Harbour Board as agents for the consignee. As to time, 72 hours would be the minimum of reasonable time.

[Buchanan, A.C.J.: What is McKenzie to do after that?]

He may retain them, but the Harbour Board will not be exonerated from responsibility. Then McKenzie never applied to the Harbour Board for a watchman.

[Jones, J.: The Board ought to have appointed a watchman.]

No, the agent by his appointment accepts the obligation of storing the goods where he is told. By complaining of the shed, McKenzie acknowledged his responsibilities. There was the case of *Holt v. Union-Castle Co.* (February 13, 1901), in which it was held that the consignee could get his goods only from the landing agents. The landing agent must keep the goods until he can hand them to the consignee. By placing goods in sheds the agents did not hand them back to the Harbour Board.

[Jones, J.: If the agent must accept the place of storage and the watchman named by the Harbour Board, how can the agent have the custody of the goods?]

He is the agent as to responsibility for them. In the course of argument, counsel referred to *Bristol and Exeter Railway v. Collins* (7 House of Lords, 194, and 5 Hurl and Norm, 969); *Hutchinson v. Tatham* (8 C.P., 483); *Crouch v. Great Western Railway Co.* (2 Hurl and Norm, 491).

Buchanan, A.C.J.: This question of liability for goods landed has been frequently before the Court, but, unfortunately, in none of the cases have we been able to settle the question definitely in consequence of the Harbour Board not being joined in the action. The Harbour Board was established by Act 35 of 1896, which empowers the Board *inter alia* to land, warehouse, and deliver all goods in Table Bay, and section 79 of the Act provides that no goods brought to Table Bay shall be landed or shipped, except by persons authorised by the Table

Bay Harbour Board. Certain regulations have been framed, and these require that all goods should be landed by one dock agent appointed by the Board, and that the dock agent who lands the goods should do so on behalf of the consignees. It is also shown in this case that this dock agent was required to put the goods so landed where told by the Harbour Board. If the agent who landed these goods had been the person appointed by the consignee to receive the goods for the purpose of delivery, and he had so received them, there is no doubt that such agent would be bound to land them in the condition in which he received them. But in this case the dock agent was controlled all through by the Table Bay Harbour Board regulations. He could not store these goods, except where told, and could not take them away or remove them. He could only comply with the regulations. When he placed these goods in the store, according to regulations, he discharged the onus that was upon him. In that respect this case is different from the case of *Lister v. McKenzie & Co.* (10 Sheil, 480), where the defendants could not prove that the goods had been placed in the store. In this case it is not denied that the defendants received the goods, and placed them where they were directed by the Harbour Board to place them. Unfortunately the Harbour Board is not a party to the case, and all the Court can say at present is that McKenzie and Co. have discharged the duty undertaken by them of landing the goods. Under these circumstances, the appeal must be allowed, and judgment given for the defendants. I may add a remark as to the desirability in future actions of this kind of joining the Harbour Board in the action, or bringing the action originally against the Harbour Board, so as to test its liability.

Jones, J., concurred.

[Appellants' Attorneys: Messrs. Silberbauer, Wahl, and Fuller; Respondents' Attorneys: Messrs. Fairbridge, Arderne, and Lawton.]

LOUW V. LOUW'S EXECUTORS. } 1901.
 } Feb 25th.
Will—Witnesses—Ordinance 15 of
1845.

This was an action instituted by Mrs. Louw, of the Paarl, duly assisted, as far as need be by her husband, Jacobus Adriaan Louw, to whom she was married without

community of property, in order to have a certain instrument purporting to be the last will and testament of her mother, the late Mrs. Cornelis J. J. Louw, declared of no force and effect. The defendants in the case were Jacobus Adrian Louw, J.A. son, and J. I. de Villiers (the secretary for the time being of the Paarl Board of Executors), who were appointed executors under the will, which it was claimed should be declared null and void. The declaration set out that the plaintiff was one of the daughters of the deceased testatrix. That in the year 1893 the testatrix executed a will which was annexed, and then, on or about July 9th, 1900, executed another document purporting to be her last will and testament, but which the plaintiff alleged was invalid owing to its not having been duly executed, inasmuch as the witnesses who signed the will were not present when the testatrix made or acknowledged her signature, and did not even know what the document was to which they affixed their signatures.

The plea denied that the will was not properly executed, and said that the instrument purported to be and was the last will and testament of, and was duly executed by, the deceased in the presence of the two witnesses, Ferreira and Retief, as required by law.

By the will which it was sought to set aside, the general appointments were left very much the same as under the earlier will, except that the plaintiff's share was burdened with a *fidei commissum*, while it was not so burdened under the first will. There was also a difference with regard to the appointment of executors, those appointed under the first will being the plaintiff and the Malmesbury Board of Executors, while the defendants were appointed executors under the second will.

Mr. Schreiner, K.C. (with him Mr. Burton), for the plaintiff; Sir Henry Juta, K.C. (with him Mr. Gardiner), for the defendants.

Johannes Jacobus Ferreira said he resided at the Paarl, and was in the police force there. One evening in July last year, while he was in the police barracks, Mr. Cross came to him. It was on a Saturday evening between six and seven o'clock. He believed the date was July 9. He did not know Cross. Cross asked him and another policeman, named Retief, to go to Cross's house. They went. Witness went into the room where Mr. Jacobus de Villiers was sitting. There was a lamp burning on the table. There were an old woman and a

young woman and a child about seven or eight years of age in the room also. Mr. Cross went in with witness. Witness explained to the Court the position of the various people in the room. Witness did not know either of the ladies. He did not remember having ever seen them before. He was not told who they were. Mr. De Villiers said to witness, "There is nothing the matter. I only want you to sign this document as a witness." There was a typewritten document on the table.

Mr. Schreiner, K.C., produced the document, and witness recognised his signature.

Witness (proceeding) said he had signed as a witness. He had no idea as to what he was signing. The old lady took no notice of what was going on. She simply sat at the table, looking in front of her. She said nothing. He did not see her sign anything. Witness could not recollect having seen any signature on the document when he signed. There might have been another signature. When witness had signed Retief took his place, and signed also. Witness remained in the room while Retief was signing, but he heard nothing said. When Retief had signed, they returned to the barracks. Retief and he were in the room about six or seven minutes. They were in a hurry to get away. Witness knew Mr. De Villiers by sight, but had never signed documents for him before. He signed this document because he thought Mr. De Villiers was a good man and the document was all right.

By Sir Henry Juta: The first he heard of the matter afterwards was when Mr. De Villiers spoke to him. Mr. De Villiers said he had got a summons, and he asked witness whether he recollected signing the will, and whether he remembered Mrs. Louw signing the document. Witness replied that he must first see Retief. Then Mr. Louw, husband of the plaintiff, came to see him. He did not know Marrie du Toit, a Malay tailor. He did not see him in the doorway of Mr. Cross's house the evening they went over there. He thought the document was a document between man and wife, between Mr. and Mrs. Cross—a will. He thought it was a will, because he saw the word "testament." He could not remember seeing the signature. Mr. and Mrs. Cross did not say anything. Mr. De Villiers gave him the pen to sign with. He might have forgotten some things as regards what took place that evening. He thought Mr. De Villiers was a good man, and he thought that to sign the will would be all right. There was no signature as far as he could remember while

he was present. He did not hear Mr. De Villiers say to Mrs. Louw that the document was her will and testament, and the signature also hers.

Re-examined by Mr. Burton: After the will was made, he saw Mr. Aurret, the plaintiff's attorney, in regard to the matter. That was on November 10. The old lady was sitting at the table, and took no notice of witness. She said and did nothing. He made the statement on November 10. He had seen Aurret a day or two days before he made the statement.

By Buchanan, A.C.J.: He had never signed a document in the same way before. He simply signed. He was quite in the dark as to what he signed. He could not say whether or no he had to witness a signature. He did not see the signature.

Buchanan, A.C.J.: Then what were you witnessing?

Witness: I simply signed the document innocently. I did not know what I was signing. I do not remember seeing any name.

Louis Bernhardus Retief said he resided at the Paarl. He was in the police force. He recollected Mr. Cross coming to him and Ferreira one evening in July and asking them to come to his house. He corroborated the evidence of the previous witness. When Mr. De Villiers asked them to sign the document he said it was nothing particular. He saw the old lady in the room. She said nothing while he and Ferreira were in the room.

By Sir Henry Juta: He was quite positive as to what took place on the occasion. He made a statement to Mr. Aurret, also to Mr. Van Eyck, attorney for the defendant. Both statements were the same. He could not say whether Mrs. Louw signed the document or not. She did not sign it when he was present.

Sir Henry Juta called

Jacob Isaac de Villiers, who said he was secretary of the Paarl Board of Executors. As a law agent, he for many years had drawn up numbers of wills. He knew the law on the subject. He took Mrs. Louw's instructions as to the making of a new will. She wanted a codicil to the old will, but he recommended a new will, and drafted one accordingly. He took the instructions and drew up the will. He went back towards evening. He was sitting in the dining-room. Mr. and Mrs. Cross and Mrs. Louw were there. That was July 9. Mrs. Louw was then living with the Crosses. Mrs. Cross

was her daughter. He knew Marrie du Toit, the Malay. He was standing on the stoep. Witness explained the will to Mrs. Louw, and said that before it could be executed they must get witnesses. He spoke to Du Toit, and wanted him to sign, but eventually got two men from the police barracks. When the men arrived witness said to Mrs. Louw: "And this is your last will and testament," whereupon she signed the will in the presence of them all. There could be no question or doubt that she signed the will in the presence of the witnesses. Mrs. Louw was quite intelligent when witness spoke to her about the will. He heard nothing more of the matter until he got the summons. Then he saw Ferreira, who said he must first speak to Retief as to the circumstances.

By Mr. Schreiner: He had no idea that the will would be impugned until he got the summons. A few days after the death of her mother, Mrs. Louw came to him in rather a flurry to see the will. Then he saw Louw. He did not say anything about contesting the will. That was shortly after the death of the old lady. Louw came to him to see the will. Witness had not seen the will of 1873. The last will was filed on December 7. Mrs. Louw died on October 30. He did not file earlier because there was some delay owing to the absence of his co-executor in Malmesbury. Mr. Van Eyck was witness's attorney in the matter. When Ferreira and Retief came in witness said the document was a will. If these men said that the old lady did not sign the will they spoke a deliberate untruth. In his honest opinion these men had been tampered with by some one on the side of the plaintiff. In witness's opinion the attention of the two was sufficiently drawn to the signing of the will. He said to Mrs. Louw, while the two witnesses were present: "This is your last will and testament." He did not repeat that to the witnesses. It would have been tautology to do so: useless repetition. Some long-winded professional might do that. He did not. Had he known what he knew now, he would not have had these two men to sign. He merely sent over to the police barracks to get two policemen. He had not heard anything even from hearsay to lead to the suspicion that these two men had come deliberately to say what was false with regard to this matter.

Peter Cross said he was married to a daughter of the late Mrs. Louw, whose will was now in question. He explained the circumstances attending the securing of the

two policemen and the signing of the will. He was positive that his mother-in-law signed in the presence of these two men.

By Mr. Schreiner: Mrs. Louw gave various reasons for altering her will. He did not care to give the reasons.

Ella Maria Cross, wife of the previous witness and daughter of the late Mrs. Louw, detailed briefly what took place when the will was signed. After the two policemen came into the room Mrs. De Villiers asked her mother to sign the will. Her mother signed first, then Ferreira, and after him Retief.

By Mr. Schreiner: Ferreira and Retief were standing near Mr. De Villiers when he asked her mother to sign the will. While her mother was signing, they saw her. They must have seen her. They were looking on when she signed. The new will made no difference to her.

Mr. Schreiner, K.C.: The issue is very simple. The Court will demand the most strict performance of the formalities. When the two witnesses were substituted for the seven, "presence" meant "intelligent presence." A sleeper would not be a witness even if the will were executed in his presence. Mere physical presence has nothing to do with the matter. The witnesses in this case did not know what was being done. If the witnesses know nothing about the will they attest the will is bad. Not mere physical, but also mental presence, is necessary in order to be a witness. If a man signs a piece of paper which afterwards turns out to be the will of X., is that to be regarded as a legitimate attestation? Here the witnesses believed they were witnessing some document between Mr. and Mrs. Cross. Here the witnesses neither saw the testatrix sign nor did they hear her acknowledge the will. It is therefore clearly bad.

Sir H. Juta, K.C., was not called upon.

Buchanan, A.C.J.: On July 9 last Mrs. C. J. J. Louw purported to execute her last will and testament, which was signed by her in the presence of two witnesses, Ferreira and Retief. The document is in order, and purports to be properly signed, and properly attested. But the plaintiff, who was the son-in-law of the testatrix, says that the attestation is bad, because the testatrix did not sign it in the presence of the two witnesses. Ordinance 15 of 1845 requires that the person executing a will must do so in the presence of two or more competent witnesses present at the same time, and that these persons must also sign in the presence

of the person executing the same. In this case the testatrix, her son, her daughter, Mr. De Villiers, and the two witnesses, Ferreira and Retief, were present, all in one room. There is some conflict of testimony as to what took place, but credible evidence shows that Mrs. Louw, who was sitting at the table, first signed the will, and then the two witnesses came, one after the other, up to the table and signed in her presence. From the evidence of the persons who were in the room, it appears that everything was done in order. The whole proceedings, as disclosed in Mr. De Villiers' evidence, were in the most regular and formal manner. The onus is on the plaintiff to prove that the will was not duly executed. Not only has he not done that, but the defendant has proved that every formality required by the Ordinance was complied with. Therefore the Court is bound to give judgment for the defendants, with costs.

Jones, J., and Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs Van der Byl and Van der Horst; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

WOLDON V. RALSTON. { 1901.
Feb. 26th.

Broker—Action for Commission.

This was an action in which Samuel Wordon, a Cape Town broker, sued Dora Ralston, a widow, living at Salt River, formerly proprietress of the Portsmouth Arms, Bree-street, for the sum of £35, as broker's commission, in respect of the sale of the goodwill of the hotel mentioned, the plaintiff alleging that he acted as broker for the defendant.

The declaration set out that in the month of November, 1900, the defendant agreed to employ the plaintiff as broker, to secure a purchaser for the goodwill of the premises. The plaintiff brought one E. J. C. Kromm as purchaser, and a sale was effected to this person for £1,400. Plaintiff claimed £35, this being commission on the purchase price at the rate of 2½ per cent. The defendant denied that she employed plaintiff as broker, or that he secured Kromm as purchaser.

Mr. Gardiner for the plaintiff.

Mr. Close for the defendant.

Samuel Wordon, the plaintiff, said he was a licensed broker, carrying on business in Cape Town. He had known Mrs. Ralston for eighteen months. In November last, he was at the Portsmouth Arms, of which defendant was the proprietress, and she then

asked him to try and get a purchaser for the goodwill. She asked £2,000, but told witness to get an offer. A man named Keyser was present during the conversation. Witness afterwards offered the hotel to Kromm, who said he would see the premises. In a subsequent conversation with Mrs. Ralston, the latter told witness that Kromm had not made a good offer. Witness said he would try to get a second offer. Witness then proceeded to find a purchaser, and employed Keyser to assist. Witness afterwards found that the house had been sold to Kromm, who had taken possession. Witness afterwards saw Mrs. Ralston, who, on witness asking for the brokerage, said she would call on him.

Cross-examined: Two or three days after witness received instructions from Mrs. Ralston to get a purchaser, Kromm came to his office and asked if he had any hotels for sale. Witness gave him the names of three hotels, including the Portsmouth Arms. Mrs. Ralston knew witness was a broker. Witness had advertised himself as a broker. Witness did not first ask Mrs. Ralston if the place was for sale. Witness told the Kromms (father and son) that Mrs. Ralston had employed him as broker. He advanced Kromm £300 on the morning he entered. About a fortnight after Kromm took possession, witness met Mrs. Ralston and her daughter, and the former said she was busy but would settle the brokerage in the course of a few days. Afterwards he saw Mrs. Ralston at Salt River, and she then promised to call on him. Witness had never asked Kromm for brokerage. Keyser was witness's partner in this transaction.

Re-examined: The seller always paid the brokerage.

Mr. Close pointed out that this was not customary where the seller had not employed the broker.

Harry Keyser deposed to having been present in a room of the hotel when Mrs. Ralston asked the plaintiff if he could find a purchaser for the house. He also heard plaintiff afterwards give the names of the Portsmouth Arms and two other hotels to Kromm, who had some time previously asked if he had an hotel.

Cross-examined: Witness was getting half out of the transaction. He had not offered Mrs. Ralston to "square" the matter for half.

Charles Ernest Kromm said that last year his son, J. E. C. Kromm, asked him to put him in an hotel. Witness went to see plaintiff, and in consequence of what the plain-

tiff said, witness went to the Portsmouth Arms. Witness thought the price was too high, and his son afterwards negotiated for the house.

Dora Ralston, the defendant, said she knew the plaintiff, who had been at the Portsmouth Arms collecting accounts. The first mention about the sale of the place by plaintiff was on an occasion upon which witness sent plaintiff an account. As he was leaving he said he heard witness was selling the place, and she replied that she was. Witness did not know then that he was a broker. Witness's daughter was at the window, and Keyser stood at the door. It was generally known that witness wanted to sell the property. She did not instruct Wordon to get a purchaser. Witness denied the statements made as to alleged conversations with Wordon as to brokerage payment.

Josephine Olsen, the daughter of Mrs. Ralston by a previous marriage, deposed to Mr. Wordon coming to the Portsmouth Arms on October 30. Witness's mother had asked her to stand at the window on that day. She did so, and saw her mother pay Wordon money on a bill, and he gave her the receipt. Wordon asked her if it was true that she was to sell the hotel, and her mother said it was if she could get the money she wanted, viz., £2,000. Witness's mother always got her to stand by when she was paying money. Witness never saw Wordon at the hotel again. The only other time she saw him again was at Salt River, and then she was not present at the conversation. On one occasion she was present at a conversation between her mother and Mr. Keyser. He asked her what about the money, and her mother asked what he meant. He said he was a partner of Mr. Wordon, and her mother said she did not know him, and owed no money in connection with the sale of the hotel. Keyser also said that if she would give him the half he would drop the rest.

At the request of the Court, plaintiff produced his day-book and ledger to show entries as to the commission.

Buchanan, A.C.J., pointed out that those entries only related to the actual sale of the hotel.

Maasdorp, J., said the question rather was whether plaintiff made any entry when he undertook the sale of a hotel.

Mr. Gardiner said he understood that he only made a rough memo., and afterwards entered it up.

The plaintiff (recalled by the Court) said that at the time he undertook the sale of the house the only particulars he took were that it was a twelve o'clock house, that it contained six rooms, and that the owners were Ohlsson and Company. He made no note of the particulars. His books did not show the payment of the money which defendant said was made on October 30.

After hearing Mr. Gardiner in argument.

Buchanan, A.C.J., said: If the plaintiff had proved the allegations in his declaration there is no doubt he would have been entitled to his commission. It has, however, been shown in the first place that the defendant did not know that the plaintiff was a broker at all. Plaintiff was engaged in collecting certain two debts due by defendant, and there is nothing whatever in these or any other transactions between the parties to indicate he was a broker. There is no doubt that the defendant was anxious to sell the premises, and that she had mentioned her intention to several parties, and had mentioned it incidentally to the plaintiff. But that she employed him as a broker, or knew that he was acting as such or that he had anything to do with introducing a purchaser to the defendant, I do not think has been established. Had he proved that he was employed as broker by the plaintiff, that he secured a purchaser, and that through his exertions the sale was effected, he might be entitled to his brokerage commission. On the question of fact, the plaintiff has failed to establish his case, and absolution from the instance must be granted with costs.

Jones, J., and Maasdorp, J., concurred.

[Plaintiff's Attorney, J. F. E. Bernard; Defendant's Attorney, Messrs. Fairbridge, Arderne, and Lawton.]

ROUX V. KOLLMAN. { 1901.
Feb. 26th.

This was an action instituted by A. J. Roux against the defendant Kollman for an order for immediate possession to be given him of a butcher's shop, a greengrocer's shop, and dwelling-house in Waterkant-street, alleged to have been purchased from the defendant. There was also a claim for damages caused by the delay in giving possession.

Mr. Benjamin for the plaintiff.

The defendant was in default.

Evidence was given by A. J. Roux (the plaintiff), who identified the original agreement between himself and defendant, making

transfer of the property subject to the provisions of a certain lease, and a subsequent document in which the defendant undertook to give possession on the 1st February. Witness said he had not yet had possession. The damages he asked for were for rent at the rate of £24 per month.

The Court granted the order prayed for, with £25 damages and costs.

[Plaintiff's Attorney, D. Tennant, jun.]

LOGAN AND CO. V. COLONIAL GOVERNMENT. { 1901.
Feb. 26th

Act 8 of 1879—Rent—Want of beneficial occupation—Lessor.

L. hired from the Colonial Government certain premises for certain periods during portions of which he was prevented from occupying the premises owing to their being in the possession of the enemy. He refused to pay rent for these periods on the ground that as the Colonial Government was a party to the war, it, as lessor, was not entitled to claim rent.

Held, that the Colonial Government as lessor did not stand in a different position to any other lessor in regard to rents which became due and payable for property which had not been occupied owing to the unavoidable misfortune of war.

This was a special case stated for the decision of the Court in the following terms:

1. The plaintiffs carry on business at Matjestfontein and elsewhere in this Colony; the defendant is the Commissioner of Public Works, and as such represents the Colonial Government of the Colony of the Cape of Good Hope.

2. In the year 1896, the defendant let to the plaintiffs several refreshment rooms and bars annexed to different railway stations belonging to the Colonial Government, including the refreshment room and bar at Warrenton, for a period of five years certain, and thereafter until 12 months' notice shall have been given or received to terminate the same. The Government agreed to give to the plaintiffs possession of the said refreshment rooms, to have and to use the

same for and during the abovementioned period, in consideration whereof the plaintiffs contracted to pay £3,900, payable monthly, in advance.

3. In the year 1896 the defendant let to the plaintiffs the right of advertising and opening bookstalls at all railway stations under the control of the Cape Colonial Government for a period of five years, and in consideration thereof the plaintiffs agreed to pay to the Colonial Government the sum of £2,600 per annum, payable in advance in monthly instalments.

4. On or about the 11th October, 1899, war broke out between the late South African Republic and the late Orange River State and Great Britain.

5. On or about the 17th day of October, 1899, the enemy's forces took possession of the aforesaid railway station at Warrenton, which was under the control of the Colonial Government, and at which there was a refreshment room and bar, and owing to the occupation by the said enemy the plaintiffs were unable to have or use the said refreshment room or bar or to use and enjoy the said station for advertising or bookstall purposes until the 15th May, 1900.

The plaintiffs contend that the defendant is not entitled to claim the rents under the contracts aforesaid for the station at Warrenton during such period as the plaintiffs were unable to have or use the same for the purposes of the said contracts.

The defendant contends that the plaintiff is liable to pay rent for the said refreshment room for the said period.

Wherefore the parties pray for the judgment of the Court upon their respective contentions and for an order regarding the costs of these proceedings.

Sir Henry Juta, K.C. (with him Mr. Rubie), for the plaintiffs: This is not a case in which two private persons were concerned, both anxious to fulfil their contract, but prevented from doing so by war. In *Bultfontein Mines v. De Beers* (10 Sheil, 665) the lessees were declared not liable, but the present case is distinguishable from that. Here it was owing to the act of the landlord (the Crown) who made the war that the lessee was deprived of the use of his premises. If any act of the landlord prevents a tenant from having the use of his premises he cannot claim rent. Here we are really suing the Crown in the Colonial Government, and the Crown has made the war. If in the *Bultfontein* case the landlord had been the Crown and had

had to take possession of the land for military purposes he certainly could not have recovered rent. The war was the act of the Crown, and the invasion was a result of the war; the Crown did not even protect its tenant. How then could it charge rent? The exception of Act 8 of 1879 did not apply if the Crown was the lessor. The old law was that land of which beneficial occupation could not be had owing to unavoidable misfortune paid no rent. It might be that war was an unavoidable misfortune to private individuals, but it was not unavoidable as far as the Crown was concerned. I can find no case in which under such circumstances the Crown has demanded rent. My second point is that from October 17, 1899, till May 16, 1900, we had had no use of the land. The rent due to Government during the effective occupation of the enemy was due to the occupying Government if to anybody. If the enemy had left us in occupation they could have claimed the rent, and if they had not claimed it the present Government might have done so. Military occupation gives the occupiers the right to all taxes and revenue during the time of occupation. The country was completely conquered. The law was clear that if the enemy had occupation all rates and taxes became due to the occupying enemy (*Hulleck*, v. 2, chap. 33). Military occupation brings with it sovereignty in so far as it is effective and no further. The victorious enemy drove us away, and it did (as it was entitled to) what it pleased with the property. They were the sovereigns for the time being, and the Crown has now no right to call upon us for rent.

Mr. Schreiner, K.C. (with him Mr. Ward), for the defendants: The plaintiffs' argument is based on the assumption that the Colonial Government made the war. In the *Bultfontein Case* it was held that war was among unavoidable evils. Possibly plaintiff might have a claim for compensation, but that was a matter not before the Court. In *Treasurer-General v. Lorton* (1 Juta, 304) it was held that a lease of a toll was on the same footing as a lease of land. So would a refreshment room be. The plaintiffs should have averred that the Colonial Government made the war, but I am not prepared to admit that even in that case plaintiff's contention should be sustained. *Voet* (19, 2, 21) goes no further than to say that if rent has been paid to an enemy it cannot be claimed over again. But here there has been no such

payment. It is monstrous that the Court should be asked to recognise the fact that parts of this colony had been conquered. The American case of *Kruger v. Parker* (V. 16. p. 659) is in point, but there it was laid down that the tenant must have surrendered his lease. He could not claim the benefit of the lease and at the same time claim remission of rent. It must also be remembered that the principles of American law are different from those of our own law. In no case can an exemption from rent be claimed unless the rent has been paid to the enemy.

Sir Henry Juta, K.C. (in reply): It is difficult to follow the argument on the other side, or to understand how the Crown can be at war and a British colony not be at war. The Colonial Government is the Crown acting by the advice of its Colonial ministers. It was the Crown which went to war, and the Crown which leased the property to plaintiff. The Colonial Government could not be sued until a special Act of Parliament was passed to sanction the proceeding. The war was made by two sovereign powers and one of them could not say it was unavoidable. It might be as unavoidable to private persons as a tempest, but not so to those who made the war. As to *Voet*, he supposed the tenant to remain in possession of the land. If the enemy cleared a man off on what principle could rent be claimed? The only ground on which the occupying enemy could claim rent was because he had carried out the contract of his predecessor and stepped into his shoes. If the enemy had left plaintiff in possession and made him pay, he certainly would not have had to pay twice.

Mr. Schreiner referred to *Hullock* (vol. 2, p. 461).

In giving judgment, Buchanan, A.C.J., referred to the decision in the case of the United Mines of Bultfontein v. De Beers Consolidated Mines (Limited), (10 Sheil, 665), and said that the Court could not do otherwise than follow that decision. It was said, however, that there was a distinction to be drawn between that case and the present one on the ground that the lessor in this case was the Colonial Government. The Court was unanimously against the contention that the Colonial Government stood in a different position to any other lessor in regard to rents which became due and payable for property which had not been occupied owing to the unavoidable misfortunes of war. The law as to liability of the tenant had been laid down so very recently that it was not necessary in this case again to

refer to all the authorities. The Court held in favour of the defendant's contention that the rent was payable under the lease. His lordship added that costs would follow the result.

Jones, J., and Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. J. and H. Reid and Nephew.]

JEMISON V. MCKENZIE AND CO. } 1901.
Feb. 27th.

Negligence Luggage—Non-delivery
—Damages.

This was an action instituted by Joseph Henry Jemison against A. R. McKenzie and Co. for delivery of a certain box and its contents, or the value thereof, £50, as damages for the non-delivery. The box was the property of the plaintiff, and he alleged he entrusted it to the defendants to land and deliver at Cape Town. They had failed to do so. The plaintiff left England in September last by the Lismore Castle as a second-class passenger. On landing here he made an agreement with one Brittain, an agent for the defendants, to land and deliver his goods in Cape Town. Brittain, as representative of the defendants, undertook to do this work at the usual remuneration. The plaintiff delivered to Brittain two keys for clearing purposes. The two boxes were landed and placed in the Customs warehouse, but only one was delivered. The box and its contents were valued at £50. The defendants' plea was that Brittain only agreed to land and deliver one trunk. It was admitted that certain keys were given him, but denied that the agreement referred to two trunks.

Mr. Close for the plaintiff.

Sir Henry Juta, K.C. (with him Mr. Buchanan), for the defendants.

Joseph Henry Jemison said he came out by the Lismore Castle in September, arriving at Cape Town on the 1st October. He now lived at Naauwpoort. Witness, before leaving for England, forwarded two trunks to the Union-Castle Company's wharf at Southampton. The second officer acknowledged to witness the receipt of the two boxes. Brittain and another man employed by McKenzie and Co. came on a tug to the vessel. Brittain asked witness if he wanted his baggage cleared through the Customs, and witness said he did, and also required that the boxes should be stored. For the purpose of enabling McKenzie and Co. to

clear witness signed a document given him by Brittain. This document was in two parts, one a declaration for the Customs, and the other an authority to McKenzie and Co to clear.

Mr. Close said that they had endeavoured to get this document, which was delivered to Messrs. McKenzie. They could not, however, get it.

Sir Henry Juta said that the Customs had one part. The other he was willing to produce. Counsel produced this.

Witness said that the document produced, which purported to be the original authority given by plaintiff to defendants, was not the one he saw, when he gave authority. The date was not right, as this document was dated the 2nd October, whereas he signed the original document on the 1st, the day he landed. On the following day witness visited the baggage department of the Customs House, and saw his two boxes being brought up on Messrs. McKenzie and Co's wagon. He afterwards saw them in the baggage department, and two of his friends—Dickie and Anderson—also noticed them. Witness told Brittain to send the boxes on next day, and he replied that they should go on the next wagon. Witness gave Brittain the keys on board the vessel. On the next day, Brittain said he had had nothing to do with the boxes. Afterwards witness went to the company's office, where they gave him the two keys, and told him that they only had one box of his. Witness asked that the declaration he signed should be produced, but after searching among the Lismore Castle declarations, they failed to find it. They afterwards produced a declaration signed by one B. Jamieson, a passenger by the mail steamer which arrived a day subsequent to the arrival of the Lismore Castle. They gave witness a note to take to the warehouse, telling the man there to deliver the one box at the station free. They said, in giving him this, that he had had enough trouble. Witness, however, thought it better to get a receipt, and they then charged him 2s. 6d., and made him take the box to the station himself. His attorney then wrote demanding delivery of the box, or £35, the value thereof, and the demand was subsequently increased to £50. When he instructed his attorneys before the first letter of demand was sent, witness did not know the exact contents of the box, and fixed the value approximately at £35. Subsequently he discovered that the articles in the box were as specified in the list pro-

duced, the value being £50 7s. Witness had a ticket from the warehouse for a camera he left there after having been prevented from taking it through the gates.

Cross-examined: The declaration put in was not the one witness signed. Witness was not aware that cameras were dutiable.

Robert Douglas Dickie, storekeeper of Naauwpoort, said he came out by the Lismore Castle with the plaintiff. He saw the plaintiff's two boxes in the warehouse.

James Anderson corroborated.

Julian Hoets, examining officer at the Customs, said he had no recollection of having received a declaration in respect to Jemison's luggage. It was not necessary that there should be a declaration in writing. There had been a search for this declaration, but it could not be found. The declaration was sometimes made verbally by the owner.

Cross-examined: If the owner was not there, a written declaration would be made. It was quite possible for declarations to get mislaid.

Mr. Brittain, luggage clerk for the defendants, said he made an agreement with the plaintiff on board the Lismore Castle to pass to the Customs one box and deliver it. The document produced was written by witness at the time, and he entered thereon one box. He was certain this was the declaration.

Sir Henry Juta: You did not fake up this declaration for this case?

Witness: I don't do things like that.

Witness said he did not put in the date on the declaration at the time. This and other details were filled in at the Customs-house. Witness had to give a ticket (produced) to the wharfinger to pass the luggage through the Docks. On this ticket one box was marked. The part of the document giving authority to McKenzie and Co. was never signed. The Customs declaration attached was signed by the passenger, whose name the agents filled in on the authority. Witness had never admitted that he had to deliver more than one box.

Cross-examined: The agents gave the passenger no receipt, and the agents relied on the Customs declaration as a guarantee of authority having been given by the passenger. The filled-up authority was given to the Customs officers at the same time as the declaration, but the authority was not always marked before returned by the Customs officer. A mark was put against such

boxes as were opened. He did not know whether two boxes belonging to the plaintiff came to the warehouse. So far as witness knew, there was no means of tracing what was in a particular wagon-load from the Docks to the warehouse.

Re-examined: The document produced was attached to the declaration signed by plaintiff.

Buchanan, A.C.J.: Why is it that there are three mistakes in this document? First, the date was wrong; secondly, the box was entered as cabin instead of hold; and thirdly, the name of the port did not appear thereon.

Witness said the name of the port was not usually entered, and the date was neither here nor there. The plaintiff might have told him it was a cabin box.

Buchanan, A.C.J.: The date is of very great importance.

James Martin, wharfinger in charge of the baggage warehouse, said that before anything left the warehouse a ticket similar to one produced had to be given in, and a pass was then given to take the goods. Witness was not wharfinger in October, but he had possession of the various papers, and the ticket produced he had found amongst them. This showed that McKenzie and Co., through Brittain, removed one box bearing the name of Jemison on October 4. A private pass in the name of Jemison was also issued. There was no record on the books of any other been taken from the Customs warehouse by Jemison. If two packages or trunks had McKenzie and Co., they must have the vouchers.

By the Court: Witness could not say whether the package for which the private pass was issued was a camera in a box.

Mr. R. Sexton, manager of Messrs. McKenzie and Co.'s establishment, said he made inquiries on it being reported by plaintiff that he had two boxes. Witness then saw the document written by Brittain, and it was then in the same condition as now. Witness had examined other documents, and satisfied himself that there had only been one package declared.

In cross-examination, witness admitted having written a letter calling on the plaintiff to produce a receipt for the packages.

By the Court: The plaintiff was not given a receipt for the package he took away.

Buchanan, A.C.J.: Then if you did not give him a receipt for the first, what receipt did you call upon him to produce?

Witness said that the Harbour Board was given receipts.

Mr. Close: Then, instead of calling on this young man, who knew nothing about these matters, why didn't you go to the Harbour Board yourself for the receipt?

Buchanan, A.C.J. (to Mr. Close): He doesn't give a receipt for the first, and calls upon him for a receipt for the second.

The witness was examined at length by the Court as to the document bearing the name "B. Jamieson" having been shown to the plaintiff on his application to be shown the document he signed. Witness said he did not think the latter document was in the office at the time.

Jones, J., pointed out that the other document was in connection with a later steamer.

Witness said he had no record of any such passenger as B. Jamieson.

John Lostrade said he kept the tally-book, which he now produced, and which showed the receipt of one package for one Jemison. Witness must have made a mistake in taking "m" for "n." There was no other package during the month of October for either Jemison or Jemison.

Frank Robb, secretary to the Table Bay Harbour Board, gave evidence as to the contract between the Harbour Board and McKenzie and Co. respecting the storing of baggage.

Buchanan, A.C.J.: This is an action founded on an express contract entered into between the plaintiff and the defendants. The plaintiff was a passenger to Cape Town by the Lismore Castle, and on arrival here he was accosted by the defendants' agent, and, according to the pleadings, he then employed the defendants to land, clear, and deliver his luggage. The declaration alleges that there were two boxes; the plea maintains there was only one trunk. The question, therefore, to be decided in the first place is whether one or two cases were delivered to the defendants. The plaintiff declares that he saw these two cases on defendants' wagon, and his two fellow-passengers also declare that they saw them on the wagon, and that they were subsequently taken to and seen by them in the warehouse. The defendants' agent, Brittain, says he had a lot of business to do for the defendants, and will not swear to many facts, but relies upon the document which has been produced. Sexton also relies upon this, but I think they are both in error. In this document Brittain was bound to admit there were errors, and

with these three errors, it is impossible to place such reliance on it as to overturn the evidence given on the other side. I must draw attention to the fact that Mr. Sexton did not mention a certain document in a letter of the 10th October. That the plaintiff had two boxes in the hold I consider incontestably proved, as also the facts that they were on McKenzie's wagon and in the warehouse. In my opinion, McKenzie's liability commenced under this contract from the time he received these cases. I am satisfied the two cases were received by McKenzie and Co. to land and deliver. They only delivered one, and liability attached to them for the other. I am inclined to think, on looking at the plaintiff's first demand for £35, that this is a sufficient sum for the goods, and so judgment will be given for immediate delivery, or, failing which, for the sum of £35, with costs.

Jones, J., and Maasdorp, J., concurred.

[Plaintiff's Attorney, E. J. Wood; Defendants' Attorney, Messrs. Silberbauer, Wahl and Fuller.]

HANSLO V. HANSLO. { 1901.
(Feb. 27th.

This was an action for divorce instituted by Sarah Louisa Hanslo against her husband, Anthony Hanslo, on the ground of his adultery with one Annie Small.

The declaration set out that the parties were married at Cape Town on January 22, 1890. Thereafter the defendant left the plaintiff, and proceeded to the Transvaal, returning to Cape Town on the outbreak of war. That he was living in adultery with one Annie Small at 22, Russell-street, Cape Town.

Mr. Buchanan for the plaintiff.

The defendant was in default.

The parties, according to the evidence, were married on the 22nd January, 1890, and about the middle of that year they went to reside at Wynberg. The husband left the petitioner there and went to Johannesburg, Bloemfontein, Kimberley, and Pretoria, sending the wife irregular contributions towards her support. When the war broke out he came to Cape Town, and it was proved that for four months he had been living at 22, Russell-street, Cape Town, with a woman named Annie Small, by whom it was alleged he had had two children.

The Court granted a decree of divorce, with costs.

[Plaintiff's Attorney, D. Tennant, jun.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

Ex parte DU TOIT. { 1901.
(Feb. 28th.

On the motion of Mr. Benjamin, Andries Francois du Toit was admitted as a conveyancer.

ELLIOTT V. SAUNDERS.

Mr. De Waal applied for provisional sentence on a mortgage bond of £100. Counsel stated that the plaintiff also claimed interest at the rate of 8 per cent. per annum from the 15th November, 1899, but this had not been included in the summons. He now asked that it should be.

The Court pointed out that as it was not specified in the summons, the defendant would be unaware of the claim in respect to interest. Plaintiff could take out a new summons.

The return day was extended till the 12th of March, judgment being given for the amount of the bond.

ALLAN, ROSS AND CO. V. KUHN.

Mr. Buchanan moved for provisional sentence for £20 on a promissory note for value received; also for judgment under Rule 329d for the sum of £38 4s. 8d., an amount due for goods sold, with interest and costs of suit.

Granted.

SMITH V. W. GLOSTER.

Mr. P. S. Jones moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £27 8s. 9d. and costs amounting to about £10. A return of *nulla bona* had been made.

The defendant appeared in person, and said he was not at present in a position to pay the debt, but if given ten days' time he would be able to do so, as he had already sent to Johannesburg to some friends for the amount required.

Mr. Jones said he was prepared to accept the offer.

A decree of civil imprisonment was granted, but execution stayed until March 14.

MANN AND CO. V. C. A. HORNE.

Mr. Close moved for a decree of civil imprisonment on an unsatisfied judgment.
Decree granted as prayed.

WILSON, SON AND CO. V. JOHN TORRANCE.

Mr. McGregor moved for the final sequestration of defendant's estate.

The defendant appeared in person, and said he had no objection to the order being granted.

Final sequestration adjudicated as prayed.

SAUERLANDER AND KRUGER V. FRANZ KUHR.

Mr. Benjamin moved for the final sequestration of defendant's estate.

Final sequestration adjudicated as prayed.

LITHMAN V. E. J. PRETORIUS AND J. H. VAN ROOY.

Mr. Alexander moved for provisional judgment on a promissory note for £76 11s. 3d.

Provisional sentence granted as prayed.

BEST V. HABRY H. HARRIS.

Mr. Gardiner moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £30 3s 3d., with £6 19s. costs.

Defendant appeared in person, and said he was not in a position to pay the debt at the present moment, as he was out of employment. He, however, offered to pay it in instalments of £3 monthly, the first payment to be made on April 1.

Decree granted, but execution stayed pending payment of the debt and costs by instalments of £3 per month, the first payment to be made on April 1.

VAN NIEKEEK V. W. SANDILANDS.

Mr. Maskew moved for provisional sentence on two promissory notes, the one for £161 10s., and the other for £148, with the interest due thereon.

Provisional sentence granted as prayed.

WOLHUTER V. LIPPIATT.

Mr. Burton applied for a decree of civil imprisonment. The defendant had agreed to pay £5 a month and half costs. He asked for a decree, but execution to be stayed on defendant paying £12 10s. at once, £12 10s. on April 1, and thereafter £5 a month.—Order granted as prayed.

ESTATE SCHICKERLING V. RETIEF.

Mr. Benjamin applied for final sequestration. Provisional order granted by Mr. Justice Jones on the 20th inst.—Granted

**WATSON AND CO. V. ANN MARIA DE WIT. { 1901.
Feb 28th.**

Power of attorney—Woman—Security bond.

The defendant gave R. a general power of attorney authorising him inter alia, "in her name to enter into any securities of what kind or nature soever." R. passed a security bond under this power in favour of W. binding defendant, without her knowledge and for R.'s own benefit.

Held, that the defendant was not liable, as the words did not authorise the agent of a woman to renounce the protection which the law gives her in case of her being bound as security for a third person.

This was an application for provisional sentence for the sum of £297 17s. The summons called upon the defendant to plead to the plaintiffs' claim for £297 17s., which she owes to and unjustly detains from the said plaintiffs, being the amount owing to them under and by virtue of a certain bond of security for the sum of £1,500, bearing date the 29th October, 1896, registered on the 3rd November, 1896, passed by Charles Friedlander as the only authorised agent of the said defendant, acting under an authority so to do duly granted to him by Martin Julius Ramf (to whom, of date 18th May, 1895, the defendant granted a general power of attorney containing a warrant to substitute) in favour of plaintiffs securing any deficiency on the indebtedness to them of the said Martin Julius Rampf, which sum of £297 17s. represents a deficiency owing by the said Ramf, whose estate has been sequestrated to the plaintiffs, which deficiency is payable by the defendant under the bond of security aforesaid.

The general power of attorney granted by the defendant to her brother, M. J. Rampf, contained the words: "In my name to enter into securities of what kind or nature soever."

The defendant, in her affidavit, said that she was not, nor had she ever been, indebted to the plaintiffs in any sum whatever. She had formerly resided at Tarkastad, but in April, 1895, left for Germany. Before doing so, she gave her brother, M. J. Rampf, her general power of attorney to collect rents of her property in the Colony, etc. Her brother made use of £5,000 of her money in his business, and lost another £5,000 in gold shares, and passed this surety bond for £1,500, binding her property without any knowledge or consent on the part of the defendant. It was contended that in so doing he had acted wrongly and without authority, that it was entirely beyond the scope of the power of attorney granted him; that it was entirely for his own interest, and that defendant derived no personal benefit. All the foregoing, it was said, was perfectly well known to the plaintiffs at the time the bond was passed, and they compelled the said M. J. Rampf to pass the bond. When defendant became aware of her brother's unlawful action, she at once repudiated it. She further stated that she had been informed by the trustee in the estate that there was certain land in insolvent's wife's name which really belonged to the estate, but that though counsel had reported favourably, the plaintiffs would not consent to take action. This property, if action were taken and proved successful, would more than liquidate plaintiff's claim.

There was also an affidavit by the said M. J. Rampf, of Tarkastad, generally corroborating that of defendant.

There was an answering affidavit by one of the plaintiffs, in which it was said that the allegation that there had been any compulsion to make Rampf sign the bond was absolutely false, as was the statement that Rampf was unwilling to pass the bond without defendant's special knowledge and consent.

Mr. Schreiner, K.C., moved.

Mr. Searle, K.C., for the defendant: The agent Rampf has acted in opposition to the interests of his principal (defendant); *Story on Agency* (sections 9, 10, 210, 211). The same agent cannot act for two parties having opposite interests. No person can take any advantage from the tortious acts of another man's agent; *Buchanan v. Sreemmer* (2 Searle, 102). The person who deals with such fraudulent agent and not the principal must suffer. In this case the plaintiffs knew that Mrs. De Wit (who was in Germany) knew nothing about the trans-

action under which it was now sought to make her liable. I submit that not only is there no case for provisional sentence, but that on the facts, as disclosed in the affidavits, plaintiffs will not succeed even in the principal case.

Mr. Schreiner, K.C., for the plaintiffs: The case of the *Equitable Assurance Co. v. Solomon* (4 Juta, 159) is very similar to the present case. See also *McKellar v. Bond* (L.R. 9, App. 715).

[Buchanan, A.C.J.: The *Equitable Co. v. Solomon* did not raise the question of a woman's liability.]

No, but here the sister is interested. She has £5,000 in her brother's business. In this case the agent has power to bind his principal as surety. If he has this power, he has power to do everything to make the surety valid. In the *Equitable Assurance Co. v. Solomon* the power to renounce benefits was not discussed. Every power to give suretyship involves power to make some renunciations (e.g., of *beneficia excussionis* and *diversionis*). When Mrs. De Wit gave her brother power to enter into suretyship she must have meant a suretyship which should be legally binding.

[Jones, J., referred to some remarks by Watson, J., in *McKellar's* case.]

The judgment of the Chief Justice in *Equitable v. Solomon* is a commentary on this very passage cited by Justice Jones. The words of the Chief Justice show that the only point which could be argued was, "Was the exercise of the power to the advantage of the principal?" It was to the interest of Mrs. De Wit to keep her brother's business going. In *Buchanan v. Sreemmer* the agent acted contrary to the interest of his principal. *Wessels v. Waal* (3 Juta, 123) shows that on a liquid document one might sue for the whole sum. It is purely a point of law which is the question.

Buchanan, A.C.J.: The question raised in this case is one of very considerable importance, and were it not that there are two cases before the Court expressly disposing of it, probably the Court would have taken time to consider its judgment. But with these two judgments, with which we do not feel inclined to disagree, and which we cannot overrule, before the Court, we do not require to reserve judgment. The plaintiffs in this action sue on a guarantee, or covering, or security bond given by the agent of the defendant. The principal was a woman whose power of attorney was held by her brother. In that power of attorney there are cer-

tain words which have been fully discussed in the two previous cases, viz.: "In my name to enter into securities of what kind or nature soever." In the case of the *Equitable Fire Assurance Company v. Solomon*, the Court laid down the fact that these words authorised the agent, under this power of attorney, to give a guarantee upon security for his principal, if in so doing he acted for the benefit of his principal. The question was discussed in that case whether the transaction was for the benefit of the principal, and when we look we find there were special grounds for holding that the transaction was for the benefit of the defendant. In the case now before the Court, however, instead of there being strong evidence to show that it was for the benefit of the agent's principal, in my opinion, the facts show distinctly that it was to her disadvantage. Whether that alone would be sufficient to cause the Court to find for the defendant does not need to be decided now, because there is the other case to guide the Court. In the case that came before the Privy Council from Natal, *Keller v. Bond*, these same words were discussed by the Privy Council, and that tribunal distinctly held that they did not authorise the agent, who was also the agent for a woman, to renounce that protection which the law gave a woman in the case of binding herself as surety for a third person. With that decision before us, the Court must refuse to give provisional sentence, with costs.

Jones, J., and Maasdorp, J., concurred.

MINVILLE, DU PONT AND CO. } 1901.
V. GEISLAR AND SILBERMAN. { Feb. 28th.

Provisional sentence — Promissory note — Partnership debt.

This was an application for provisional sentence on a promissory note for £1,500 for value received.

The second-named defendant's brother filed an affidavit under a power of attorney given him, in which affidavit he stated that the defendant was unaware of the present proceedings, taken on the promissory note signed by Geislar on behalf of the partnership which existed between the defendants. The deponent alleged that the second-named defendant would repudiate the transaction, as it did not fall within the scope of the authority conferred on Geislar by the partnership.

The plaintiff's agent, Edlingh, stated in reply that the promissory note was given as

the purchase price of certain goods which were sold on two different occasions, and that at least on one of the occasions the second-named defendant was present and knew what was taking place.

Mr. Gardiner, for the plaintiff, moved.

Mr. Nathan, for the defendants, opposed.

The Court granted provisional sentence, with costs, holding that there was nothing whatever to show that the dealing was outside the scope of the partnership.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne, and Lawton; Defendants' Attorney, C. W. Herold.]

HOLMES AND CO. V. DE HART.

Mr. Benjamin applied for judgment for £58, the value of goods wrongfully carried away by the defendant.

Granted.

DE VILLIERS V. ERLANK.

On the motion of Mr. Searle, K.C., judgment was given for the plaintiff for the sum of £757 1s., with interest as per conditions of sale, at 9 per cent.

GURDON V. GREEFF.

Mr. Benjamin applied for judgment for £1,650, purchase price of six cottages.

Granted.

IN THE MATTER OF THE PETITION OF BENJAMIN WHEELER } 1901.
AND FRANK WHEELER. { Feb. 28th.

Sir Henry Juta, K.C., applied for a rule nisi to operate as an interdict restraining the proprietor of the Opera House at Port Elizabeth from allowing the performance of numbers from "The Geisha," "The Messenger Boy," and "The Shop Girl" at the Opera House there, and also restraining Geraldine Wrangham and others from singing numbers from these pieces, which were copyright, and which the petitioners had the sole liberty of representation in the Colony.

Sir Henry Juta said that this was a precisely similar application to that made by the present petitioners in January, the then respondents being De Jong and Walton. In the present case certain numbers of the pieces in question had been advertised to be performed that night at the Opera House in Port Elizabeth by Miss Wrangham, who had announced in the "Port Elizabeth Advertiser" a novel and pleasing entertainment.

A rule nisi was granted to operate as an interdict, the rule being made returnable on the 12th March.

TOWN COUNCIL V. SCOTT.

Mr. Schreiner, K.C., applied for judgment for the sums of £53 6s. 5d. and £10 2s. 6d., due in respect of general rate and water rate respectively.

Granted.

REX V. NAUDE AND OTHERS. { 1901.
Feb. 28th.
Mar. 5th.

Martial Law—Bail—Military—Act 6 of 1900.

The Supreme Court refused, during the continuance of martial law, to set aside the arrest by the military of persons admitted to bail under Act 6 of 1900.

This was an application upon notice of motion for an order for the immediate release of the petitioners from the custody of the military at Beaufort West, where they were being detained as prisoners. The notice was served on Lieutenant-General Sir Frederick W. Forestier-Walker, the General Commanding the Lines of Communication.

The petition set forth that the petitioners were British subjects domiciled in the district of Aliwal North. In March, April, and June of 1900, they were arrested in Aliwal North on charges of high treason and placed in gaol, where they were detained until released on bail on application being made on their behalf to the Special Court. This was in November, when they were admitted to bail, each in a personal surety of £2,000 and two other sureties of £500, the condition being that they should reside in one of five specified places, of which Beaufort West was one. The petitioners selected Beaufort West whereat to reside, and had lived there with their wives and families until January 3, when they were called before the Commandant of the Troops in the district. They were told that they were to be arrested by order of Brigadier-General Settle. They were arrested and taken to the Public Boys' School at Beaufort West, where they had since been, and were now detained. On the 31st January last application was made by Lieutenant-General Sir Frederick Forestier-Walker to vary the bail terms, and for the removal of the petitioners to King William's Town, but this application was refused.

They asked for an order for their immediate liberation and discharge, or alternative relief.

The respondent (General Walker) opposed the application on the ground of the disturbed state of the district. Occurrences in the district since the admission of the prisoners to bail were detailed by the General, who stated, amongst other things, as evidence of the disturbed nature of the district, that a sentry had been shot in close proximity to the town and seriously wounded; that a commando of Boers and emissaries of the enemy were reported to be in the neighbourhood; that a patrol of thirty had been captured; and that it was considered to be necessary to confine the prisoners until the state of affairs existing in November last, when bail was granted, had been restored. The authorities were, however, still willing that the men and their families should be removed to King William's Town at the expense of the Government. Affidavits in the same terms were made by Colonel Goldsmid, Captain Boyle, and others. Margaret Dunbar, a servant employed at a boarding-house at Beaufort West alleged that several of the petitioners lived in the house in which she was in service. She has seen them go out and hold meetings with other prisoners of war, and return about midnight, and she had heard one of them say that they must form themselves into a fighting body, and that "Pony" de Wet must be captain. She also said she heard another of the prisoners say that they must go to the dam and shoot the soldiers.

There were answering affidavits by P. J. de Wet, M.L.A. for Wodehouse, and some of the other petitioners denying the statements made by Dunbar. It was further stated that at an official inquiry the charges made by her were not sustained, and that her evidence was then commented upon as being tinged with malice. Affidavits were also read testifying to the petitioners' proper conduct when on bail at Beaufort West.

Mr. Molteno (with him Mr. Burton): The petitioners were all arrested between March and June, 1900. In August, 1900, the cases of Bekker and Naude (10 S.C. 443) came before the Court, and it was then pointed out that if that application were granted, many others would have to be liberated. But it was said that the Court was bound to take notice that the Legislature was about to deal with such cases. Act 6 of 1900 became law, and in terms of that Act on November 7 the petitioners were liberated on bail. They

went to Beaufort West and peacefully resided there till January 3. They were then arrested, and they accordingly communicated with the Registrar of the Special Court. Meantime it was arranged between petitioners and the military that they should reside at Cape Town. But the military applied to have the prisoners ordered to reside at King William's Town. The Court refused the application. The evidence of Margaret Dunbar is useless, and cannot be relied upon. The petitioners have been admitted to bail by a properly constituted Court. They stand not only by their bail bonds, but also rely on Act 6 of 1900. In that Act, as Mr. Justice Solomon said, the Legislature dealt with two things: (1) with certain illegal acts done by the military; (2) with the position of persons accused of political offences. When that Act became law the petitioners were under that Act. That Act legalised their original arrest. It justified their admission to bail by the civil authority. The military have no right to override the authority of the Special Court which granted bail.

[Buchanan, A.C.J.: These persons can be arrested under martial law like anybody else.]

But the military are supposed to be guided by certain principles of justice. What principle justified the detention of these persons who have done nothing. Under the Habeas Corpus Act it is necessary to justify not only the detention but the original taking. These men were arrested admittedly without cause. An inquiry is held, and the woman who accuses these persons is discredited by the military authorities, and yet a fortnight after they come forward with this woman's affidavit in support of the arrest.

[Buchanan, A.C.J.: I fear you are missing the point. We cannot go into the merits. The question is: Are these arrests justifiable under martial law on the ground of necessity?]

Act 6 of 1900 shows what the Legislature understood by necessity. The military have given their reasons in the affidavits, and it is for the Court to decide as to the necessity. The Crown, by the Act of 1900, declared its will with reference to what can be done under martial law, and it is the duty of the military and everybody else to render loyal obedience. If the Court holds that the military have power to do as they pleased, I would ask what danger would there be in allowing petitioners to reside in

Cape Town. Even if the Court believes the affidavit of Dunbar (and the military did not) that only affects De Wet's case; there is nothing against the other thirteen petitioners.

Mr. Innes, K.C., A.G. (with him Mr. Ward): My learned friend has laid stress upon an arrangement that these applicants should reside in Cape Town. The military did not approve, and the arrangement was changed. I cannot see how any rights under Act 6 of 1900 can affect the position of the prisoners. That Act has only to do with what took place after the Act passed. The question now is, will the Court interfere with the military? The bail bond provided that these people were to reside outside what was then the area of disturbance. It was felt it was not desirable to leave prominent men in disturbed districts. Under these circumstances the applicants were ordered to reside at Beaufort West. Now the whole country is disturbed. All the surrounding districts have been occupied by the enemy. On February 9 the enemy were in force within four miles of Beaufort West, and an entire patrol had been captured within 40 miles thereof. On January 1 a sentry was shot at, although there was no commando at the place. The Commandant has a very difficult position to fill.

[Buchanan, A.C.J.: The question is, is the arrest of these people legal or illegal, and if illegal is it reasonable?]

In *Fourie's* case (10 Sheil, p. 195) the question of the legality of a trial by Court-martial was before the Court. In subsequent cases, as in *Bekker's* (10 Sheil, p. 407), there was the question of admission to bail. In *Fourie's* case the Acting Chief Justice held that the Supreme Court would not interfere where the power had been taken out of the hands of the civil authority by the military. In that case Justice Maasdorp said the Court would inquire whether martial law was necessary, and, if so, they would not interfere. Justice Solomon said that the Court would not only inquire into the general necessity, but into each particular instance brought before it. I submit that once martial law has been shown to be necessary, the Court will not enter into details during the currency of martial law, but after it is withdrawn will investigate the matter subject to an Act of Indemnity. The English authorities all speak of a state of things quite different from what obtains here. If it is a military necessity to place people

under restrictions, the Court will not interfere. The military will not let these people come to Cape Town because it is not a martial law district. It is not denied that martial law is necessary in Beaufort West, and, if so, the Court will not interfere at present. See also the judgment of *Wylde, C.J.* in *Standen v. Godfrey* (1 Searle, 60).

Mr. Molteno, in reply: I am surprised that any Attorney-General should come before a Civil Court and say that the Court will not give an order for fear they could not carry it out. He has not attempted to meet the position that the prisoners are willing to come to Cape Town, and he put it as a serious argument that their presence here might lead to an extension of martial law to Cape Town. The chief part of his argument has been directed to the impropriety of having placed these persons in custody at Beaufort West. Then there was no martial law there. Now the Attorney-General says he wants to send them to King William's Town because it is a martial law district. If the Court is going to fold its hands and say "non possumus" because martial law has been proclaimed, it would be taking up a position never taken up by any other Court in His Majesty's dominions. The Attorney-General referred to *C. J. Wylde's* remarks in *Standen's* case (1 Searle, 60), but in *Bekker's* case it was pointed out that this was a mere *obiter dictum*. The Attorney-General said the Court would not interfere with the military. Suppose the military took a prisoner out of the hands of the Special Court and put him in prison again, or suppose they put the Special Court in prison, would not this Court interfere? The object of Act 6 of 1900 is to take these people out of the operation of martial law. But the point we object to is the arrest of these people. Suppose the military ordered 40 civilians to be shot in 14 days' time, would the Court refuse to interfere?

[Jones J.: Suppose they caught a spy and ordered him to be shot, could you come into this Court for an interdict?]

No, because he would be shot under military law. In this case we need not fall back upon the common law. Act 6 of 1900 provides for the very case of this war, and binds the military as much as anybody else. See *Regina v. Adam Kok* (3 Searle, 44), and *Regina v. Sigau* (12 S.C., 283).

Curia ad cult.

Postea (March 5).

Buchanan, A.C.J., said: This is an ap-

plication for an order for the liberation and discharge of the petitioners, who are at present detained as prisoners in the hands of the military authorities at Beaufort West. The petitioners were formerly residents in the district of Aliwal North. After the invasion of that part of the Colony they were arrested in the early part of last year by the military on charges of high treason. Subsequently, by order of the Special Court created by Act No. 6, 1900, they were liberated on bail upon certain conditions, one of them being that they should reside in one of the following towns, viz., East London, Port Elizabeth, Graham's Town, King William's Town, or Beaufort West. The petitioners selected the last named place. None of these towns were at that time within the sphere of active operations. Towards the end of the year the state of affairs was suddenly changed, in consequence of a fresh invasion by the enemy, whose commandoes overran new districts, and martial law was extended over nearly the whole of the Colony. It was proclaimed over Beaufort West on the 26th December, 1900, and is still in force in that district. That a necessity existed for such a proclamation is not questioned. The affidavits state that large bodies of mounted men from the late Republican States were in the district of, and adjoining, Beaufort West; that encounters between the enemy and our forces had recently taken place in these districts; that a patrol of our men had been captured; that sentries had been fired at and wounded within a quarter of a mile of the town; that great unrest prevailed in the district; and that emissaries and agents of the Republican forces were going about stirring up strife and rebellion, and doing all in their power to persuade the people of the Colony to join the invaders. Owing to these altered conditions of the country, the Military Commandant of the district, on the 3rd January last, required the applicants, together with certain prisoners of war on parole, to surrender themselves, and they have since been detained in custody in the hands of the military. As the Commandant considered it desirable to remove these persons to a place where better supervision could be exercised, and where communication with the enemy would be less easy, and where the population was more settled and less disaffected, an application was made to the Special Court to vary the conditions of the bail bonds, but in the absence of consent, no order was made. As far as these allegations have reference to

the charge of treason and the previous arrest and subsequent admission to bail of the petitioners, it will be sufficient to point out that these matters are now in the cognisance of the Special Court, and not of the Supreme Court. And as to the arguments founded on the indemnity clauses of Act No. 6, 1900, it may at once be stated that those clauses do not control the present application. The first section of the Act limits the indemnity therein granted to acts, matters, and things done between the date of the commencement of the war and the date of the taking effect of the Act, viz., the 12th October, 1900. The material contention on behalf of the applicants which has now to be dealt with, is that their present detention is unjustifiable, and should be set aside. This raises the question whether or not this Court should, under the circumstances now existing, interfere with the military authorities in the exercise of their powers in the endeavour to resist the enemy and to restore peace and order in the district. The effect of martial law in proclaimed districts has been fully discussed in several recent cases, and the principles guiding the Court have therein been set forth with some preciseness. In this application no fresh authorities have been cited, the efforts of counsel being mainly directed to an endeavour to show that this case is not governed by these previous decisions. It has been urged that the Court should scrutinise the actions of the military authorities, and determine whether or not this particular one was done in good faith, and was necessary for the suppression of hostilities, the maintenance of good order and government, or for the public safety. In my opinion, this is not the time for the Court to take up this position. On the merits, there may or may not be sufficient grounds for the detention of the petitioners by the military. To decide that question now would be for the Court to assume a responsibility which in previous cases I have endeavoured to establish rests upon the military alone. After full and deliberate reconsideration, I find myself unable to depart from the view taken by me in the case of *Bekker and Naude* (10 Sheil 443), and I cannot do better than repeat my remarks in that case: "As long as martial law is necessary, the mode by which alone it can be made effective, when tested by the rules prevailing in a court of justice in times of peace, is in itself illegal. To attempt control over the acts of those en-

trusted with the administration of martial law, and to condemn only certain of their proceedings, would, in effect, be to ratify their other acts, and thus to justify the very measures which the civil law cannot tolerate." And how much more would this be the case if, after consideration of the circumstances, the Court should approve of any acts as being necessary for the public welfare? To make the decision of a court of law rest on such a consideration would, in my opinion, be unsound, and essentially bad in principle. On the contrary, it is a firm foundation upon which to rest, to hold that in this time of war, by invasion, insurrection, and rebellion, the peaceable course of justice is disturbed and stayed. At such a time those who are trusted with the safety of the country must act on their own responsibility, and be prepared hereafter to take the consequences, but meanwhile *silent leges inter arma*. When this unhappy time has passed, and the Court can again freely exercise its authority, justice will be dispensed according to law, irrespective of any other consideration. For these reasons, I am of opinion no order ought now to be made in this application.

Jones, J., said: The main facts upon which this application is based in the petition before this Court are as follows: The petitioners allege that they are British subjects formerly residing in the district of Aliwal North, where during the period March to June of last year they were arrested for high treason and placed in the hands of the local gaoler. Subsequently, an application was made to the Special Court created by Act 6 of 1900, and in November last they were released on bail, the conditions being that they should reside at certain places named in the order, of which Beaufort West was one; and at this town the applicants now are with their wives and families. At the time when the application was made to the Special Court, martial law was in force at Aliwal North, but not at Beaufort West. Since then great changes have occurred, the enemy's forces having invaded the Colony, and among other districts the district of Beaufort West, and the surrounding districts, and have sent emissaries into these districts, and without much, if any, resistance from the inhabitants, have wandered about the country looting wherever they wished. Martial law has been declared over nearly all the districts of this colony, including Beaufort West. Upon 3rd June of this year the petitioners were sent for by the Commandant

of the troops in the Beaufort West district, and were told that they were to be detained by the order of Brigadier-General Settle. After arrest they were placed in the Boys' Public School at Beaufort West, where they were still detained until the affidavits filed in the case were completed, namely, on the 9th of February last. On the 31st of January last an application was made to the Special Court by Lieutenant-General Sir Frederick Forestier-Walker to vary or amend the terms of bail, so as to permit the removal of the petitioners to King William's Town. Mr. Justice Solomon, before whom the application was heard, sat as a member of the Special Court and refused the application. We have no very clear and definite information of the grounds of refusal, but it is said by counsel that he held the view that, as the matter had already been dealt with by the full Court, he was *functus officio*, and that, as he was sitting as a single judge, he could not alter the previous decision. The grounds upon which the application was refused, however, do not in any way affect the application now before this Court, and it is unnecessary for me to express any opinion whatever upon the reasons which are supposed to have guided that Court. We have the fact that bail was granted in November, and that there was a refusal to amend the order or the conditions of the recognisance on the 31st of January. It is clear that the Special Court had the power to deal with questions relating to admission to bail in cases of prisoners charged with offences of this character, and that there is no appeal from that Court's decision. The application of the petitioners is to all intents and purposes similar to an application for a writ of Habeas Corpus in England, or *de homine libero exhibendo* of the Roman-Dutch Law, and I take it that, as a rule, in times of peace, we must follow the principles laid down by the Chief Justice in *In re Willem Kok and Nathaniel Bailie* (Buch., 1879, page 45). He said: "The rights of the personal liberty which persons within this colony enjoy are substantially the same since the abolition of slavery as those which are possessed in Great Britain." But in this case, the questions we have to determine are of a wholly different character. "Undoubtedly occasions have arisen, and may again arise," said the Chief Justice, in the case already cited, "when civil jurisdiction is suspended, and the ordinary forms of trial are held in abeyance, and in consequence martial law is proclaimed, but

such a proclamation can only be justified, if at all, as an absolute necessity, and by way of self-defence, and cannot continue in force after the occasion which gave rise to it. It is a power which may be exercised by the military authorities, but they do so at their own peril, and cannot expect the assistance of any Civil Court in carrying it out." This being so, we have to consider the present state of the country, the fact that martial law has been proclaimed, and that this proclamation gives notice of the fact that in the proclaimed districts there was a state of things which, in the opinion of His Excellency and his advisers, compelled the military authorities to put in force another law which might be, even without the proclamation, put in force, if necessity and self-defence required it. We have to consider the fact that this district was in a highly disturbed condition; that the circumstances of the district had wholly changed since the original order of the Special Court had been made; that on the outskirts of the town of Beaufort West a sentry had been shot; that there were then no enemy's commandoes near, and that a Boer commando still remained some few miles away; that Boer emissaries were in that neighbourhood, and had honeycombed the district; that a patrol of thirty British had been captured; that fighting with the Boer forces had occurred not only in the Beaufort district, but in the neighbouring districts, and that these districts are still the scene of military operations. Can it then be argued with even a scintilla of reason that martial law was not necessary, and that the military were not entitled to enforce martial law for the safety of the community placed under their care? It seems to me that this question can only have one reasonable answer, and I unhesitatingly say that in my opinion the affidavits filed point to a condition of things on the 9th of February which amply justified the military enforcing martial law. In this case it certainly is not necessary to rest the reasons for judgment solely upon the somewhat wide dicta of Chief Justice Wylde. The learned Chief Justice said: "Under a simple, direct, and absolute proclamation of martial law, the civil judicature was stayed, as the two jurisdictions cannot work concurrently. As a law it became paramount from necessity and like a state of war, foreclosed all regard to the operation of the civil judicature. Whatever took place as to criminal or civil interests would be under and subject to martial law, in whatever

form of procedure, if any, that martial law for the time ordained." And further on he adds: "The very object of martial law is to create and justify that despatch and violence of measures which the civil law cannot tolerate, but which the public safety requires. The mode by which alone martial law can be rendered effective is necessarily illegal, and can only be compensated by indemnity-ordinances; but if the civil law is at the same time in exercise it will be reduced in such submission to illegal practices as to be inoperative against that very injustice which can only be protected from legal vindication by legislative indemnity." Further on he said: "The Court will not take upon itself to question the emergency, but will presume it to justify the Governor's act of authority, while if there are terms in the proclamation which can be construed as tempering and reducing the force of it so as not to foreclose the civil jurisdiction, the Court will be willing to adopt any such principles of relaxation so as to keep the Court and its jurisdiction open to the community. *Stander v. Godfrey* (1 Searle, p. 63). This statement was a mere dictum, no doubt, as it was not absolutely necessary for the decision of the case then before the Chief Justice, but it indicates generally the principles which he thought were applicable on the promulgation of martial law. This passage was cited with approval by the Acting Chief Justice in *Fourie's* case (10 Sheil, 195), decided on the 22nd May, 1900. No doubt the dicta of Chief Justice Wyld go very far, and many require some modification, as recent experience shows that all cases are not exactly covered by them; but as I have already said in this case, it is not absolutely necessary to base our decision solely upon these dicta. In fact some modification was, as a fact, introduced, and properly so, in *Fourie's* case, when the Acting Chief Justice remarked that: "Though circumstances may require the Civil Court to stay their hands, the military authorities are not free from liability for any excessive exercise of power. Only this is not the proper time to inquire into their conduct. When that time comes they will be amenable for their acts." In the face of rebellion and invasion the public safety requires as a matter of paramount necessity that military officers shall, at any rate while the emergency lasts, have power immediately to take every useful, *bona fide* precaution against those who appear to be a danger to their military operations. In *Fourie's* case the

military officers had practically decided that the temporary detention of a British subject might be a measure necessary for the preservation of the public safety. Mr. Justice Solomon, who in the later case of *Regina v. Bekker and Naudé* certainly seems to have claimed for this Court a right of interfering with military operations not claimed by either of the other judges, in *Fourie's* case made the following remark: "Considering that the district in which the applicant was arrested had been invaded by the forces of the enemy, and that rebellion was spreading therein, it is not open to argument that martial law was properly proclaimed." And lower down in this same judgment he says: "Now whatever the full effects of martial law may be, it was frankly (that is, in *Fourie's* case) admitted by Mr. Burton, on behalf of the applicant, that in such a state of things the military authorities were entitled to do everything that was necessary for the purpose of repelling invasion and suppressing rebellion, even to the extent of destroying life and property"; and I think I may fairly *a fortiori* add, of depriving even a British subject of his liberty for a time. In the exercise of this discretion, and at their own peril, the military authorities at Beaufort West have deprived the petitioners of their liberty. Is it for us now to interfere in a time of peril with the judgment at which they have arrived? I say, undoubtedly not. It is wholly unnecessary now to again discuss the many dicta cited in the case of *Bekker and Naudé*. They have been but recently before the Court, and for myself I may at once say that the principle laid down by the majority of the Court in that case appears to me to be both sound and reasonable. Mr. Justice Solomon, no doubt, went further than the other judges in claiming a power to control the military authorities after the proclamation of martial law than either of my brothers; but, at the same time, the exceptions which he introduced practically reduce the jurisdiction of this Court to very much the same level upon which it was placed by the two judges who sat with him, for which he enunciated the propositions (1) that the justification for proclaiming martial law, and the actual exercise of authority thereunder are strictly limited by the necessities of the situation"; (2) that the "arbitrary powers with which, under martial law, the military are armed, are only justifiable on the ground of necessity," and that (3) "they can not interfere with the rights and liberties of the inhabitants

further than is required by the emergencies of the situation," three propositions based upon dicta of judges and theoretical text writers of high repute, with which none will, I think, quarrel; he admits "that the conditions of the country may be such that the Courts of Justice are of necessity closed, or the particular act challenged may be an act so essentially of the nature of an active military operation that the Court would, as a matter of course, accept the opinion of the military as conclusive on the question. or again, the Court may, in its discretion, if it deems it advisable in the interest of the State, refuse to allow military authorities to be harassed by judicial proceedings while military operations are in progress, and postpone an inquiry into their conduct until a more convenient time arises." Practically it comes to much the same thing, whether the Court hedges itself behind a series of arbitrary denials of private rights because of necessity, or whether it at once recognises the necessity for martial law, and postpones the consideration of each particular case until a more convenient season. In either case, it temporarily abrogates its own function, because of necessity. In the one case it professes to decide on a private individual's rights during time of war, when it cannot enforce the very powers confided to it. In the other, it admits its inability to properly adjudicate upon the rights of private individuals, and postpones their consideration until the civil power has recovered its strength, and can execute its own decree. It comes to this, necessity during war may, and generally is, an absolute bar to the complete exercise of the jurisdiction of a Civil Court. The condition of the country may be such that no ordinary civil power has the means at its disposal of executing the decrees of the civil court, and has not even the means of compulsorily enforcing the attendance of witnesses, parties, etc., before it. Meanwhile the military, for reasons wholly beyond the province of law, may find it absolutely necessary, in order to carry on war strictly within the ethics which internationally govern war, to depart from conduct which could be wholly justified by a consideration of the strict legal rights of individuals, based upon civil law and enforced by our civil tribunals, in fact, for the public safety they would necessarily have to exercise a discretion as to the infringement of private rights wholly at variance with the legal rights enforceable by civil law. During the war,

while the emergency exists, while it is clear that martial law only will meet the exigencies of the case, the civil courts should not be compelled, at the instance of any and every complainant, to inquire minutely into the acts done under the discretion necessarily conferred upon the military authorities.

Maasdorp, J., said: In my opinion there is nothing in the circumstances of this case to distinguish it from the cases of *Naudé* and *Bekker*, in which I expressed my views as to the principles applicable to such cases. I do not wish to do more now than to say that I adhere to the views I then expressed, and I concur in the decision that the present application must be refused.

[Applicants' Attorney, J. J. Michau.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

Ex parte WILLIAMS. { 1901.
(Mar. 1st.

Mr. Buchanan moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

Ex parte BOWLES.

Mr. Buchanan moved that a rule *nisi*, granted under the Derelict Lands Act, be made absolute.

Granted.

GRAFFWEG V. MCKENZIE { 1901.
AND CO. (Mar. 1st.

This was an application on notice for the issue of a commission to take certain evidence in connection with the above-named suit at Hamburg, in Germany.

The applicants were being sued by Graffweg for the delivery of certain goods. The defence raised was not one of short delivery by the ship, but that the goods in question did not belong to the plaintiff at all, but to some other firm. This the defendants were desirous of proving, and for that purpose the evidence of certain witnesses in Hamburg was required to be taken on commission. The affidavit of one Sexton, manager for the

defendants, was to the effect that the evidence of these persons was very material, since on their statements the defence depended.

Graffweg, the plaintiff and respondent, said that the goods alleged to belong to the firm in question were not the goods in dispute. He was of opinion that the object of the defendants was to obtain an indefinite postponement.

Sir Henry Juta, K.C., moved.

Mr. Close for the respondent.

The Court granted the application, and ordered the defendants to be ready for trial in the May term. The British Consul at Hamburg or the person acting as such was appointed commissioner.

ARDERNE V. KAISER AND ANOTHER.

Mr. P. S. Jones moved that a rule *nisi* restraining the respondents from altering certain premises and interfering with certain buildings be made absolute.

Granted.

MATTHEW AND READ V. HENRY AND MEYER LYON.

Mr. Schreiner, K.C., applied on behalf of the plaintiffs, Abraham Matthew, manager of the Cape Town branch of the National Bank of South Africa, and the representative for the assignee of the estate of A. & S. Lyon, of London, for a provisional order for the sequestration of the estates of the partnership of the defendants, carrying on business under various names, and for a rule *nisi*, to operate in the interim as an interdict, restraining any moneys being paid from banks where it was alleged they had accounts to them.

The orders were granted, the return day being fixed at March 12, leave being given to the defendants to have the rule *nisi* set aside.

BRADLEY AND OTHERS V. ZAMBESIA EXPLORING COMPANY.

Mr. Searle, K.C., applied for an extension of time in which to prosecute certain appeals from the High Court of Southern Rhodesia.

Mr. Schreiner, K.C., consented, and the application was granted.

BRITISH SOUTH AFRICA COMPANY V. FURB R.

Mr. Schreiner, K.C. (for Sir Henry Juta, K.C.), moved for a commission to take cer-

tain evidence at Beira, Salisbury, and London.

There was no objection, and the application was granted.

GREENBERG V. GREENBERG. (1901. Mar. 1st.

This was an action for divorce instituted by Samuel Greenberg against his wife, Toby Greenberg, on the ground of her adultery with one Alfred Davies.

The declaration set forth that the parties were married at Cape Town on October 22 last, out of community of property, and that during the months of January and February the respondent, Toby Greenberg, committed adultery with one Alfred Davies. This the respondent, in her plea, denied. The petitioner asked for a decree of divorce and forfeiture of benefits under the ante-nuptial contract.

The civil marriage of the parties at Cape Town was formally proved.

Mr. Searle, K.C. (with him Mr. P. S. Jones), for the plaintiff.

Mr. Rubie for the defendant.

The plaintiff said he was married to the respondent by civil ceremony before the Magistrate on the 22nd October, but the Jewish religious ceremony was not performed until the 19th December. Between these dates they lived in a house in Harrington-street, and Davies, who was the respondent's brother-in-law, occupied a room in the same house. Davies accompanied them to Laingsburg when the religious ceremony was performed. Witness, on returning, thought Davies and the respondent were a little "too friendly," and told the former he could not remain in the house. Davies left on December 21, and witness's wife also left the next day. Witness found she had gone to Pontac-street, and saw Davies and her walking together and entering the house in Pontac-street. Subsequently he saw his wife in the presence of the Rev. Mr. Lyons, and she then agreed not to speak to Davies for six months. Witness then took her back, and took a house in Pontac-street. Witness agreed on his part not to talk to certain people of whom his wife complained that they made mischief between them. He subsequently saw his wife on three occasions talking to Davies in the Government Gardens. He told her she must not do it, and she said all right. On returning home one day, after having told his wife he was going away for four days, he

found Davies under the bed, his wife being in the room. Witness called a policeman, and Davies was taken to the Police-station. Mrs. Greenberg then went to the station and said Davies was her brother-in-law, and that she had called him in. Davies was thereupon liberated. Witness then consulted an attorney. He left his wife, telling her he could not live with her again. She replied that she did not care. He had since seen her in the street with Davies on four or five occasions. Witness had settled £100 on his wife at marriage, and this he had given her.

Cross-examined: Witness and his wife did not quarrel immediately after the Jewish marriage, nor did he complain to his wife that she was too expensive for him.

Rev. E. D. Lyons corroborated the statement of the plaintiff as to the agreement by the defendant not to speak to Davies for six months.

Samuel Louston and Louis Stein stated that they saw Davies coming from under the bed on the occasion spoken to by the plaintiff. They were called in by the plaintiff.

Mr. Rubie called

Toby Greenberg, the defendant, who said she came from Russia. Davies was her brother-in-law, and had been extremely generous to witness's family, to whom he had sent money. He gave witness, her brother and a sister money to come out with. After coming out here she went to Johannesburg, where she lived with Mr. and Mrs. Davies for about seven months, doing home work. The Davies's then left for Europe, and Mrs. Davies did not return. After Davies returned, witness came to Cape Town, where she lived in a house in which Davies and a family friend named Bremner also resided. After that the civil marriage with the plaintiff took place, and Davies lived in the same house until the religious marriage. After this event, her husband was continually quarrelling about what people had said to him about her and Davies. Afterwards she left her husband, but returned to him, and they went to live in Pontac-street.

Questioned as to the statements concerning the discovery of Davies under the bed, witness said it was untrue that Davies was under the bed. He was in the room, he having called in with a letter. Witness asked him in, and he was sitting on a chair reading the letter when her husband entered. There were no improper relations between her and Davies in William-street, nor at any time or place. Witness's brother—Israel

Levine—and Davies often visited the house. Everything Goodman said was untrue.

Cross-examined: Witness never met Davies in the Government Gardens. Davies and Israel Levine used to come to the house in William-street for meals every day, and witness prepared the same. Witness's letters were addressed to care of Davies.

Re-examined: She had no other affection for Davies than that of a sister-in-law.

Alfred Davies was then called, and gave evidence to the same effect as the last witness. He said that, when stated to be under the bed, he was sitting down reading a letter to Mrs. Greenberg. The petitioner came in, and said nothing for a while. Then the cab came to the door, and Greenberg called in the two men. He told them he found witness under the bed, but the men at first said they only saw him standing by the bed, and not under it. Then Greenberg went for the police, and returned with a constable, to whom witness explained he was Mrs. Greenberg's brother-in-law. The police-constable and sergeant demanded to know from Greenberg why he told them when he gave the information about having found the man that he did not know the man he found in the house. They discharged witness at once, saying it was not a criminal case, and that a constable would not have been sent had it not been reported by Greenberg that he did not know the man.

Cross-examined: Mrs. Greenberg's brother told him of the agreement that Mrs. Greenberg would not see him for six months. Witness was informed of this before he went to the house, and was accused of being under the bed. He went because he had received a letter in which there was news that interested her. He read this letter to her because she could not read. He told her, through the window, that he had this letter, and she asked him in to read it. He went in to do so, notwithstanding that he knew of the undertaking by Mrs. Greenberg that she would not see him for six months. The room he entered was a bedroom and sitting-room combined.

[Buchanan, A.C.J.: When you knew that the condition upon which they were reconciled was that Mrs. Greenberg should not speak to you for six months, why did you go to her a few days afterwards?]

The witness replied that he went to take the letter.

[Jones, J.: You see the curious part of it is that at the very time you went the husband was not expected to be at home.

You knew he was supposed to be away for four days, and told his wife so.]

Witness said he was not aware that the husband was to be away.

Mr. Searle asked the witness why the brother of the defendant could not have looked after her and arranged for her lodgings, etc., instead of him (the witness) doing so.

Witness said that the brother was working, and had no time.

Mr. Searle: You seemed to have plenty of time to look after Mrs. Greenberg.

Witness: I was not working then. Witness said he took a family interest in the defendant.

Israel Levine, brother of the respondent, deposed that at the time Davies was said to be under the bed, he was sitting in a chair reading a letter.

Cross-examined: Mr. Greenberg said at the time that he found Davies under the bed, but the cabman he called in said they did not see him come from under the bed. Louston entered the room before Stein.

Frances E. Sharp, landlady of the house in Pontac-street in which Mr. and Mrs. Greenberg lived, said she had only seen Davies in the house once, and that was on the occasion upon which Greenberg said he had found Davies under the bed. Greenberg called witness to the room, and witness went and saw Davies sitting down in a chair. He was not excited or white. Mrs. Greenberg and her brother and another man, whom she assumed was the cabman, were also in the room. Plaintiff said Davies had been under the bed. Witness did not wait to hear anything more, but saw the policeman come.

In answer to the Court, witness said that she had seen nothing wrong about Mrs. Greenberg, who appeared to be a very respectable woman. Witness did not know Davies was in the house until after the disturbance occurred.

Abraham Fineberg, of Albert-road, Woodstock, said the defendant came to sleep at his house one night and slept with witness's mother.

P.C. 12 (John Noble), said he remembered Greenberg complaining of a man being in his bedroom. He went up there and found Davies, whom he took to the Police station. No proceedings were taken. He could not remember anything being said by Greenberg about the man being a stranger. Davies told him he was the defendant's brother-in-law.

This concluded the evidence, and Mr. Rubie then addressed the Court.

Buchanan, A.C.J., said that prior to the marriage of the parties the defendant and Davies seemed to have been on very intimate terms. Within a few days of the religious ceremony quarrels ensued between the parties with regard to Davies. The conduct of the respondent and Davies was not only indiscreet, it went beyond that. On the evidence given, it was impossible for the Court to come to the conclusion that there had only been a mere exercise of family care, and that the relationship of Davies and the respondent did not extend beyond that. The facts shown were such as to prove adultery and to entitle the plaintiff to a divorce. A decree of divorce would be granted, with forfeiture of the benefits conferred on the defendant under the ante-nuptial contract.

Mr. Searle, in answer to the Court, said he did not ask for costs, and no order was made with regard to the costs.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, Gus. Trollop.]

NATHAN V. STEINWEISS. } 1901.
Mar. 4th.

This was an action instituted by Dinah Nathan, the lessee of Claridge's Hotel, against L. Steinweiss for the recovery of £83 5s., being the balance of a sum due by the defendant to her for board and lodging. The declaration set out that the defendant hired rooms at the hotel from January, 1900, to November, 1900, and accordingly was indebted to the plaintiff in the sum of £358 5s., and of this amount had paid £275. The defendant pleaded that the amount due to plaintiff was only £328, the difference between which and £275 he was willing to pay.

Mr. Searle, K.C., for the plaintiff.

Defendant in default.

Dinah Nathan said she was the lessee of Claridge's Hotel. In January of last year Mrs. Steinweiss and her children and her sister-in-law came to the hotel. They remained about six days. Then they went away and came back. Mrs. Steinweiss and two children stayed until November. The whole amount of the account was £358 5s. Witness proceeded to explain the details of the account. The account was quite correct. Witness admitted that £275 was paid by defendant. There was no arrangement that Mrs. Steinweiss and the two children should be taken at £12 a month. She had received a letter from defendant's attorneys.

stating there was no intention to defend the suit. Defendant was now living at Sea Point, and had offered to pay off the debt by instalments, or in full the moment he was able to reach Johannesburg.

Judgment was given for the plaintiff for the amount claimed, with costs.

CLAUSEN V. WOOLF. { 1901.
 { Mar. 4th.

Ejectment—Lease—Agency.

H. & Co., acting as plaintiff's agents, had leased a certain house to defendant. Plaintiff now repudiated H.'s agency, and sought to eject defendant. As it was shown that plaintiff had given a general power of attorney to one P. and that P. had consented to H. & Co. leasing the house, the Court found H.'s agency proved and gave judgment for defendant with costs.

This was an action for ejectment. Defendant was a monthly tenant who refused to quit on the ground that G. and P. Herbert, brokers, had, as agents of the plaintiff, leased the premises on a six months' lease. Plaintiff denied the right of G. and P. Herbert to enter into the lease.

Plaintiff's declaration was as follows:

1. Plaintiff is a builder and contractor, carrying on business in Cape Town, where defendant also resides.

2. Before and on December 31st, 1900, defendant was tenant by monthly hiring from plaintiff of a certain house and premises situate in Hofmeyr-street, Cape Town, at a rental of £8 per calendar month.

3. On December 31st, 1900, plaintiff lawfully gave defendant notice to terminate the hiring and tenancy, and calling upon defendant to quit the said house and premises on or before January 31st, 1901.

4. Defendant wrongfully and unlawfully failed or refused on or before January 31st, 1901, duly to quit and deliver up possession of the said house and premises to the plaintiff.

5. Defendant has caused, and is causing, damage to the plaintiff by reason of his wrongful and unlawful failure and refusal as aforesaid to quit and deliver up possession of the said house and premises, which damages are properly calculated at the rate

P

of £8 per month, reckoned from February 1st, 1901.

Wherefore plaintiff prays for:

(a) An order ejecting defendant forthwith from the said house and premises.

(b) Judgment for damages calculated at the rate of £8 per month from February 1st, 1901, to the date of ejectment.

(c) Alternative relief.

The defendant's plea was as follows:

1. Defendant admits paragraph 1 of plaintiff's declaration.

2. In or about June, 1900, defendant entered into a written agreement with G. and F. Herbert, a firm of brokers, and the duly authorised agents of the owner thereof, by which the premises in the second para. of the declaration mentioned were leased to the plaintiff for a term of six months at a monthly rent of £8, with a further option of renewal at the same rental for an additional six months, such tenancy to commence from July 1st, 1900. In pursuance of the said agreement, defendant took possession of the said premises and paid the said rent.

3. Prior to the expiration of the first term of six months defendant duly exercised the said option of renewal, of which due notice was given to and acknowledged by the said firm of G. and F. Herbert.

4. Save as aforesaid, and save that defendant admits that plaintiff requested him to give up possession of the said premises, and that he refused to do so, he denies all the allegations in paragraphs 2, 3, 4, and 5 of the declaration.

In his replication plaintiff specially denied that any lease was granted with his authority by the said G. and F. Herbert to defendant upon the terms set forth in the said plea, and that if the said G. and F. Herbert purported to lease plaintiff's property to defendant upon those terms, they acted without any authority either from him or from one Pedersen, who, during plaintiff's absence from the colony, held his said plaintiff's general power of attorney, and was authorised to represent him in regard to the letting of his said property, and save as to admissions, he denies all allegations of fact and conclusions of law in the said plea, joins issue thereon with defendant, etc.

Mr. Schreiner, K.C. (with him Mr. Nathan), for plaintiff; Sir H. Juta, K.C. (with him Mr. Gardiner), for defendant.

Mr. Schreiner said he would like the ruling of the Court as to whether the burden of proof lay on plaintiff or defendant.

Jones, J., said the onus lay upon the plaintiff.

Eraustus Clausen, said he was a builder, and the owner of two houses in Holmeyer-street. He sold the house in question on December 5 for £1,400. He did not know Wolff before he let the property. It was a new house. He owed money on the house. Several brokers had approached him. Herbert asked him if he would let the property. He did not wish to do so. Herbert said he could get a good tenant, but he would like a lease. Witness said he would not grant a lease under any circumstances. He had given a general power of attorney to Mr. Pedersen. On June 20, when he left for Europe, Pedersen spoke about the matter. He heard nothing about the lease till his return. He sold the house to one Fineberg for £1,400. He had no idea that Wolff claimed to be more than a monthly tenant. About a week afterwards Mr. Ball (in Messrs. Scanlen and Syfret's office) told him about Wolff's claim. Then Wolff wrote to Pedersen claiming to exercise his option of renewal of a six months' lease. Mr. Syfret wrote on plaintiff's behalf giving notice to quit. In reply, Mr. Wolff stated he had a six months' lease. Rent had been paid up to January 31 at £8 a month. A letter from Mr. Syfret to Messrs. Herbert was put in, and in their reply they said they had full authority from Pedersen to grant a lease.

Cross-examined by Sir H. Juta: He got the account rendered to Pedersen on September 30. There was a debit to Herbert of £2 8s. for letting house. Pedersen said the £2 8s. was wrong. He knew that £2 8s. was 5 per cent. on £48. Pedersen did not object in writing to this. He knew nothing about the account rendered on 14th December. No tender had been made to him of the rent for February.

It was admitted by Mr. Searle there had been a tender.

James Pedersen said he was a builder, and held Clausen's power of attorney while Mr. Clausen was away in England. He knew Mr. T. Herbert. Mr. Herbert saw him about 10 days before Clausen left. He knew Clausen wanted to sell for £1,450. The house had stood empty for a month. It was damp, and he suggested it should be let cheap. On June 19 Herbert wrote saying he could get a tenant at £8 a month. He told Herbert he would take £8 a month, but not on lease. He got a telegram from Herbert, but had destroyed it. The telegram was dated the 20th, and stated that the house

was let. He delivered the key to Herbert. He said "You can let the house for £8 a month." Mr. Herbert did not then say anything about having given a lease. He never received the letter of June 22 from Herbert saying the house had been let on a six months' lease. He received Herbert's account only once. He did not pay it, because he did not understand how more could be charged for one house than for the other. He never told Clausen that there was any claim for a lease until Clausen had sold the property. Clausen told him before the sale that there was some difficulty about a six months' renewal. He knew nothing about the sale. The conversation with Clausen took place after Herbert's letter of December 21. Herbert had never collected rent. He was never agent for the property. The business was never withdrawn from his hands.

Cross-examined: He got the telegram on the 20th, and then went to Mr. Herbert's office. He never authorised Herbert to let from six to twelve months. He had no letter of October 23. He got no letter about the letting of the house in question. He got a letter on the 25th saying that both houses were let. He had not paid any of the items of the account rendered September 30. He was not aware in October that the house had been let for six months. His bookkeeper had told him so. He did not go to Herbert and remonstrate. Clausen came back at the end of November. He told Clausen what his bookkeeper had told him. He could not remember going to Clausen's office early in December and seeing some letters. He continued to take rent from Wolff, knowing that Herbert had let for six months with option of renewal.

James A. Cameron said he was bookkeeper to plaintiff, and also to Pedersen. He collected the rent from Wolff. The first he received was on August 4. Messrs. Herbert's claim, including the £2 8s., came into his hands. He saw Pedersen and asked why £2 8s. was charged as commission on one house, and £1 1s. on the other. He was told one house was let on a monthly tenancy, and the other for six months. Nothing was said about renewal.

John D. Ball said he was manager in Messrs. E. R. Syfret's business. The property was sold on December 1. He went to see Wolff before writing the letter of December 24. It was after the sale when he went. Wolff said he had a six months' option. He went to Herbert and asked him for an explanation. The purchaser of the

property was anxious to get immediate possession.

Cross-examined: He heard about the option from the agent of the purchaser.

Mr. Schreiner closed his case.

Sir H. Juta called Thos. F. Herbert. He said he was a broker. He knew Clausen, and had often done business with him. He did not remember Clausen saying anything about not letting on a lease. He put an advertisement about a house in the "Cape Times."

Sir H. Juta was proceeding to question further as to the advertisement, when Mr. Schreiner objected, as the advertisement was not put in.

Examination continued: He was authorised to let or to sell. Wolff came and wanted a lease. Pedersen came and authorised them to let on a twelve months' lease if Wolff wanted it. He never forbade them to let on a lease. He authorised them to agree to a lease six or twelve months, as desired. He wrote to Wolff on the 20th accepting his offer of £8 a month, with a twelve months' lease, if desired. On June 22 he wrote to Mr. Pedersen stating he had let the house. There was a record of the letter in his post book. His book showed a number of other letters posted on that day. That letter was never returned. He wrote on June 23 to Wolff. He sent in an account (produced) in September for commission. That account had never been disputed. It was sent in again in December. Clausen came to him on his return from Europe in December, and he showed him all the correspondence. He had nothing to do with collecting rents. He often saw Pedersen after the account of September 30 was written. He got a verbal answer to his letter of October 23.

Cross-examined: He got authority to let the property from Pedersen. Within fourteen days before Clausen left he introduced Pedersen. He thought Clausen authorised the letting of the houses. He believed other brokers were trying to sell the houses. Before Pedersen was introduced to him Clausen had asked him to sell or to find a tenant. The term of months was never discussed with Clausen. He did not know when it was first discussed with Pedersen. He let the house for six months to Wolff on Pedersen's authority. Pedersen gave him a free hand as far as Wolff was concerned up to twelve months. He discussed the six months' lease with the option of renewal with Pedersen. He informed Pedersen

verbally. Pedersen did not come in before the telegram of the 20th was sent.

At this stage witness was taken ill, and had to be assisted from the box, and the Court adjourned till two o'clock.

This case was then proceeded with, and the cross-examination of Mr. Herbert was resumed.

His first record of any demand for commission was September 30. The copy was not pressed till October 2, because letters were often allowed to accumulate before pressing. The account sent out was made up from the ledger. He sent no covering letter with the account. Five per cent. on £48 appeared quite clearly in the ledger. In his letter of October 23 he referred to Clausen's other house, and he thought that perhaps Mr. Wolff would not exercise his option. He had heard from a third party that Wolff would not exercise his option. When he sent the wire on the 20th he had let the house for a month. At that time Pedersen had not told him not to let the property on lease. He would not swear that Clausen told him not to let on lease. Cameron never came to him to ask for an explanation of the account rendered for commission. They had not taken any steps to recover it because they thought that Clausen was good enough for the money. He gave Clausen a verbal explanation of his action about the middle of December. He showed all the correspondence with Wolff and Pedersen to Clausen. He did not draw up a written lease unless instructed to do so, more particularly if the lease were for a few months.

Re-examined: The accounts in his letter-book were copied in a batch. He was certain that Pedersen came to see him on September 22. It was in accordance with his practice that his letters which were stamped should be posted. He had a small balance to pay Pedersen.

Frank M. Wolff said he was an agent practising in Cape Town. He saw Herbert about a house in consequence of an advertisement in the "Cape Times." He wanted it for six months, and eventually Mr. Herbert let it to him. On December 31 he heard for the first time that there was a difficulty about the lease—that letter was dated December 24.

Cross-examined: He had not the envelope of the letter. He answered the letter immediately he got it. He received another letter on the same day, of even date. He received the formal notice to quit dated December 24 on the 31st. He wrote to Her-

bert on the 21st to exercise his option. He wrote to Herbert because he took the house from him. He did not pay rent to Herbert. He had never seen Clausen, and drew his cheques in favour of Pedersen. Graham and Morris told him they were not aware there was a lease. Before he wrote on the 21st he knew that Clausen was trying to get out of it.

Sir H. Juta closed his case.

Mr. Schreiner: If a person, presumably a monthly tenant, receives notice to quit, the onus lies upon the tenant to prove he is a lessee. It would be a dangerous doctrine to hold that a broker could bring forward such evidence as Mr. Herbert had produced to show that his principal was bound by his actions. It was for defendant to prove Herbert's agency. Clausen had always wanted to sell the property, and hence it was not at all likely that he would consent to let it. Clausen gave his evidence very clearly, and Herbert's recollection of the whole transaction was very indistinct. Herbert said he had asked to be allowed to let for a year. That was refused, and then he proceeded to let for six months with six months' option. That was a very disadvantageous arrangement for the landlord, for up to the very last moment the option might be exercised. The tenant got the full benefit of the year's lease, and the landlord all the disadvantages. Pedersen's recollection was very clear as to what took place on June 19, when he said there must be no letting for a term of months. On the 26th Herbert sent him a wire that he had let the house. What else could he imagine but that it had been let on a monthly tenancy? He asked the Court to hold that Herbert's letter of June 22 was never received by Pedersen. If it was not they could not be bound by Herbert's action. An agent could not go beyond his authority. In *Woodfall's Landlord and Tenant* it is stated that a bailiff can only let for a customary term, unless by special instructions. A general authority to let could only be to let from month to month. If Herbert had special instructions it was for him to prove them. So far from doing so he at last admitted that the option of renewal was never mentioned between him and Pedersen. See *Woodfall's Landlord and Tenant* (pp. 68 and 69).

Sir Henry Juta was not called upon.

Jones, J., in giving judgment, said that the plaintiff sought to eject the defendant from a certain house in Hofmeyr-street, having, as he alleged, let the house to him

on a monthly tenancy. The defendant, however, set up the plea that he occupied the house under a lease which he got from the firm of G. and T. Herbert on June 20, 1900. The existence of the lease could only be shown by the evidence of Herbert himself, and the correspondence between the parties. It had been said that the agency of Herbert had not been clearly proved. As to that, it was shown that some time in June Clausen had seen Herbert and himself said that he wanted to sell the property, failing which he would let it. His lordship took it that at that time he did not want to let it on more than a monthly tenancy. But later, he introduced Pedersen to Herbert and told him that Pedersen held his (Clausen's) general power of attorney, granted as far back as May 17. After that Clausen left for England. Pedersen therefore had full powers to act for Clausen, and it appeared from the correspondence and from the evidence that he agreed to Herbert letting the house under the conditions he did. His lordship, reviewing the circumstances, said he preferred to accept the testimony of Herbert on this point, seeing that he was a man apparently of business habits, and that that testimony was backed up by Herbert's business letters. In these circumstances, his lordship thought there could be only one judgment, and that in favour of the defendant. Judgment would be entered accordingly, with costs.

[Plaintiff's Attorney, A. W. Steer; Defendant's Attorney, Chas. Friedlander.]

Ex parte STERN AND OTHERS. { 1901.
Mar. 4th.

Act 23 of 1897, sections 15 and 16—
Regulations — Hotel — Public Health.

*Where in virtue of certain powers conferred by Act 23 of 1897, the Colonial Secretary had made certain regulations giving the Medical Officer of Health power to close houses, hotels, &c., in the interests of the public health,
Held, that such regulations had the force of law and were intra vires.*

This was an application for an order cancelling a notice issued by the Medical Officer of Health for the Colony on March 2, 1901, closing the premises known as the Masonic Hotel.

The petition set forth that the petitioners were the lessees of the Masonic Hotel, and that on Saturday, March 2, 1901, a notice purporting to be issued under regulation 4, sub-section b, framed under paragraph 15 of the Public Health Amendment Act, 1897, was served on them, ordering the hotel to be vacated from and after Monday, March 4.

They further stated that although the hotel was an old building, they paid careful attention to its sanitary state, more especially since the outbreak of bubonic plague. That they believed the reason of the notice was the rumour that a servant in their employ lately suffered from plague. That the facts were that on April 14 a female cook employed in the hotel in a private kitchen left on leave for a few days, leaving another woman as a substitute. That this substitute remained in the kitchen until April 17. That she never slept on the premises, and when she left, appeared to be perfectly healthy. That on the 21st she developed suspicious symptoms, and was taken to the suspect camp, but the symptoms did not develop into plague. That there were no circumstances which would indicate the slightest danger from bubonic plague or any other disease in their premises. Wherefore they prayed for an order cancelling the notice referred to.

Sir Henry Juta, K.C., for the petitioners: The notice was sent under certain Government regulations framed under section 15 of Act 23 of 1897. Section 4b of the regulations published under Government Notice No. 187 of 1901, in the "Government Gazette" of March 1, 1901, authorises the Medical Officer to close houses, hotels, etc., when necessary for preventing the spread of disease. In this case there is nothing save the bare notice to close. This is a very serious matter for the lessee of the hotel, and I submit that we are justified in coming to the Court and asking that the Government might be called upon to show that the closing of this house was necessary to check the progress of the plague.

[Jones, J.: Your difficulty is that section 16 says that regulations made under section 15 shall have the force of law. It is for you to show that the closing is unnecessary.]

If the regulation is *ultra vires* the case is clear, but the Government must show that the closing is in some way connected with the plague. If the house was a source of danger on Saturday, the very best way to spread the plague was to turn all the people out of it and leave them to disperse about

the city. I ask for a rule nisi returnable to-morrow morning to show why it was necessary to close the house.

[Maasdorp, J.: Then may any person who is interfered with by the Medical Officer come to court on an *ex parte* application and ask it to interfere?]

Every case must be judged on its own merits, and the regulations must be administered in accordance with common sense. Surely the Government cannot close up any house *ex proprio motu*.

[Maasdorp, J.: Either their action is legal or illegal. If it is legal, how can we interfere? If it is illegal, you have your remedy.]

Yes, but we will not be able to get any damages. We are quite willing to take the risk. There has been no case of plague in the house. If the medical authorities can wait till 6 p.m. to-day to close the place, there is no reason why they should not wait till 10 a.m. to-morrow. The regulations must be read with the Act. There must be reasonable fear of infection, and surely the Medical Officer has not power to close up any place he likes at his own sweet will.

Jones, J.: It appears that the Acting Medical Officer of Health has acted under the provisions of Act 23 of 1897. The Minister has exercised the powers conferred upon him by paragraph 15 of that Act. And by virtue of the regulations promulgated by him, it is lawful for the Medical Officer of Health to do all things necessary for disinfecting or cleansing any dwelling, public building, or other place, or part of a dwelling, public building, or other place likely to be or become infected with or spread the infection of bubonic or Oriental plague, and may prohibit the habitation or using of any such dwelling, public building, or other place, or any part thereof, until such time as such Medical Officer of Health, person, local authority, or Council aforementioned shall deem such dwelling, public building, or other place, or part thereof, as the case may be, to be free from the infection of or likelihood of spreading such disease. So far as the present petition is concerned, there is nothing to show that the Medical Officer was not acting within these regulations, and the Court cannot grant a rule nisi checking him in the exercise of powers conferred upon him by what is practically the law. The application will therefore have to be refused.

Maasdorp, J., concurred.

HOGG V. HART AND HART. } 1901.
Mar. 5th.

Judgment debt—Arrest under Rule 8.

A writ of arrest was granted under Rule 8 against the respondents, who had left Cape Town for Natal without satisfying a certain judgment debt; the fact that they had entered an appeal against the said judgment notwithstanding.

This was an application on notice calling upon Isaac and Hette Hart to show cause why they should not be arrested to abide by and perform a judgment given against them in the Resident Magistrate's Court of Cape Town, or in the alternative, why they should not be compelled to give security for the amount and costs of the judgment.

An affidavit by Henry Buchanan, an attorney in the employ of applicant's attorneys, stated that he, on March 4, served the notice of motion and the applicant's affidavit on the defendants' attorney, and was informed that the same would not be accepted on account of short service. That subsequently he wrote to the defendants' attorney, informing him that the matter was of such an urgent nature as to admit of no delay, and intimated to him that the application would be heard on March 5, 1901. The letter was delivered personally.

The applicant's affidavit stated that on February 28, 1901, judgment was obtained against the first defendant for £4, and the taxed costs amounted to £3 1s. 1d. A further judgment against both the defendants was obtained on the same day for £15, and the taxed costs were £7 11s. 1d. That the defendants had booked their passages by a vessel leaving Cape Town for Natal on March 1, 1901, the day of the making of the affidavit. The defendants were arrested on this affidavit, but released "on paying capital, taxed costs, and costs of arrest." There was an affidavit by the defendants' attorney to the effect that an appeal had been noted against the judgments obtained, that the defendants were in Natal under an engagement with the De Jong-Walton Theatrical Company, and intended returning to Cape Town at the conclusion of the performances there, and that they were domiciled in Cape Town.

Mr. Buchanan moved.

Mr. Alexander, for the respondents: The arrest cannot be granted, as the affidavit of the applicant does not state that the defendants are leaving or have left with intent to defeat or delay their creditors. *Lippert v. Adler* (May 26, 1887); *Van Zyl's Judicial Practice* (p. 124). The defendants are domiciled in Cape Town, and have gone to Natal under a contract with the theatrical company. The judgment has not been satisfied because defendants have entered an appeal.

Buchanan, A.C.J.: The affidavit fully complies with the rule of Court, and the Registrar will issue an order for the arrest of these two persons under Rule 8. The costs of this application will abide the result of further proceedings.

[Applicant's Attorneys, Messrs. Innes and Hutton; Respondents' Attorney, Chas. Friedlander.]

WOOD V. GILL. } 1901.
Mar. 5th.
" 6th.
" 7th.

This was an action instituted by John Henry Wood, of Muizenberg, against James Gill, also of Muizenberg, for an interdict restraining him from allowing certain water to overflow from a certain tank, and for £270 damages caused by such overflow.

The plaintiff's declaration was as follows:

1. The parties to this suit are John Henry Wood and James Gill, both of Muizenberg.
2. Plaintiff is the owner of certain property called the "Towers," situated on the mountain slope at Muizenberg, defendant being the owner of certain land situate at the north and at the west side of plaintiff's property.
3. A stream of water, taking its rise in the mountain, formerly flowed or percolated down and in the slope of the mountain, passing the properties of the respective parties on the east side, but defendant thereafter collected the said water and caused the same to deviate in large quantities from the natural flow by laying pipes from the point of collection to a tank which he erected on his land, and thereby drawing off a great volume of water to this tank and storing it therein above the property of the plaintiff.
4. Defendant allowed more water to flow into this tank than it could contain, and caused the tank to overflow, and negligently and wrongfully, and not taking the necessary and proper precautions for the protection of the plaintiff, caused the said water

to sink into the soil and to percolate underground on to plaintiff's property, causing certain damage, as is set out below in paragraph 6.

5. In the hope of preventing further damage, the plaintiff, in or about December, 1899, caused certain excavation work to be done at the back of his house, but the damage caused the plaintiff, as aforesaid, continued.

6. The damage caused to plaintiff's house and land, and the cost of the excavation, amounts to £270.

7. Thereafter plaintiff, by way of motion in this Hon. Court, sought an interdict against the defendant in respect of the matters aforesaid, but this Hon. Court made no order on the application, and directed that the costs should stand over.

8. The overflowing, percolation, and damage has at present ceased, but the plaintiff reasonably apprehends that unless he obtains such an interdict against the defendant, and more especially when the wet season sets in, the water will again be permitted by defendant to cause him damage as aforesaid.

9. Plaintiff has lawfully demanded payment of £270 as and for damages caused by defendant as aforesaid, but defendant has refused, and still refuses, to pay the same or any part thereof.

Wherefore plaintiff claims:

1. Payment of £270 as and for damages
2. A perpetual interdict restraining defendant from allowing any of the water to overflow from the tank or pipes, and to percolate on to plaintiff's property.
3. Costs of suit, including the costs of the aforesaid motion.

Defendant pleaded as follows:

1. Defendant says that he admits paragraphs 1 and 2 of the declaration.
2. As to paragraph 3, he admits that he did make a deviation of water flowing down the side of the mountain, and did collect portion of the said water in a tank, which is the tank referred to in the declaration. He says that the said deviation was made before plaintiff built his said house, or purchased the land whereon it stands, which land was formerly owned by the defendant. At no time was there any very large quantity of water collected, or capable of being collected, in the said tank through the said deviation. Save as above, he denies paragraph 3.

3. As to paragraph 4 thereof, he admits that there was from time to time some over-

flow of water from the said tank, but not to any great extent, and he specifically denies that overflow water from the said tank did reach, or could reach, plaintiff's property, or cause any damage thereto. Save as above, he denies paragraph 4.

4. As to paragraph 5 thereof, he says that defendant did recently make certain excavation work at the back of his house, and he says that the same was rendered necessary owing to plaintiff having, with gross negligence, built his house right up to and adjoining a bank, being the side of an excavation which he had made, and in which excavation he placed his said house. Owing to the position of the said house in the said excavation, and adjoining the said bank, it was inevitable that the said house should sustain some damage through the action of the water which is found in the soil of the said mountain at all parts in the neighbourhood. Save as above he denies paragraph 5.

5. As to paragraph 6 thereof, he has no knowledge of the alleged damage, or of the items set forth in the said account. He denies that any retaining wall as set forth has been built, or that any of the items referred to are in any way chargeable against him (the defendant), or that plaintiff has sustained any loss or damage for which he (defendant) is responsible.

6. As to paragraph 7 thereof, he craves leave to refer to the said interdict proceedings.

7. As to paragraph 8 thereof, he denies that there is any reasonable apprehension on plaintiff's part that unless he obtains an interdict against defendant, plaintiff will sustain damage by means of water discharged on to his property by defendant.

8. As to paragraph 9 thereof, he admits that the plaintiff has demanded payment of £270 as damages, and that he (defendant) has refused to pay the said sum; but save as above, he denies paragraph 9.

Wherefore he prays, etc.

Plaintiff's replication was general.

Mr. Schreiner, K.C. (with him Mr. P. S. Jones), for the plaintiff.

Mr. Searle, K.C. (with him Mr. McGregor), for the defendant.

Mr. Schreiner called

John Henry Wood, who said he was the plaintiff in this case. He resided at "The Towers," at Muizenberg. He bought the property from the defendant in December, 1897. For health considerations, he wanted a particularly dry site. Mr. Sherwood, jun., supervised the work of building. He was an officer in the Public Works Department.

Witness was the managing director of the City Flour Milling Company. He had had a considerable experience in building and road-making during the last twenty years. There was a considerable slope on the property. They had to first remove the rock and then to cut into the side of the mountain. On three sides his property was bounded by roads, and on the fourth side by Professor Gill's property. To get to a level for the foundation, he had to excavate. He was going to build a double-story house, but abandoned that idea, owing to the danger from heavy weather, and instead built the house in terraces. In this way he had a ground floor, a first floor, and a second floor, rising in terraces above each other. The house was constructed with good material. While they were putting in the foundations there was no sign of damp. On the contrary, the ground was uncommonly dry, and they were able to use the gravel in the building of the house. Witness proceeded to explain the state of the house. After occupying the house for three months, he noticed the paper coming off the walls. He entered into correspondence with the defendant, and they were nearly coming to litigation. He wrote to the defendant, telling him he would not put up with his "bullying insolence and injustice." Witness explained the formation of the soil in support of his contention that the water causing the damage percolated from Professor Gill's property. Since November the property had not been damp. Professor Gill cut off the water supply to which plaintiff had been accustomed, and plaintiff proposed to him that an expert should be secured to pronounce finally what was the cause of the dampness. Before November the tank overflowed regularly. During November the overflow at the tank ceased, and then the damp on plaintiff's property also ceased. During February the tank overflowed again, and witness again noticed the damp on his property. Others observed this besides himself. There was a pool about 50 or 60 feet to the further side of witness's property, but there had been no water in it for months past. He had never seen water flowing out of it in the direction of his property. When Professor Gill alleged that the pool was the cause of the damp on witness's property, witness examined the pool, and found it to be perfectly dry. Witness had frequently complained to Professor Gill as to the state of affairs.

At this stage the Acting Chief Justice expressed the opinion that it would greatly

simplify matters if some expert, independent of both parties, were appointed to test the overflow complained of and its effects.

Mr. Schreiner said his client would be only too glad to have this test made. It was precisely the original proposal made by his client to the defendant.

Mr. Searle said that his client had had tests made.

Mr. Justice Jones said that it would, of course, come out in evidence, but what the Court would like was an expert testimony quite independent of either party to the suit.

The Acting Chief Justice said that it certainly did seem difficult to say from the evidence whether the damage was or was not caused by the overflow water.

Mr. Searle said that the evidence of his client's expert would be given on that point. Plaintiff was cognisant of the investigations of these experts.

Eventually the Acting Chief Justice said perhaps it would be better to go on with the evidence.

Mr. Schreiner then called

Henry Peter Hansen, Mayor of Muizenberg, who said he was a builder and contractor. He had resided there for fifteen years, and had built the greater part of Muizenberg. He knew Professor Gill's tank and the overflow. Whenever he went to the tank it was overflowing. He knew the kranz from which the water was drawn. It formerly supplied a spring to the Cape Town side of the property. After the construction of the tank, and the overflow from the tank, the damp in Mr. Wood's house was considerable. Indeed, witness regarded the place as uninhabitable. He did not think that the damp could come from the pool referred to as being about 50 to 60 feet to the further side of the house. He would say it was impossible. He knew the pool well. In summer it was usually dry. In his opinion the overflow from the tank was largely responsible for the damp in the house. If there were no overflow, he felt sure the house would be perfectly dry. As a practical builder he considered the plaintiff's estimate of damage was a most reasonable one.

James Collie said he was a plumber and sanitary engineer. He knew both parties to the suit personally. He laid the supply pipe from Professor Gill's tank to "The Towers." He knew the tank since 1898. The flow into the tank was less now than formerly. He was called in in December, 1899, by Professor Gill, because there was

a scarcity of water. He found that wild flowers had grown over the ledge, and were diverting the water, so that very little water was flowing into the cement tank. With that one exception he had always seen the tank in question overflowing. About 3,000 gallons per diem would be the average overflow. The sand bridge constructed to divert the water was not a satisfactory diversion. There was nothing constructive about the channel. It would probably be effective for about twelve hours. There was nothing at present to divert the water. An overflow pipe diverting the water to another portion of Mr. Gill's property would meet the case. He would undertake to keep the water out of Mr. Woods's property for £5.

Charles Pinker said he was a builder and contractor. He was working on "The Park" property. Mr. Wood had paid him more than £200 for the excavation he made on "The Towers." He considered the estimate of damages put in by the plaintiff was a very low one. He would not like to do the work of repairing for the price specified. Witness was always of opinion that the damp in Mr. Wood's house came from the overflow of the tank on Professor Gill's property. There was a very considerable overflow from the tank. When he first went to work at "The Towers," in the middle of 1899, there was much more water coming down than at present. With two exceptions, about eight months ago, there had always been an overflow from the tank. Every time the tank overflowed the ground at Mr. Wood's house was correspondingly damp. The excavations at "The Park" were deeper than those at "The Towers," yet there was no water.

Herbert Sherwood said he was in the Public Works Department. He was the architect for Mr. Wood's house. He had had a lengthy experience in architecture. Every precaution was taken to have the house damp proof. Great care was taken with the walls facing the excavations.

By Mr. Searle: No dampness appeared in the ground when they were excavating; only a natural dampness consequent on rain. The house was perfectly dry.

Edmund J. Sherwood stated he was an architect and surveyor. He was Mr. Wood's brother-in-law, and knew the property called "The Towers." He knew the pool or bath of Professor Gill. He had often seen water discharged from the overflow pipe. Eighteen months ago the discharge was more than at present. The pipe was dis-

charging about 4,000 gallons. He saw the pipe on the 1st March. When the water got six or seven feet from the tank it soaked into the ground. The building of "The Towers" was done exceedingly well. He knew the house had been damaged by damp. He made an estimate of the damage done. He made the total £91 7s.—£38 16s. for a concrete wall appeared in his estimate, but not in the declaration. No concrete wall could have stopped the damp. The damp came from below. If the water were again turned on it would take the terrace wall away. He had supervised the excavations at the Park (the adjoining property). There were no signs of damp there.

Cross-examined: The nearest point to the house where water came from the mountain was 58 feet from the house. It would not damage the house, but it would damage the retaining wall at the side of the house. It would wash away the whole terrace. Mr. Wood was now using the water for his garden. The water from the tank ran down the mountain side till it met with clay soil, and then it turned off to Mr. Wood's corner. He did not see water coming out of the excavation while "The Towers" was still in course of construction.

Re-examined: By continuing his excavations Mr. Wood had forced the water back to the corner.

Wm. T. Olive stated he was a civil engineer, with 30 years' experience. He was called in by Mr. Wood on November 30. He saw the tank then. He thought there was no overflow at the tank, but there was at the tub. The whole bank was moist. Wood's supply pipes had been cut off. Smith's pipe could take 4,500 gallons a day. The drop from the tank to the place where the water appeared was 81.4 feet. He saw water in the bathing pool on November 13. There was about a foot of water in it. On February 7 he saw the property again. The overflow pipe was discharging about half an inch; that water went towards Wood's property. On February 7 the bathing pool was dry. It was dry at the tub. Mr. Wood was with him that day. On the 27th he gauged the water. There was some overflow, but he did not gauge that. He noticed no bracken near the pool. The overflow from the tank must come down to Wood's property. £130 was a fair estimate for the excavation. In November the paper on the walls had been destroyed by damp. The Park was perfectly dry. He would suggest a very deep French drain at the back of the house. It would not cost Professor Gill

much to discharge the water above his own property.

Cross-examined: On none of the occasions referred to did he find out whether there had been much rain. He attached no importance to the rainfall. He had seen the bank damp, but there was no water oozing out. The mountain was a dry mountain, and he would not expect to find a house built into the mountain damp. There was nothing wrong about the design of the house, if there was plenty of space under the joists. The overflow at the tank was the root of the mischief.

Re-examined: The rainfall for January was 5.21 inches and .5 for February.

Mr. Schreiner closed his case.

Mr. Searle called Eustace F. Wilson. He said he was a civil engineer in the employ of the Imperial Government. He had known the property since 1896. On December 1 he gauged the water coming in. It was over 1,300 gallons a day. There was an overflow which would be about the same as the intake. On the 8th they found the intake to be 1,200 gallons. The average for several days was 700 gallons. The overflow was turned off from December 8 to 13. The water came into the tub during this time as usual. About 300 to 400 gallons a day ran. From the 13th to 22nd they allowed the overflow to run, and the discharge at the tub decreased. They filled a tin full of blue about 5 feet below the tank which caught all the water, but the water at the tub came out quite clear. They watched for eight days. He did not think the overflow water could injure Wood's house, the soil was too spongy. Above Gill's house $1\frac{1}{2}$ millions of gallons decreased to $\frac{1}{4}$ million in about 400 yards. There was generally water in the pool. He thought the water in the pool and that in the tub both came from the same source. He thought the way Wood's house was built accounted for its being damp. There was a heavy rainfall at Muizenberg in winter. That part of the mountain was very wet in winter.

Cross-examined: The tin was nearly full of blue. When he looked the blue had all gone, and he filled up the tin with stones and sand. The tin was embedded in the sand. He had not noticed Wood's property till the present dispute. He had advised Gill to get a ball cock for his tank. That was not done. Then there would have been no overflow. He first gauged the water in November or December, 1896. He gauged it up near the krantz. The tanks were put in in 1897. He found about 2,000 gallons.

He did not think the water would find its way down to Wood's property unless brought by pipes. He had never found the flow less than 1,700 or 1,800 gallons. About the middle of 1897 he had found over 2,000 gallons coming into the tank. He gauged morning and evening. He gauged again towards the end of 1899 and found 1,600 gallons. He never found a well-defined channel along which the water flowed. The water would naturally flow towards the north of Wood's house. The inflow decreased in December. That might have arisen from the pipe becoming choked. He had not been frequently at the place since December 22. While the water was turned on there was a marked decrease of water at the tub. He did not think that Rickett's Champion Blue was likely to lose its colour in the soil. He was not a builder. He had been at the pool all the year round. He had never bathed there. He had never seen any water flowing out of the pool.

Re-examined: The water in the pool must come up from the spring. It was 290 feet from the tank to the tub.

By Buchanan, A.C.J.: The overflow might have been prevented at the cost of £3 to £4.

Roger Price said he was a mechanical engineer, and was in the temporary employment of the Government. He went to the tank with Wilson on December 8. He substantially corroborated Wilson's evidence as to the tests. He did not think enough of the overflow water could reach Wood's house to do him any damage.

Cross-examined: He thought that the position of the house would account for the damp. The mountain was full of water. He was a hydraulic engineer. He had been at the tank three times.

Charles Roe said he had built houses at Muizenberg. He had known the locality for 15 or 20 years. He had got a grand supply of water from a well there 16 or 18 feet deep. The level of the water would be about 8 feet below the main road. He would expect a house built against the slope to be damp. He had had 12 years' experience as a builder. He did not think any builder would build against the mountain. He had never seen houses built in terraces.

Cross-examined: He served his time as a builder in England. Stones and broken brick would not prevent damp from coming through. He never told Mr. Wood that the house was badly built.

Thomas Stewart said he was a member of the Society of Civil Engineers and a Fellow of the Geological Society. He knew Muizenberg well, and was engineer for the local water scheme. On January 12 he went with Gill to the tank. There was a slight overflow of water. The excavation seemed quite dry at the back of Wood's house. There was some water running through a tube into the tub. At a depth of five or six feet clay was found on the mountain. The overflow which he saw would not greatly affect Wood's house. He considered the dampness of Mr. Wood's house was due to its being built against the mountain. Ordinary concrete was not water-tight. He saw that the walls of the house were discoloured by damp. He had had great experience in building dams, but had never succeeded in making one water-tight. He could not understand how the water would follow the course described by plaintiff's witnesses. A French drain at the back of the house would not cure the evil.

Cross-examined: He did not visit the place between January 12 and February 24. The dribble he saw at the tank might come down to Wood's place. He had never seen a cement wall a foot and a half thick water-tight.

Re-examined: In the winter he would expect percolation in any excavation made on the slope of the mountain.

Professor James Gill, the defendant, was called. He said he built the tank in February, 1897. He sold the ground on which the "Towers" was built to Mr. Wood in December of that year, and the overflow pipe was in the same position now as then. Witness was astonished at the position in which the house was built. In 1898 Mr. Wood agreed to take water from witness's tank, and a ball cock was put in plaintiff's tank in August, 1900. Witness had, on two occasions, seen an overflow from here, and had frequently complained that there was no overflow from his (witness's) tank. The first witness heard of the complaint by Mr. Wood that the overflow was damaging his property was in December last year. There was an overflow on the previous day of about 1,000 gallons, and this was the largest he had seen for a long time. Witness believed that the water oozing from one part of Mr. Wood's land was connected with the pool.

Cross-examined: From October, 1898, to November, 1900, there was no overflow from

the tank beyond a dropping, and sometimes there was not even that. After witness's complaints, he generally found the overflow strengthened for a short time. Witness did not receive a letter from Mr. Wood in December, 1898, complaining of the damage done by the overflow.

Witness was cross-examined at length as to certain correspondence.

Harold Edward Gill, son of the defendant, said he was staying at Muizenberg from August, 1900, to the end of the year. It was an exception to find an overflow from the tank. About November, 1900, witness made a furrow from the tank to take the overflow, but it took him an hour to get the water a distance of 8 or 10 feet. The overflow was not great then.

Thomas T. Watson, Government land surveyor, said that on the 30th November he inspected the properties in question. Witness would expect water to ooze from the excavation in winter, and a house built there would, he thought, be damp. The overflow from the tank was hardly likely to get to Wood's place, as the trend of the country was in a different direction.

Wm. Henry Legg, M.I.C.E., said he visited the neighbourhood on the 9th February, when there was practically no overflow. Witness had paid subsequent visits to the place, and had never seen moisture at the excavations, except at the corner. He had seen a dropping from the tub. Built as it was, Mr. Wood's place must be damp.

Cross-examined: Witness had not been on Mr. Wood's property.

This concluded the evidence, and counsel were then heard in argument.

In giving judgment, the Acting Chief Justice, after briefly reviewing the evidence, said that it was greatly to be regretted that the defendant had not gone to the small expense in placing this ball-cock, as by so doing he would have obviated legal proceedings and a great deal of expense. That this house had been damaged by damp had been clearly proved, and he thought the estimate of damage was a reasonable one. The question was whether that damage was caused by the overflow of water from the defendant's tank, or by the natural underground drainage of water which came down that mountain. He (the Acting Chief Justice) had some difficulty, in view of Mr. Hansen's evidence, in deciding for the defendant. Mr. Hansen had said that since the excavation the dampness had ceased, and this was certainly singular. As far as the evidence was

concerned, however, the Court could not hold that the damage to the plaintiff had been suffered by reason of an overflow from the defendant's tank, and absolution from the instance would be given, with costs. The costs of the witnesses Kilgour, Legg, Price, and Steward had not been of assistance to the Court in determining the case, and the costs of the application for the interdict would be costs in the cause.

[Plaintiff's Attorneys, E. J. Wood; Defendant's Attorneys, Messrs Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

Ex parte MOIR. } 1901.
Mar. 6th.

Mr. Schreiner, K.C., as a matter of urgency, applied for the attachment of the person and certain property of George E. Brewster, the said property having been unlawfully removed on January 25 from Kimberley. Brewster was insolvent, and it was said that the property had been removed to Rondebosch with intent to defraud his creditors. It was supposed that Brewster was now in Cape Town.

Several affidavits were read in support of the application. Counsel asked for the attachment of Brewster's person, on the ground that he had fled the jurisdiction (i.e., that of the High Court).

An order was granted for the attachment of the goods, but the Court refused to order the attachment of Brewster's person.

HAHNE v. JOSEPH. } 1901.
Mar. 7th.

Mr. Schreiner, K.C., applied on behalf of Joseph for a postponement of the jury trial set down for the next day, on the ground of the defendant's illness. There was evidence that the defendant was seriously ill with high fever.

Sir Henry Juta, K.C., opposed the application, unless the defendant paid the costs.

The Court ordered the case to stand over till the 27th March, the question of costs to stand over till the trial.

LOGAN v. COLONIAL GOVERNMENT. } 1901.
Mar. 8th.
" 11th.
" 13th.
May 6th.

Quitrent land—Expropriation for railway purposes—Acts 19 of 1874, 9 of 1858 and 26 of 1882. *The Colonial Government have the right to make and repair railways and to raise materials for that purpose on quitrent land, coming under the provisions of Sir John Cradock's proclamation; nor are they bound to pay any compensation to such quitrent tenants for materials so taken. By Act 19 of 1874, Government have the same rights as were given by Act 9 of 1858 to the Road Commissioners with regard to the expropriation of land for general railway purposes, but when they expropriate for these general purposes compensation must in the absence of any special reservation in the grant of such land, be paid: whether the land be quitrent or freehold. How far the Government are entitled to expropriate for additional railway purposes, or for objects connected therewith, cannot be defined in general terms, but each case must be judged on its own merits. If the Government convey water across land by means of pipes the owner of such land is entitled to compensation (Act 26 of 1882, section 7).*

This was an action for a declaration of rights.

The plaintiff's declaration was as follows:

1. The plaintiff is the registered owner of certain land being the farm granted in 1838, and known as "De Draai," alias "Kruispad," and situated at Touw's River. The defendant is the Commissioner of Public Works of this Colony, and as such represents the Colonial Government, and is the proper party to be sued in this action.

2. In the year 1885 one C. du Plessis was the registered owner of the said farm, and in or about the month of January, 1885, the Colonial Government expropriated, with the consent of the said Du Plessis, a certain portion of the said farm, for railway purposes, according to a certain plan, which said consent and plan were and are duly registered in the Deeds Registry Office of the Cape Colony. Copy of the said plan is herewith attached, and shows the land expropriated coloured green.

3. There were at the date of the said sale and transfer to the plaintiff, and there are now, several buildings with grounds and gardens attached thereto, situated upon the said land and outside the portion expropriated as aforesaid. Immediately after the said sale the Colonial Government wrongfully and unlawfully trespassed upon the said farm and took possession of the buildings, grounds, and gardens, and has been in the use and occupation thereof since the said date, and is still in occupation thereof, all of which it has done without the consent and against the will of the said plaintiff, but the defendant, though requested so to do, has refused and still refuses to evacuate and give up possession of the said buildings, grounds, and gardens, and to pay any sum for the use and occupation of the same.

4. The said Colonial Government has further, since the date of the said sale, at various times, wrongfully and unlawfully trespassed upon the said farm to the extent of about 200 acres, and has taken possession of part thereof, and has wrongfully and unlawfully erected and constructed upon portion thereof a school, a church, a recreation room, other buildings, and several tennis courts, and has made several gardens thereon. The defendant still holds and retains possession of the same, and has had and still has the use and occupation thereof, but, though requested to do so, he refuses to evacuate and give up possession thereof and to pay the plaintiff any sum for the said use and occupation.

5. The defendant claims to be entitled to enter upon and retain possession of the said land, buildings, tennis courts, and gardens as having expropriated the land on which they are situated for railway purposes in the year 1885, which the plaintiff denies.

6. The portion expropriated in 1885 for railway purposes, and marked green on the plan attached, is for the greater extent still vacant and unused, and the plaintiff contends that, until this said portion is used and occupied for railway purposes, the defendant

or the Colonial Government cannot expropriate or claim to expropriate further land belonging to the plaintiff.

7. The further land claimed to be expropriated by the defendant was and is to a great extent used for purposes not being railway purposes, viz., gardens, church, school, recreation room, tennis courts, and the like, and the remaining portion thereof was and is not used or required to be used for any purpose whatever by the defendant.

8. In or about the year 1897 the Colonial Government wrongfully and unlawfully further trespassed on the said farm, and laid pipes under the ground thereof. The defendant claims the right to lay the same by virtue of the terms of Act No. 6 of 1882, and has tendered the plaintiff the sum of £2. The plaintiff denies the right of the defendant to lay the said pipes as claimed, and says that the sum of £2 is wholly inadequate, and claims the sum of £500.

9. By reason of the premises the plaintiff has been deprived of the use and occupation of the said land and buildings and constructions thereon, and has suffered damage to the extent of £7,000.

The plaintiff claims an order:

(a) Declaring that so long as the land expropriated in 1885 remains unused for railway purposes the defendant is not entitled to expropriate any land belonging to the plaintiff;

(b) Declaring that the portion of the land expropriated in 1885 remains unused for railway purposes;

(c) Declaring that the land claimed to be expropriated since 1885 was and is not required or used for railway purposes;

(d) That the portion occupied by the said buildings, school, recreation room, tennis courts, and gardens, and the like were and are not used for railway purposes, and that the portions of land claimed to be expropriated, but not actually used by the defendant, are not used and required for railway purposes;

(e) Declaring generally that the defendant evacuate and give up possession of all buildings, erections, constructions, and land so declared not to be used or required for railway purposes;

(f) That the defendant pay the plaintiff the sum of £7,000 as and for damages and loss sustained by him, and for the use and occupation by the defendant;

(g) That the defendant pay the plaintiff the sum of £500 for laying the said pipes on his farm;

(h) Alternative relief;

(i) Costs of suit.

To this defendant pleaded as follows:

1 The defendant admits the allegations in paragraph 1 of the declaration, and says that the tenure of the said farm is quitrent, and the title is subject to the ordinary conditions affecting land held by such tenure.

2. He does not admit that the plan annexed to the declaration is a true or correct copy of the plan registered in the Deeds Registry Office of the Colony, from which it differs materially in various respects, and it does not indicate correctly the extent of land taken and expropriated by the Colonial Government at various times before 1885 from the said Du Plessis, to whom subsequently in 1885 the Colonial Government paid the sum of £350 for the said land which, besides being devoted to railway purposes, had in part been used for the building of an hotel at or near the Touw's River Railway-station.

3. At the date of the purchase of the remainder of the said farm by the plaintiff, i.e. or about the month of December, 1896, there were and there still are in the possession of the Colonial Government several buildings used for railway purposes with their appurtenant grounds and gardens, which were not situated upon the portions shown on the said registered plan, but before the said sale the Colonial Government gave notice of expropriation for railway purposes under the statute law of this colony of a further portion of the said farm shown upon a plan, which included with other land the said building with appurtenant grounds and gardens in so far as the same were not situated upon the land shown as expropriated on the said registered plan, and the defendant refuses to evacuate or give up possession of the said buildings with appurtenant grounds and gardens. The said notice was in fact read at the sale by public auction of the remainder of the said farm.

4. The Colonial Government pursuant to the notice aforesaid further took possession for railway purposes of other land, part of the said farm, and has from time to time taken and used such unimproved land of the said farm as was required by it for such purposes, but the land so taken since the purchase of the remainder of the said farm by the plaintiff does not extend to 200 acres, as by him alleged, nor did the Colonial Government wrongfully and unlawfully, as is alleged, erect and construct a church, a recreation room, and several tennis courts upon any portion of the said farm bought

by the plaintiff in December, 1896, which were all erected and constructed before the sale to the plaintiff upon land theretofore expropriated and paid for.

5. The defendant claims to be entitled to retain possession of such unimproved land as is required by the plaintiff or his predecessors in title for railway purposes, including the buildings with appurtenant grounds and gardens mentioned in paragraph 3 hereof, the church recreation room and several tennis courts, mentioned in paragraph 4 hereof, and including also certain buildings and structures erected for railway purposes since the sale of the remainder of the said farm as aforesaid upon parts of the land referred to in the aforesaid notice mentioned in paragraph 4 hereof.

6. The defendant annexes hereunto (marked A) a plan indicating correctly:

(a) The land acquired in 1885 as aforesaid;

(b) The land to which the notice mentioned in paragraph 4 referred;

(c) The uses to which the land acquired or taken for railway purposes is put.

(d) The portion (b) of which it is possible to return to the plaintiff as being land which the Colonial Government can manage so to return as being not indispensable for railway purposes.

And the defendant begs to refer this Honourable Court to the said plan and its details as correctly indicating the facts therein depicted and set forth.

7. The Colonial Government is willing to restore to the plaintiff that portion of the land of the said farm which was in its possession for railway purposes at the time of action brought, but which is not included in the land acquired as aforesaid before the plaintiff bought the said farm, and which is not included in the land shown on the said plan as indispensable for railway purposes, and hereby tenders to the plaintiff possession of the said portion of the said farm so indicated together with the sum of £100 in settlement of any claim of the plaintiff for damages.

8. As to paragraph 8, the defendant says that the pipes laid by the Colonial Government as therein referred to were laid without trespass and with the knowledge of the plaintiff, but he admits that the plaintiff has not agreed to accept the sum of £2 by way of legal compensation, as to which the defendant is willing to increase the amount tendered to £20.

9. The defendant tenders to pay the plaintiff's taxed costs to this date.

10. Save as is admitted above, the defendant denies all and singular the allegations in paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the declaration.

The replication was as follows:

1. Save for admissions, plaintiff denies the allegations in paragraphs 1, 2, 3, 4, 5, and 6 of the defendant's plea.

2. As to paragraphs 7 and 8 of the plea, plaintiff denies that the remainder of the land claimed by him was, or is required for railway purposes. He denies the other allegations of fact in the said paragraphs, and says that the sums of £100 and £20 respectively tendered by defendant are wholly insufficient.

The facts appear from the judgment.

Sir Henry Juta, K.C. (with him Mr. Close), for the plaintiff cited in argument, section 4 of Cradock's proclamation, section 10 of the Road Act 9 of 1858, section 3 of Act 19 of 1874. *Slabbert v. Bell* (4 Searle, 3), *Stellenbosch Divisional Council v. Myburgh* (5 Juta, 8), *Borer v. Colonial Government*, 13 Juta, 158, section 4 of Act 19 of 1874.

Mr. Schreiner, K.C. (with him Mr. Ward), referred to Act 9 of 1858, Act 19 of 1874, section 4 of Act 19 of 1861, *Slabbert v. Bell* (4 Searle, 3), *Davison v. Colonial Government* (7 Sheil, 284), *McDonald v. Engineer to Midland Railway* (7 Juta, 290), *Grimbeck v. Colonial Government* (10 Sheil, 268), *Colonial Government v. Gertenbach's Executor*. (14 S.C.R., 51), *Gillet v. Colonial Government* (14 S.C.R., 185), *Landmark v. Van der Walt* (3 Juta, 300), *Stockton and Darlington Co. v. Brown* (9 H.L., 246), *Lewis v. Westonsuper-Mare* (58, L.J., Ch. 39), *Betts v. Great Eastern Railway Co.* (43 L.J., Exch. 4) *Kemp v. South Eastern Railway Co.* (41 L.J., Chancery 404).

Cur. ad vult.

Postea (May 5).

Buchanan, A.C.J.: The farm De Draai, in the district of Worcester, which included a former loan place called Kruispad, was granted by Government in 1838 upon perpetual quitrent title to one Pienaar. After passing through several hands, the farm was transferred to Du Plessis in 1882. In 1885 Du Plessis agreed with the Government for the expropriation, for railway purposes, of about 44 acres, for which he was paid the sum of £350. On the ground so expropriated the Government placed the railway, and built the station now known as Touw's River, and also erected an hotel and other buildings. The Railway Department did

not confine its operations to the land expropriated, but encroached on the adjoining land, on which, among other things, they placed a reservoir and established a native location. Du Plessis died, and in December, 1896, the farm was sold by public auction by his executors. At the sale public notice was given by the Chief Railway Engineer that the department required a further extent of land, and a plan was served on the executors showing a block of 200 acres in all, including the 44 acres previously obtained from Du Plessis. The notice also stated that the Railway Department were prepared to treat for the purchase of this land, provided that the owner was entitled to compensation. With knowledge of this notice, the plaintiff bought the property for £6,700, and forthwith began negotiations with the Government for the expropriation of the block required. Offers were made to compensate plaintiff by the exchange of other lands, and questions as to the supply to plaintiff of surplus water were discussed; but ultimately, after interviews and correspondence lasting over several years, the Railway Department maintained the position that, as the farm was held on quitrent tenure, the plaintiff had no legal claim for compensation on the expropriation of the land in question. Hence this action. In addition to the question of compensation, there was also a dispute as to the amount to be paid by Government for laying pipes and leading water across the farm from an adjoining property to the station. The claim on this head is quite apart from the main issue, and will be dealt with separately. The pleadings in this case are somewhat involved, the declaration being more in the nature of an action for ejectment, though praying certain declarations of rights and payment of £7,000 damages in respect of the land taken and used by the Railway Department. The defendants, in their plea, tender to return 110 acres of the land taken by them as not being indispensable for present wants, and to pay £100 to cover any damage the plaintiff might have sustained by being deprived of the use thereof. But as the department expect hereafter to require all the land, and need part at least at once, and as the plaintiff is quite willing to the expropriation going through provided compensation be paid, the parties have consented, without formal amendment of the pleadings, that the issue be now determined whether or not compensation is payable in respect of the expropriation of this land for the purposes for

which it is required. To ascertain the rights of the parties it will in the first place be necessary to refer to the original grant of the farm. This grant contains a provision that the land should be liable without compensation to the proprietor to have any road made over it for the public good by order of the Government. Nothing turns on this reservation, as it is not now a question of making any road over the farm. But the deed also contains the clause usually inserted in quitrent grants, rendering it subject "to all such duties and regulations as are already or shall in future be established respecting lands granted under similar tenure." The decision in *De Villiers v. Cape Divisional Council* (Buch., S.C. Rep., 1875, p. 50)—a case which went on appeal to the Privy Council (see Buch. S.C. Rep., 1876, p. 105), by which tribunal the judgment of De Villiers, C.J., was supported against the view of the majority of the Court—established that these words in a quitrent grant rendered it subject to the conditions contained in Sir John Cradock's proclamation of August 6, 1813, promulgated with the object of converting loan places into quitrent. The report of that case contains an interesting historical summary of the changes of tenure leading up to the proclamation itself, which it is not now necessary to follow. Beginning with that proclamation, it will be sufficient to refer to two sections. The fourth section enacted: "Government reserves no other rights but those on mines of precious stones, gold, or silver, *as also the right of making and repairing public roads, and raising materials for that purpose on the premises*; other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor." The 11th section provides that "this perpetual quitrent shall further not be liable to any other burthens but those to which all freehold lands are already subject, or which may hereafter be further prescribed." The words of the fourth section above italicised form the foundation upon which the Government build their case, counsel, however, further contending on their behalf that the obligation upon owners of quitrent lands to surrender without compensation land required for making and repairing imposed by the proclamation was enlarged by subsequent legislation to quitrent lands required for any railway purpose. It has also been contended that once land has been taken for railway purposes it may be used for any allied object or purpose. The uses to which land expropriated may afterwards

be put is not a question of great moment where there has been an out and out purchase and sale of the property, and its value duly paid for it; but it is of greater consequence where land is sought to be expropriated without payment. It has been repeatedly laid down that a *mala fide* expropriation for such allied objects under colour of the necessities of railway construction would not be permitted. However, in this case it is not necessary to test the *bona fides* of the Government. Reverting to Sir John Cradock's proclamation, as far as the right of Government thereunder is concerned to make and repair roads and to raise materials on quitrent land without payment of any compensation, there is now no question. And from the facts of the case of *De Villiers v. Cape Divisional Council*, as well as from the judgments given in the earlier case of *Slabber v. Bell* (4 Searle, 3), it may be assumed that the right of raising material on quitrent lands is not limited by the requirements of only so much of the road as passes over the land itself. Coming to later legislation, we find that the powers of Government were vested successively in Road Commissioners and in Divisional Councils. There were several Ordinances and Acts which dealt with the management of roads by Commissioners. These enactments were consolidated into Act No. 9, 1858, further back than which it is unnecessary to refer; and it is the 11th section of this Act upon which counsel have mainly relied. Before discussing the terms of that Act it may be noticed that some difficulty is created in consequence of its unreserved repeal by Act No. 40, 1889, the Divisional Councils' Consolidation Act. The 146th and 147th sections of this latter Act in effect invest Divisional Councils, as far as public roads are concerned, only with the powers reserved under Sir John Cradock's proclamation. It has been assumed in argument that the repeal of Act No. 9, 1858, has not affected the powers given for the construction of railways in Act No. 19, 1874. It is singular that in the same session in which Act No. 9, 1858, was repealed, the powers conferred by that Act on Road Commissioners were in express terms bestowed on the Metropolitan and Suburban Railway Company (Act No. 23, 1889); and in subsequent sessions on the Government in regard to extensions of certain public lines, by incorporating the sections of Act 19, 1874, in the subsequent Acts No. 10, 1890, and No. 17, 1891. This favours the view that the

Legislature intend the powers of the Road Act still to be continued in regard to railways. It is convenient here to quote section 3 of Act No. 19, 1874, to show how the statutory provision as to roads were made to apply to railways. This section enacts that "all and singular the powers and authorities which are by the Act No. 9, 1858, bestowed upon the Commissioners of Roads in regard to the taking or acquiring lands and materials necessary for the making and repairing of any such main road as in the said Act mentioned, *or of any works in connection therewith*, are hereby bestowed upon the Governor, or any person charged by him with the making or maintaining of the railways aforesaid, precisely as if the said powers and authorities were *mutatis mutandis* herein again set forth, and as if the said railways were public roads." The case of *Slabber v. Bell* (4 Searle, 3), has in argument been referred to as showing the strict construction which ought to be placed on the statutory powers conferred in aid of railway construction, but the fact seems to have been overlooked that the decision in that case was governed by section 10 of Act No. 20, 1857, which did not contain the words "of any works in connection therewith," such as are included in Act No. 19, 1874. It was in construing this more limited section that the Court held that a private railway company were not, under the right to make or repair roads, vested with authority to enter on the lands of a person holding on quitrent tenure, and to quarry stone for the purpose of building a railway station. We come now to a consideration of the several clauses of Act No. 9, 1858, which bear upon the issue in this case. Section 10 of that Act deals with Crown lands, and confers power on the Commissioners to enter and take lands belonging to Government required for the purpose of any main road, and for the erection of toll-houses, toll-bars, residences for workmen, or for any other purpose relating to the execution of the Act, and to dig, get, and carry away any stone, clay, or other materials required or serviceable for making or repairing any main road. The 11th section, upon which the Railway Department relies in this case, is as follows: "For the purpose of making any such main road, and of providing any such toll-houses and residences as aforesaid, and generally for any of the objects of this Act, the aforesaid Commissioners are hereby invested, for the purpose of so doing, with all and singular, the legal rights, if any, belonging to the Government of this

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colony, in respect to the taking of any land, and the raising and carrying away materials for making and repairing public roads, whether such rights have been preserved to the said Government by the proclamation of His Excellency Sir John Francis Cradock, bearing date the 6th August, 1813, permitting the conversion of lands on loan into places on perpetual quitrent, or have been created by express stipulation of condition in any grant of freehold property, or exist in any other way or manner whatsoever." The next section protects lands which have been improved from being taken without compensation, and this protection was expressly recognised as extending to quitrent lands in the case of *De Villiers v. Cape Divisional Council*, already cited. This 12th section also authorises the Commissioners to treat for the purchase or hire of land or materials required by them with any person who may not be bound by law to allow the taking of his land without compensation, and failing agreement, provides for arbitration. Admitting that this Act gives a right to appropriate lands for purposes additional to those mentioned in Sir John Cradock's proclamation, the important, and in this case the crucial, question remains, whether it places any additional liability upon owners of quitrent land, which it is not sought to allege falls upon freehold lands, and which compels such owners to suffer expropriation for such additional purposes without compensation? Counsel contended that this question had been already decided in favour of the Government in the case of *Landmark v. Van der Walt* (3 Juta, 300). The report of the case, however, fails to support any such contention. There, Van der Walt was the owner of quitrent land, a portion of which he leased to the plaintiff Landmark for a store, contracting to protect him from competition on the farm. Government afterwards expropriated a part of the property for railway purposes, and though it was quitrent land, paid compensation therefor. The Government allowed a rival store to be set up on the land expropriated by them, whereupon Landmark brought his action against Van der Walt, but unsuccessfully. In his judgment the learned Chief Justice referred very briefly to the 11th and 12th sections of this Act, No. 9, 1858, to show that whether the expropriation had taken place under the one section or the other, it was equally clear that Landmark could not recover. The question now in issue was in no way involved in that, for in fact the Government had paid com-

pensation for the land. It is not questioned that under section 11 quitrent land could be expropriated for certain limited purposes without compensation, and to this fact the casual allusion of his lordship may be taken to refer; but there is nothing in his remarks to justify the contention that quitrent land could be so taken for any purpose. Reading this 11th section carefully, it will be noticed first, that it is not confined to quitrent lands, and secondly, that it vests in the Road Commissioners only such rights, if any, as were actually belonging to Government. No new rights to take without compensation are created by the section. As to quitrent lands, the section expressly refers to the terms of Sir John Cradock's proclamation, and as to freehold property, it refers to any right which might have been created by express stipulation of the grant. As to both tenures, it transfers generally any right which may exist in any other way or manner whatever. No special right has been shown to exist in regard to this specific property, either by reservation in the grant or otherwise; and no statute can be quoted giving any general right. The Government, then, have the right without payment of compensation to make and repair railways and to raise material for that purpose, on quitrent land coming under the provisions of Sir John Cradock's proclamation. By Act No. 19, 1874, they have the same rights as were formerly given to the Road Commissioners by Act No. 9, 1838, to expropriate in respect of other works which may be designated generally as coming under the definition of railway purposes, but when expropriation takes place for these additional purposes compensation must, in the absence of any special reservation in the grant, be paid whether the land expropriated be quitrent or freehold. How far the Government are entitled to expropriate for additional railway purposes or for objects allied thereto, it is difficult to define. Each case must be dealt with on its own merits. No objection is raised to this expropriation on the ground of the proposed use, so that the question does not in this case require to be determined. The Railway Department have themselves admitted in respect of this very property that they could not expropriate without payment for any object, as they compensated Du Plessis for the land originally taken when the line was constructed. As the General Manager stated, it was considered only fair to do so, as it was intended, among other objects, to build an hotel for the convenience

of travellers by rail. It is common cause that the additional land now in question is not needed specifically for the making or repairing of the railway. This land lies mostly outside the land previously expropriated, and only in places does it abut on the line of railway. This additional land is needed for extending workmen's barracks, for erecting cottages and residences for guards, for locomotive staff, for clerks, for engineers, and others, for reservoir and filter beds, and a caretaker's room, for locomotive sheds and maintenance workshops, for a native location and for school buildings, and, indeed, some of the land has been turned into a plantation, and another portion made into a brickfield for the making of bricks with which to erect new buildings. These may be objects allied to railway purposes, and very desirable in themselves, but the owner is not bound in law to surrender his land for these purposes, even though it is held on quitrent tenure, without being compensated for the property of which he is being dispossessed. In giving judgment for the plaintiff on this part of his claim, it is not necessary to discuss the question of damages, as they would be covered by the compensation which will be awarded by the arbitrators, as the Government was entitled by the proviso to the 3rd section of Act No. 19, 1874, to enter on the land at once, leaving the question of compensation to be afterwards settled. The plaintiff's second claim for compensation can be dealt with shortly. The Government having acquired certain water at a distance from the station, conveyed it in pipes, with the consent of the plaintiff, under the Rights of Passage of Water Act, 1882, across the farms of one Hugo and of the plaintiff. They admit that the plaintiff is entitled to compensation for allowing of this transit, and at first tendered £2, which in their plea they increased to £20. This the plaintiff says is altogether insufficient, and he claims the sum of £500. The question of the amount might have been referred to arbitration under the Act, but both parties desire the Court to fix the amount to be paid, and evidence has been led to enable an award being made. This right of passage is claimed in perpetuity. The distance for which the pipes have been laid on plaintiff's farm is between two and three miles, and constant access to the tracks will be required for all the distance. The pipes ran over Hugo's farm for about the same distance, and he made a claim for £300 compensation, which claim was, by agreement,

No order was made.

NATIONAL BANK AND OTHERS V. LEON.

Mr. Schreiner, K.C., applied for an extension of time in this matter, saying the parties were in consultation.

Granted.

PENTELow V. MEYER.

Mr. Rubie applied for a decree of civil imprisonment for the non-payment of two sums, viz., £46 1s 3d. and £8 1s. 9d.

Granted.

HUGO V. HUMPHRIES.

Mr. De Waal moved for provisional sentence on a mortgage bond for £600 with interest, and for certain property hypothe- cated to be declared executable.

Granted.

ISAACS V. RICHARDS.

Mr. Howel Jones applied for provisional sentence on a mortgage bond.

Mr. Benjamin consented, and the order was granted.

RIEBEEK QUARRIES V. STEWARD MILLS.

Mr. Buchanan applied for a decree of civil imprisonment in respect to a judgment for £34 for stone supplied, and £32 costs.

Defendant appeared and said he could not satisfy all his creditors, whom he was paying by instalments. There was a meeting of creditors in a few days. He did not want to surrender.

The Acting Chief Justice said that a decree of civil imprisonment against him would be a strong reason for surrendering.

A decree was granted as asked, being suspended for one week.

PRETORIUS V. JORDAAN.

Mr. Buchanan applied for provisional sentence on a Magistrate's Court judgment for £10 19s., and £1 12s. costs, and for certain property to be declared executable. This property was now in the hands of the Sheriff.

An order was granted in the terms of the summons.

KEAST V. ZWAIGENHAFT.

Mr. Benjamin moved for a decree of civil imprisonment in respect to a debt of £27, taxed costs in an action for ejectment, and damages in the nature of rent.

Defendant said he was unable to pay, and produced a written statement showing his means. He offered to pay £1 per month.

An order was made for payment of £1 a month, with leave to apply to increase that amount.

VOERASAMY V. NICHOLS.

On the motion of Mr. Benjamin, provi- sional sentence was given for the sum of £1,162 11s., the purchase price of certain property. The amount was due on a promis- sory note put in.

BUCHBINDER V. WOOLF. { 1901.
Mar. 12th.

Lis alibi pendens.

B. sued W. for provisional sen- tence on a bond. To the said summons W. pleaded lis pendens in a foreign Court.

Held, that as the bond had been entered into within the Colony, and the property mortgaged was also situate here, Lis pendens in a foreign country was not a good defence. Provisional sentence was granted as prayed with costs, and the property declared exe- cutable.

This was an application for provisional sentence on a mortgage bond for £330.

The summons called upon the defendant, Martin W. E. Woolf, to pay to Justin Buch- binder, of Cape Town, the plaintiff, £330 by virtue of a certain mortgage bond dated January 31, 1900, passed by C. H. van Zyl, as agent of the said defendant, in favour of J. Buchbinder, with interest at 6 per cent. per annum from January 1, 1901, which said bond had become due and payable in conse- quence of non-payment of interest, and by reason of its having been only called up on three months' notice.

The affidavit of defendant set forth that previous to summons certain correspondence passed between the attorneys of the parties, to which he moved leave to refer. The letters were annexed and marked A, B, C, D, E, F, G, H, and J. The sum and sub- stance of this correspondence was as fol- lows:

(a) Defendant's attorneys said that plaintiff had instituted certain irregular proceedings against their client in Germany in respect

of the said bond, and that while these proceedings were still pending they had called up this bond in the Colony. That their client was prepared to pay the bond with interest thereon on being assured that the said proceedings had been withdrawn, and that his costs in connection therewith had been paid. Defendant refused to pay interest on the said bond after the date (January 18, 1901) of this tender.

(b) Plaintiff's attorneys replied, denying the irregularity of the proceedings taken in Germany, repudiating any claim for damages in connection therewith, and offering to pay all costs to which he might be legally liable. They further offered a refund should it transpire that defendant had paid his debt twice over.

(c) Defendant's attorneys said that as the case only came before the Court in Germany on January 14 (they wrote on January 25), it was not possible for their client to know the result of that judgment, and that plaintiff must be aware from communications with Messrs. Findlay and Tait that funds lay in their hands at his disposal on his complying with the terms set forth in letter A.

(d) Plaintiff's attorneys state that defendant has not paid in Germany; that all proceedings there instituted against him had been withdrawn, and that they now tendered the cancelled bond against payment of capital with interest to date of settlement. They also offered defendant's taxed costs incurred in Germany.

(e) Defendant's attorneys replied that from a cablegram received by their client from Germany it appeared that the proceedings there instituted by plaintiff had not been withdrawn, and asked whether plaintiff was prepared to deliver up the bond, duly endorsed for cancellation, to Messrs. Findlay and Tait upon receiving a written guarantee from them that they would hold the amount of the bond, plus interest, pending instructions of defendant's attorneys to pay plaintiff's attorneys the same upon their client furnishing certain proof that the entire proceedings instituted in Germany had been withdrawn, and defendant's costs paid.

(f) Plaintiff's attorneys again said that all proceedings against defendant instituted in Germany had been withdrawn, and that plaintiff had offered to pay costs thereof.

(g) Defendant's attorneys dispute the accuracy as to the withdrawal of proceedings, and insist on some guarantee as to payment of costs beyond the personal security of plaintiff.

(h) Plaintiff's attorneys cite a letter received from Hamburg to show that proceedings there against defendant had been finally abandoned, and that plaintiff had given instructions to pay taxed costs of such proceedings. They renew the offer to hand over the cancelled mortgage bond on payment of capital, with interest to date. They further state that they had been informed that defendant was about to leave for Europe, and intimated that consequently they would issue summons on even date unless the matter were settled in the course of the day.

(j) Defendant's attorneys ask for some satisfactory undertaking that their client will be held indemnified against proceedings in Germany, and suggest that if such indemnity cannot be furnished a portion of the capital due on the bond should be left in the hands of Messrs. Findlay and Tait pending proof that the action in Germany had been withdrawn and costs therein paid. Defendant's affidavit proceeds to state that he does not dispute the debt under the bond, but tenders to pay it with interest under the conditions set forth in the above letters. That he had been put to great inconvenience and expense by the proceedings in Germany, which were instituted before the capital and interest were due, the bond not having then been called up. That plaintiff himself denied that these proceedings had been instituted with his knowledge and authority, though after he had called up the bond in October last he fully ratified them. Defendant said he was not aware that the proceedings in Germany had been withdrawn or the costs paid. He says that plaintiff is well aware that he has the funds necessary to meet the bond with interest, and that he has raised money for the purpose. He further offers to pay the amount into court.

The affidavit of Justin Buchbinder, the plaintiff, stated that he had a business in Cape Town, and was largely interested in cyanide and mining materials in Johannesburg. Defendant was in his employ about seven years, and left under unsatisfactory circumstances, his cash being short. Deponent protected Woolf against his partners, Arndt and Cohn, who were disposed to prosecute, and agreed to accept the mortgage bonds which form the subject of the present action. While visiting Germany early in 1900, defendant promised Arndt and Cohn to settle this indebtedness at an early date in Hamburg, and it was in consequence of his failure to do this that proceedings were taken against him there. Deponent

was not a party to those proceedings, and when informed of them objected. In the course of business deponent sent a power of attorney to Arndt and Cohn, giving them very wide powers, and they used this document for the purpose of instituting proceedings anew, as the original action had failed owing to want of proper authority from deponent. On defendant's return to Cape Town he expressed himself willing to pay the bond if the proceedings in Germany were stopped, and the costs there were paid. Deponent agreed to this, and immediately cabled to Arndt and Cohn to that effect. In due course he received a reply stating that his instructions were being acted upon. This was followed by the letter marked H. A further cable was sent to Arndt and Cohn inquiring whether the action had been withdrawn and the costs paid, in reply to which they wrote specifically that defendant's father prior to February 15 had offered to despatch a cable to defendant stating that the claim had been withdrawn and the costs arranged for if Arndt and Cohn would bear the expenses thereof. Deponent submitted that he had done all that was required of him when he withdrew the action and agreed to pay the costs in Germany. The summons in the present case was issued before the letter marked H reached deponent's attorneys.

Mr. Searle, K.C., for defendant: The point is whether, in view of the proceedings still pending in Germany, the Court will give provisional sentence here. Since October fresh proceedings have been commenced there, and are still pending. The plea of *lis alibi pendens* can be urged if costs of proceedings have not been paid. We have no proof that proceedings are not still being continued at Hamburg. The costs must actually be paid. A mere tender or guarantee is not sufficient. Before the plaintiff can commence a suit here he must stop proceedings elsewhere, and pay the costs.

Sir H. Juta, K.C., for plaintiff, was not called upon.

Buchanan, A.C.J.: The bond was entered into in this colony. The mortgaged property is within the Colony. In the present case, therefore, we need not discuss whether *lis pendens* in a foreign country is a good defence. Provisional sentence must be granted with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. Walker and Jacobsohn.]

MILLS V. FREDERIK.

Mr. Rowson applied for a provisional sentence on a mortgage bond for £100, with interest, for certain property to be declared executable, and for provisional sentence on a promissory note for £20.

Granted.

ILLIQUID ROLL.

Judgment was given under Rule 329b in the following cases:

SMITH V. EVANS.

For £67 12s. 4d., goods sold, interest, and costs. Mr. Rubie applied.

SCOTT V. CROWN FRUIT COMPANY.

For £129 13s. 11d., goods sold, interest, and costs of suit. Mr. De Villiers applied.

JOUBERT V. BOOYSEN.

For £100 6s. 8d., rent due, interest, and costs. Mr. Buchanan applied.

JUTA V. DE VILLIERS.

For £38 8s. 3d., interest and costs. Mr. Alexander applied.

MINNAAR V. AGINVODREN.

For £800, less £100 paid, price of property purchased, with interest and costs. Mr. Currey applied.

BUDGE V. TIMBRELL.

For £95, money lent, interest, and costs. Mr. Rubie applied.

CURREY V. REELER.

For £44 18s. 3d., premiums due on a policy of insurance. Mr. De Villiers applied.

BAMFORD V. BROWN.

For £25, on lost promissory note. Mr. Benjamin applied.

REHABILITATIONS.

On the motion of counsel named, the following persons were rehabilitated, viz.: Stephanus Abraham Cilliers; Mr. McGregor moved. Veruma Petronella de Villiers; Mr. Currey moved. Peter Denysen Myburgh; Mr. Benjamin moved. Ferdinand

Ludwig F. W. Borchert; Mr. Benjamin moved. Lionel Christian Edward de la Rue; Mr. De Wahl moved.

IN THE ESTATE OF THE LATE ALETTA J. SWART.

Mr. De Waal moved for an order authorising the minor daughter of the deceased to execute certain documents concerning the division of certain property.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE WILLIAM ASPINALL.

Mr. Benjamin moved for the cancellation of a certain mortgage bond on which the amount due had been paid off.

A rule *nisi* was granted, to be published once in the "Gazette," returnable on April 12.

WILLCOCKS V. WILLCOCKS.

Mr. Buchanan applied for a decree of divorce. Counsel said the rule *nisi* had been advertised as ordered, and the respondent had not returned.

Granted.

IN THE MATTER OF THE MINORS SMALL.

Mr. Gardiner moved for leave to sue in *forma pauperis* in an action to set aside a certain transfer and for an order to stay execution of judgment in the case of Perold v. Small.

A rule was granted, returnable on the 12th April.

IN THE MATTER OF THE PETITION OF MARTHA BOLDMAN.

Mr. Nathan moved for an order authorising the Registrar of Deeds to register certain transfers, purporting to be passed by Mrs. Boldman without the assistance of her husband, who had deserted her and could not be found.

Granted.

IN THE ESTATE OF THE LATE GEORGE G. ULYATE.

Mr. Gardiner applied for leave to raise money on mortgage.

Granted in terms of the Master's report.

IN THE MATTER OF THE PETITION OF PETRUS J. VAN DER WALT.

Mr. Buchanan moved for a rule *nisi* for the cancellation of certain bond to be made absolute.

Granted.

LEGATE V. LEGATE.

Mr. Searle, K.C., applied for a decree of divorce. A rule *nisi* had been obtained, but the respondent, Annie Angelina Legate, had not returned, as called upon to do.

Granted.

HAUSSMANN V. HAUSSMANN.

Mr. Buchanan applied for a decree of divorce. Peter Charles Haussmann, the respondent, had not returned.

Granted.

IN THE MATTER OF THE PETITION OF THE DUTCH REFORMED CHURCH OF LADY GREY.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

Granted.

ROUX V. KOLLMAN.

Mr. Benjamin made application for personal attachment for contempt of Court.

Counsel said that the defendant had not complied with an order made upon him to give up possession of certain premises.

Defendant said that the premises were let prior to the order being made, and he could not get the present tenants out.

The Court were of opinion that there had been no wilful disobedience of the order, and no order for personal attachment was made. They advised the defendant to see about getting the occupants out of the premises.

IN THE ESTATE OF HENDRIK HOFFMEESTER.

Mr. Benjamin moved for an order authorising the curator of the estate to purchase certain property in the same.

Granted.

IN THE MATTER OF THE MINOR HITGE.

Mr. Gardiner applied for an order authorising the division of certain property.

Granted.

MILLS V. ESTATE MILLS.

Application was made for an order fixing a day for the continuation of the said case, already part heard.

Sir Henry Juta, K.C., appeared for the applicant, and Mr. Schreiner, K.C., for the respondent.

The case was ordered to be set down for next term.

**IN THE MATTER OF THE PETITION OF
JOHANNES CHRISTIAN LESSING AND
OTHERS.**

Mr. Solomon moved for an order authorising the Registrar of Deeds to pass transfer of certain property. The petitioners were desirous of making a division of certain property in which minors were interested.

An order was granted as prayed, the executor to pass transfer.

EDISON BELL CO. V. A. MCKENZIE.

Sir Henry Juta, K.C., applied for an order on respondent restraining him from selling or dealing in certain articles, which infringe applicants' patent rights.

Counsel said this was a similar application to others which had previously been brought before the Court by plaintiffs.

The order was granted.

EDISON BELL CO. V. GODDEN AND CO.

Sir Henry Juta, K.C., moved for an order restraining respondent company from selling or dealing in certain instruments which infringe applicants' patent rights.

Granted.

**IN THE MATTER OF THE PETITION OF
ENGELA FREDERIKA GRIMBECK.**

Mr. Schreiner, K.C., moved for the rule for the removal of a certain executor to be made absolute.

Granted.

**IN THE ESTATE OF THE LATE ELIZA
EVERY, OR GOOLD.**

Mr. Close moved that the rule *nisi* for the cancellation of a certain bond be made absolute.

Granted.

**IN THE INSOLVENT ESTATE OF GEORGE
HICKMAN BREWSTER.**

Mr. Schreiner, K.C., moved that the rule to hand over certain goods to a provisional trustee be made absolute.

Granted.

**BENJAMIN WHEELER AND ANOTHER V.
WRANGHAM.**

Sir Henry Juta, K.C., applied for the rule restraining respondent from performing certain theatrical plays, or parts of them, to be made absolute.

The original rule had not been returned, and the application was granted, subject to this being done.

**IN THE MATTER OF THE PETITION OF
CAROLINA HENDRIKSE.**

Mr. McGregor made application for an order authorising the Registrar of Deeds to register certain transfers.

Counsel read certain documents, from which it appeared that a difficulty had been caused owing to some of the parties named therein being known by other names than those by which they were referred to in the documents.

A rule *nisi* was granted, calling on all interested to show cause why certain aliases should not be inserted for the purpose of making transfer.

Re KAISER.

Sir H. Juta, K.C., moved as a matter of urgency as to some building on a party wall in Albert and Harrington streets. One Kaiser had inserted some beams in the said wall without consent of petitioner. Petitioner asked for an interdict ordering Kaiser to remove his beams. The affidavit of Mr. Lyon, a builder, was read.

The Court granted a rule *nisi*, returnable on April 12.

**IN THE ESTATE OF LATE JACOBUS H. VAN
DER MERWE.**

Mr. Benjamin presented a petition from the widow of Van der Merwe. After her husband's death she remained in possession of the estate, and afterwards married one Pepler. She had entered into a contract with the Woodstock Municipality in ignorance of her rights. There were three minor children, and she asks that £200 to be paid by the Municipality shall be spent in improving her farm. The Master had reported favourably. The Court ordered the case to stand over, notice to be given to the mortgagee.

**THE TRUSTEES IN CAPE COLONY OF
SEVENTH DAY ADVENTISTS.**

Mr. Schreiner applied on behalf of certain members of the Wessels family for leave to

transfer certain property at Claremont as trustees of the Seventh Day Adventists. The Registrar of Deeds refused to pass transfer. Four out of the nine persons named in the title deed were still trustees. The association had got deeply into debt, and it was now desirable to sell this property. There were at present seven trustees, but since May, 1900, there had been two changes. He asked for a rule nisi to be served upon the chairman and secretary of the parent association in America at Battle Creek, calling upon them to show cause why the present trustees in this country should not pass transfer. The rule to be returnable on the 31st May.

Rule granted as prayed.

THE TOWN COUNCIL OF CAPE (1901.
TOWN V. FALCONER'S TRUSTEE. (Mar. 12th.

Insolvency—Municipal rates—Trustee's liability—*De bonis propriis*
—Act 26 of 1893, section 102.

The trustee of an insolvent estate was ordered to pay de bonis propriis, the amount of a judgment for municipal rates assessed on landed property in the estate after sequestration, he having with full knowledge of the judgment distributed all the assets in the estate without making any provision for the payment of the judgment debt.

This was an application calling upon Frederick Beecher Steer in his capacity as trustee of the insolvent estate of Mary Falconer, and also individually to show cause why he should not be ordered to pay as trustee of the abovementioned estate, and failing payment by him as trustee, then *de bonis propriis*, the sum of £63 4s. 7d., being £71 8s. 7d., the amount of a judgment granted against him in the Supreme Court at the suit of applicant on November 29, 1900, and the sum of £18 16s., the taxed costs and charges in the matter, less the sum of £27 paid on account, for the reasons set forth in the affidavit hereunto annexed; or otherwise, why a writ should not issue against him in his said capacity, or individually, for the recovery of the said sums of money; or for alternative relief, and why the said Steer, in his said capacity, should not be ordered to pay the costs of the present application, and failing payment in his said capacity, then to pay such costs *de*

bonis propriis, and why a writ should not issue against him in his said capacity or individually for recovery of such costs and charges.

The affidavit of Alfred Benjamin Lawton stated:

1. That on August 15, 1900, applicants demanded of him as trustee of the insolvent estate of Mary Falconer payment of municipal rates which fell due on March 15, 1899, and March 15, 1900, in terms of section 102 of Act 26 of 1893. The said letter of demand referred to the case of *Krachmal v. Epstein* (10 Sheil, 418).

2. On August 21, 1900, applicant's attorneys received a letter from Messrs. Steer and Co., stating that there were no funds to pay rates claimed.

3. Thereafter applicant decided to claim only £71 8s. 7d., being the rate which fell due on March 15, 1900, and a letter was addressed to respondent to that effect, and drawing his attention to the fact that as he had lodged a liquidation and distribution account at the Master's Office, in which he had not brought up the Council's claim, and if the account was confirmed before the same was settled the applicants would hold him personally liable.

4. That at the date that this letter was sent deponent inspected an account which had been lodged by respondent at the Master's Office for approval. The account had not been advertised to lie for inspection, as required by law, but had merely been lodged, as is often done, in order that the Master might have an opportunity of raising any objections thereto or making queries thereon.

5. No settlement having been made, summons was issued on September 26 against respondent in his capacity as trustee aforesaid, claiming payment of the rate which fell due on March 15, 1900.

6. Respondent entered appearance to defend the said claim; plaintiff's declaration was filed on October 26, 1900, and a copy thereof duly served on respondent's attorney.

7. On November 1, 1900, respondent's attorney asked deponent for an extension of time to enable him to communicate with Dr. Impey (who had purchased the said property from the insolvent estate) in regard to the rates claimed.

8. Applicants' attorneys thereafter received from deponent a letter making the aforesaid request, and in reply thereto refused to allow the matter to stand over indefinitely.

9. Respondent was barred on November 22, and the matter was set down for judgment on November 29.

10. At the request of respondent's attorney, made before judgment, deponent was sworn to say further proceedings, provided he was satisfied that every effort was being made by respondent to recover the amount from such other persons whom the latter considered liable.

11. Respondent's attorney did not at any of the interviews referring to above matters that the liquidation and distribution account had been advertised as yet for inspection, or that the same was filed at the Master's Office for inspection, a matter as a matter of fact your deponent subsequently ascertained that the same had been advertised in the "Government Gazette" of the 11th of November, 1900, to be for inspection as required by the Insolvent Law, from 12th of November, 1900. Respondent's attorney did, however, in course of conversation at one of the interviews, lead deponent to believe that the trustee had already, that is prior to the confirmation of the account, paid out the balance for distribution to creditors.

12. Judgment was taken in this Hon. Court against respondent in his aforesaid capacity on November 29, 1900.

13. On December 9, deponent for the first time, heard that respondent had had his first and final liquidation and distribution account in the insolvent estate confirmed. Inquiries were then made, when it was ascertained that the account had been advertised to be as aforesaid at the Master's Office from November 19, 1900, and that it had been confirmed on December 6, 1900, by order of the Hon. Mr. Justice Maasdorp in Chambers.

14. That a few days subsequently one Abdul Hadien, tenant of the premises in respect of which the rates were claimed, called upon applicant's attorneys and paid £27, representing the charge for water supplied for which judgment had been obtained against respondent. That the said sum of £27 was accepted without prejudice to the right of the applicant against the respondent, and was set off against the amount of the judgment debt.

15. That thereafter on December 28, applicants' attorneys wrote to respondent's attorney claiming payment of £80 4s. 7d. in respect of the judgment debt and costs, less £27 paid on account as aforesaid, for which credit was given.

16. A reply was received stating that respondent's attorney had not had an oppor-

tunity of communicating with his principal. On January 10 applicants' attorneys again wrote pressing for an answer to their former letter, and stating their intention of applying to the Court unless they should receive payment of their demand by noon of January 13, 1901.

17. That respondent had previously disputed applicants' claim, and had made no payment for the same in the account, and that the effect of the judgment was in any event to render a fresh distribution account necessary, yet the respondent, in spite of this fact, and knowing of the judgment, improperly, and in contempt of the judgment, procured the confirmation of the account.

18. That by reason of the facts aforesaid applicants are entitled to ask for an order of this Hon. Court to pay the amount of judgment and costs aforesaid, *de bonis propriis*.

The affidavit of Frederick Beecher Steer, the acknowledged respondent, stated that:

1. The only asset in the said estate was a block of houses situate in Zonnebloom, with mortgages amounting in all to £2,000, and bearing interest at 6 per cent., and been raised.

2. That on July 10 he sold the said property to one Samuel P. Impey, and transfer to him was duly passed on September 4, 1900, he having been informed at the time of the sale that the Municipal rates were in arrears.

3. Respondent admitted the receipt and despatch of the several letters mentioned in Lawton's affidavit.

4. The applicants have never at any meeting in the said insolvent estate filed any claim for arrears rates.

5. The account and plan of distribution was duly filed by deponent on November 19, 1900, and was confirmed, as set forth in paragraph 13 of the affidavit.

6. No objection to such account was lodged by the applicants.

7. Deponent has no knowledge of the transactions between applicant and Hadien referred to in paragraph 14.

8. Applicants have issued no execution on the judgment granted against the said estate as set forth in paragraph 12 of the said affidavit.

9. Deponent denies the allegations set forth in the 17th and 18th paragraphs of the said affidavit.

The answering affidavit of A. B. Lawton stated, *inter alia*, that the rates were not paid at any meeting in the insolvent estate, because they were not due at the date of sequestration, but that they became due

on March 15, 1900, in terms of sections 97 and 102 of Act 26 of 1893. That on September 15, 1900, respondent received notice that his account was objected to, and that he would be held personally liable if the applicants' claim was not settled. That judgment against the insolvent estate was obtained on November 29, 1900, and applicant could only have moved the Court on December 12, 1900, while the trustee had his account confirmed on December 6, 1900, and that no execution was issued on the judgment, as respondent and his attorneys had stated that there were no funds, and also as it had been arranged between deponent and respondent's attorney that execution should be stayed, as alleged in paragraph 10 of deponent's former affidavit.

Mr. Schreiner, K.C., for applicants: This case is different to the case of *Krachmal v. Epstein* (10 Sheil, p. 418), in which case the rates fell due before the insolvency. If rates fall due after sequestration, they must be paid out of the estate, and the duty of seeing that they are paid falls on the trustee. *Re Dreyer's Estate* (Buch., 1868, p. 246). In this case the trustee had notice that if his account was confirmed without provision being made for the payment of these rates he would be liable *de bonis propriis*. In such a case no proof of debt is required. Section 102 of Act 26 of 1893 throws the liability for rates on the person who is legal owner of property on March 15. The trustee Steer was (as trustee) at that time the statutory owner of the property. He sold the property, and was in funds from the sale. It was gross negligence for the trustee to part with a penny until the account was confirmed.

[Buchanan, A.C.J.: He does so at his own risk.]

The trustee was undoubtedly negligent. We might have taken out a writ on the judgment.

[Buchanan, A.C.J.: How could you if, according to your argument, the rates could not be paid until the account was confirmed?]

I submit a trustee will always obey a judgment of the Court. There was no need for proof, because the debt arose after the sequestration, and the trustee was as much bound to pay these rates as he was to make any other payments necessary for the upkeep of the property. In *Krachmal's* case the Court clearly distinguished between rates due at the time of insolvency and those which fall due during the administration.

[Maasdorp, J.: Has it ever been decided that a trustee as a future owner becomes liable for past rates?]

[Buchanan, A.C.J.: The trustee as a future owner is only liable for one year's rates.]

Krachmal's case decided that a trustee ought to pay rates for the current year even out of the proceeds of mortgaged property. The rates for 1900 were the trustee's own debts. Mr. Steer never seemed to realise this. The judgment was obtainable a week before the confirmation of the plan of distribution. We might have recourse against Dr. Impey as purchaser of the property.

Mr. Searle, K.C. (with him Mr. Benjamin): In the case of *Swemmer, Trustee of Heyns, v. Webmeyer* (Buch., 1873, p. 96), the Court refused to make a trustee personally liable when a judgment had been obtained against him on motion. If the applicants want to make the trustee liable they must bring their action. *Lamb v. Pieters* (10 Sheil, p. 669) is quite in my favour; there the matter was brought before the Court by action. In this case the facts are disputed, and an action must be brought to enable the Court to go into them fully. In *Swemmer's* case a writ had been issued; here there is no writ. The applicants have mistaken their remedy. The applicants should have objected to the confirmation of the plan of distribution, sections 109 and 112 of Act 6 of 1843. The confirmation is a final sentence against all persons except creditors afterwards allowed to come in.

[Buchanan, A.C.J.: Mr. Schreiner says their having taken a judgment necessitates your satisfying it.]

The judgment makes no difference. I do not say they were bound to prove their debt, but it was their plain duty to have objected to the confirmation. In *Stewart v. Wall* (3 Juta, 243) a creditor had a clear right of preference, but he did not object to the confirmation, and the Court refused to relieve him *vigilantibus non dormientibus jura subveniunt*.

[Maasdorp, J.: You say it was the duty of the creditor to object to the confirmation, but what is the trustee's duty?]

None at all in that respect. See *Stewart's Assignee v. Wahl's Trustee* (3 Juta, 243), where the account lay open for inspection, was advertised and confirmed. Stewart received a cheque in error. He did not know then the plan lay for inspection, and yet the Court would not annul the confirmation. If a debt has once been proved as preferent the trustee cannot rank it as

concurrent. In *Basson's* case (1 Roscoe, 369) it was decided that a trustee cannot make any alteration in an account once confirmed.

[Buchanan, A.C.J.: The trustee has to marshal the debts.]

The Court will surely not hold that a trustee can rank a preferent account once so proved as concurrent. *Du Plessis's* case (1 Roscoe, 327) is the first that dealt with the matter. *Stewart's Assignee v. Wahl's Trustee* (3 Juta, 243) dealt with the question more fully. The Chief Justice there laid down that the account could be set aside only on grounds which would warrant *restitutio in integrum*.

[Maasdorp, J.: But they say you lulled them into security.]

We deny this on affidavit, and this conflict of evidence shows how difficult it is to decide a matter of this kind on motion. This is only an attempt to get by a side wind what sections 109 to 112 refused to give.

Mr. Schreiner, K.C., in reply: We have no wish to do anything against the Insolvent Ordinance, or to upset the decision in *Stewart's* case or any other case.

[Maasdorp, J.: If a trustee omits to pay certain accounts of administration, would he have to pay *de bonis propriis*?]

It would be a question of negligence; it would not be necessary to prove misconduct. In *Lamb's* case, Lamb acted vigilantly and wisely, but had not got funds from one of the creditors, and he had to pay a part of the costs *de bonis propriis*. This case falls under a special statute. In Cape Town the rates are a charge on the property. Possibly the trustee might have been misled by *Mossel Bay Municipality v. Holloway* (3 Juta, 50), or by *Green Point Municipality v. Powell's Trustees* (2 Menz., 380), but the Cape Town local Act put Cape Town in quite a different category. A confirmation of the account is not a decree of personal absolution in favour of a trustee. *Standard Bank v. Jacobsohn's Trustee* (16 S.C.R., 352). The trustee was bound to pay the costs of the proceedings. The Court has often taken matters on motion which, according to *McCrula*, should be decided on action. The facts show the trustee has been negligent.

C.A.V.

Postea (March 18).

Buchanan, A.C.J., said: The respondent, as trustee of the insolvent estate of Falconer, was sued by the applicants and judgment recovered against him for Municipal rates assessed after the sequestration

upon the landed property of the estate. At the time of the judgment the landed property had been sold, but not transferred, and no legal distribution of the proceeds had taken place. By the 102nd section of the Cape Town Municipal Act, these rates were created a charge upon the property recoverable against the owner at the time the rate was levied or any future owner. In the case of *Krachmal's Trustees v. Epstein* (10 Sheil, 418), decided last August term, the position of a trustee in insolvency was recognised as being that of a future owner in succession to the insolvent. *A fortiori* therefore, the respondent, in his capacity of trustee, must in this case be considered the owner at the date these rates were assessed. Although the trustee had sold the property, he was still liable as such owner, and at the date of the judgment he had estate funds in hand. Instead, however, of satisfying the judgment, and in the face of a special intimation against doing so, he framed his distribution account without providing for the payment thereof, and had the account confirmed and the estate distributed. He now alleges that in his fiduciary capacity he has no funds wherewith to satisfy the judgment. The applicants say that his conduct has been such as to justify them in asking for an order upon him *de bonis propriis*. For the trustee, objection was taken that such an order could not be given on motion, and the case of *Wehmeyer v. Swemmer* (Buch., S.C. Rep., 74, p. 46) was relied upon. Since that decision, however, a more elastic practice has prevailed in this Court, and orders for the payment of moneys have frequently been made upon motion when the facts were sufficiently before the Court upon the affidavits. Here there was an action and a judgment against the respondent in his fiduciary capacity, and the more recent case of the *Standard Bank v. Jacobsohn's Trustee* (16 S.C. Rep., 352) shows that where there are no trust funds to answer a judgment an order *de bonis propriis* may after judgment be obtained on motion. If there were material facts in dispute, it would be open to the Court to order an action to have them decided, but in this case that is not necessary. It is not a matter of course that a trustee would be liable personally in every case merely because there was an insufficiency of trust moneys. As was stated in *Lambe v. Peters* (10 Sheil, 669), heard last November term, there must be some default on the part of the trustee. If there was such mis-

conduct, or negligence, a personal liability might be imposed. Under the circumstances stated in this case, I am of opinion that the trustee cannot shelter himself behind the confirmation of his distribution account. There was a clear liability attaching to him in his fiduciary capacity; he had full notice thereof; a judgment of the Court was obtained for the amount; he had estate funds in hand amply sufficient to satisfy the claim; and if he subsequently voluntarily put it out of his power to discharge the debt from those trust funds, he ought to be made answerable personally. There is no question at issue as to the marshalling of claims or the rights of preference between various classes of creditors. The application will be granted with costs.

Jones, J., said: I am of opinion that the order must be as stated by the Acting Chief Justice. In this case there are very few facts to be considered, and most of them are undisputed.

After referring to the allegations of the affidavits, his lordship continued: Now, what is the position of an insolvent's trustee as to rates falling due during his administration? It is no better and no worse than that of an ordinary owner of landed property, and against such a trustee the Municipality has, as far as I can see, precisely the same remedies as they have against any other owners of landed property. By virtue of the Insolvent Ordinance, the trustee became vested with the ownership of the property, and as owner he, in my opinion, took the property, subject to the ordinary incidents of ownership, as far at least as rates falling due and payable during his legal ownership are concerned. He may sell and transfer to another, and the purchaser may become liable too, but the trustee cannot rid himself of his primary liability which the law has imposed upon him. The Municipal Act for Cape Town provides that it shall be lawful for the Town Council to sue either the owner or occupier for any rates assessed, and concludes with the proviso: "Any and every rate assessed under the provisions of this Act shall, in so far as the owner of any property is concerned, be, and be deemed to be, a charge upon the property rated, and recoverable against the owner at the time such rate was levied, or any future owner: provided always that no future owner of property shall be liable for any rates which became due and payable at any period more than one year prior to the date upon which he became owner of the said property." See also the

decision in *re Dreyer's Estate* (Buchanan's Supreme Court Reports, 1868, p. 246). Now rates falling due during the administration of an insolvent estate are not debts provable in the ordinary way as they become due during administration, and by virtue of the trustee's ownership, and are not due at the date of the sequestration. Again, in the case of *Jacob Krachmal v. Epstein*, decided in this Court on August 7 last year, it was argued that the Municipality should have proved the amount of the rates due in the insolvent estate; that upon such proof the debt would be discharged, and that the property would pass into the hands of the purchaser free from any liability for these rates; but it was distinctly held that there was "no reason for limiting the plain meaning of the words of the Municipal Act used in the proviso or for holding that a purchaser from a solvent proprietor is a 'future owner,' and that a purchaser from an insolvent estate is not." In the first instance, the trustee is undoubtedly liable as an owner for rates falling due during the period in which he is vested by the Insolvent Ordinance with the ownership, though the purchaser from the insolvent estate may be liable also. As it was said in the case to which I have referred, "If the purchaser from the insolvent estate became liable for these rates, then clearly it was the duty of the trustee, who knew of the liability in selling the property, either to pay the rates before the sale and so dispose of the property free of encumbrances, or else to have declared at the time of sale that the purchaser of the property would be liable for the rates due upon the property at the time of sale." But whether the trustee sells without mentioning the fact of the rates being due, or sells after having mentioned that fact, he cannot rid himself of the liability as owner, which accrued during the administration of the estate. In the case before us the trustee knew of his liability in August, but in spite of this, he sent an account to the Master's Office in September, in which the rates are unprovided for. On September 15 his attention is called to this fact, and he is told that "if the account of the trustee be confirmed before applicants' claim was settled he would be personally responsible. On the 1st November the trustee's attorney asked that the matter be allowed to stand over to enable the trustee to communicate with Impey. Thereafter, the account was advertised and lay for inspection, though without applicants' knowledge, from the 19th November. On the

29th November applicant obtained his judgment against respondent, but ever this judgment had no effect on the trustee, who in Chambers, after the judgment was obtained against him, obtained the confirmation of his account on the 1st December. Before the 28th December the applicants discovered what he had done, but meanwhile they had obtained payment without prejudice of £27 from one of the tenants. Thus amount they deducted from their claim of £33 4s 7d, and wrote demanding £55 4s 7d. It is said that for this sum and costs judgment cannot now be given against the trustee on motion. The facts upon which the demand is based are fully before the Court, and I see no reason why applicant should not now obtain the order he requires. It is further argued that the case of *Stewart's Assignments v. White's Trustee* 3 Jura. p. 265 stands in the way, and that the trustee's account having been confirmed the applicants can have no remedy. With this view I cannot concur. If there were no more assets, the respondent is the cause of these disappearances, and must now pay personally the judgment debt, of which he had the fullest knowledge, and for which he deliberately made no provision.

The Acting Chief Justice said that Mr. Justice Maasdorp, who had left on circuit, concurred in the decision arrived at.

Application granted accordingly, with costs.

Applicant's Attorneys: Messrs. Fairbridge, Ardenne and Lawton; Respondent's Attorney: A. W. Steer.

BROWN V. SHORT. 1901. Mar. 12th.

This was an application for release from civil imprisonment.

The petition of Samuel Short the applicant, stated that on November 29, 1900, James Brown, the plaintiff in the above cause, obtained a decree of civil imprisonment against petitioner on an unsatisfied judgment debt of £50 and costs, on a certain promissory note, and that in pursuance of the said order, on December 30, 1900, petitioner was arrested and imprisoned in Beaufort West gaol, where he has been confined ever since. That petitioner had no means wholly or in part to satisfy the said judgment. That petitioner pointed out to the Deputy Sheriff when the writ of execution was served upon him all the property goods, and effects he was possessed of, the value of which was insufficient to cover

the costs of levy. The petitioner failed to attend the Supreme Court in answer to summons on account of want of means, but, instead, forwarded to Messrs. Tredgold, McLintyre and Bisset an affidavit of inability to pay the judgment debt, of the same tenour as the allegations contained in the present petition: but that he has since been informed by them that it reached its destination too late to be of service. Wherefore, petitioner prayed for an order releasing him from further imprisonment, or for alternative relief.

On the motion of Mr. Nathan, the Court granted an order as prayed.

[Applicant's Attorney: C. W. Herold.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN Acting Chief Justice, the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. 1901. Mar. 14th.

M^r. Partridge was admitted as a conveyancer on the motion of Mr. Buchanan.

LYNCH V. VENTER. 1901. Mar. 14th. - 15th.

Interdict—Damages—Right of way.

Where a certain passage had been long since used, but such wrongful user had been discontinued on complaint being made by plaintiff to defendant, the Court refused to interdict defendant from so using the said passage in future. The Court further held that plaintiff had forfeited all right to damages to which she might otherwise have been entitled by discontinuing certain property of defendant which obstructed her right of way.

This was an action brought by Mrs. Lynch against the defendant for obstructing a certain lane in Kerroom-street by washing carts there and obstructing the lane. The plaintiff claimed for £50 damages and an interdict to restrain defendant from ob-

structing the lane and from using a certain lane by driving horses and mules up it, and by using it for the purpose of removing ster-cu- and rubbish. There was claim for £5 damages in reconvention for rubbish thrown into defendant's meat cart.

Plaintiff's declaration was as follows :

1. The plaintiff is the registered owner of certain property situate in Keerom-street, Cape Town. Between certain lots owned by the plaintiff in the said street, is a passage marked common passage on the plaintiff's diagram, and the said passage is for the use of these said lots and also of certain adjoining lots of which the defendant is the registered owner.

2. At various times during the year 1900, and up to the present time, the defendant has wrongfully and unlawfully obstructed the said passage by leaving carts belonging to him standing in the said passage, and thereby preventing the plaintiff from using the said passage as she was entitled to do, and the defendant has during the said period wrongfully and unlawfully used the said passage for washing his carts, thereby preventing the plaintiff from using the said passage as she is entitled to do.

3. The defendant, though requested to desist from so using the said passage, persists in his aforesaid wrongful and unlawful user thereof.

4. The plaintiff is the registered owner of certain other property situated in Keerom-street and marked as lot 3. The defendant is the registered owner of certain adjoining land, portion of ground marked as lot 2. On the diagrams of both lots there is a common passage marked on the N.E. side of lot 3 and extending a few feet along the N.E. boundary of lot 2 and the following condition is contained in the title deeds of both lots: "That the proprietors of these lots, as also the proprietor of the remaining part of the property, shall have a right of way through the alley of three feet broad on the N.E. side of lot 3 represented on the diagram by the brown slip marked "Common passage," and that the water from the backyard of each of these two lots and that coming from the remaining part of the property shall be led off through the same." The portion of lot 2 owned by the defendant does not abut upon the said common passage or 3-foot alley, but was and is retained by the then owner of the said lot 2 when he sold the remaining portion of lot 2 to the defendant in 1894.

5. At various times during the year 1900, and up to the present time, the defendant

wrongfully and unlawfully led and drove horses and mules along the said 3-foot alley.

6. The plaintiff contends that the defendant is not entitled to use the said alley for leading and driving horses and mules, but the defendant contends that he is entitled so to use the said alley, and though requested to desist by the plaintiff, the defendant persists in using the said alley in the aforesaid wrongful and unlawful manner.

7. The defendant by himself, his servants, and agents during the year 1900, and up to the present time, has continually used the said alley for the conveyance of manure and other stable refuse, and in so doing the said manure and stable refuse is continuously being deposited in the said alley.

By reason thereof and of the stench arising therefrom the plaintiff, whose dwelling-house is situated upon lot 3, and whose backyard and windows open upon the said alley, has suffered and suffers loss and damage to herself and her property.

The plaintiff contends that the aforesaid user by the defendant is wrongful and unlawful, but the defendant, though requested to desist, persists in so using the said alley, and contends that he is entitled so to do.

8. By reason of the aforesaid wrongful and unlawful acts of the defendant, the plaintiff has suffered damage and loss to the extent of £50.

The plaintiff claims:

(a) The sum of £50.

(b) An interdict restraining the defendant from leaving his carts and washing his carts in the common passage marked Brink's Alley, and from obstructing the plaintiff in her user of the same.

(c) An interdict restraining the defendant from leading and driving mules and horses along the 3-foot alley, and restraining the defendant from using the said alley for the conveyance of manure and stable refuse.

(d) Alternative relief.

(e) Costs of suit.

1. For a plea, the defendant says as follows:

1. He admits paragraph 1 of the declaration, and says that the common passage therein mentioned was formerly known as Brink's Alley, and is known as Keerom-lane.

2. The defendant lawfully has and uses upon his property a cartshed and stable, the carts and the horses and mules being lawfully used by him for the purposes of his business.

3. The access for his carts to and from the said shed is by Keerom-lane, leading into Keerom-street, and the ordinary access for

his horses and mules to and from the said stable by the 3 foot passage, hereinafter referred to as the "Three-foot Passage," which is mentioned in paragraph 4 of the declaration.

4. Before and on April, 1900, the acts of the defendant at times and in Keerom-street, and were washed there occasionally; but the plaintiff then complained that the defendant thereby obstructed the said common passage. Whereupon the defendant gave strict instructions to the men in his employ, which instructions have been always thereafter duly observed, that no cart of his should be left standing or be washed in Keerom-street at any time, with his knowledge or consent, or at all, as the said act has been since the said date obstructed by any cart of his.

5. Save as aforesaid, he denies the allegations in paragraphs 2 and 3 of the declaration, specially denying that he has wrongfully and maliciously obstructed the said common passage, or prevented the plaintiff, as she alleges, from using the same, as she is not that to do.

6. As to paragraph 4, he admits generally the allegations as to the ownership of their respective properties by the plaintiff and defendant in relation to the 3-foot passage, but for greater certainty, both as to the extent and situation of their properties, and as to the conditions under which they are held, he begs to refer to the title deeds and diagrams when produced. The defendant's title to that part of his property, in virtue of which he is entitled to the use of the 3-foot passage, is dated the 9th October, 1884, when he purchased that part of his property from one Meager.

7. The defendant has at all times since his purchase legally had and used a stable on his said property for standing horses and mules used in connection with his business, and the said horses and mules have at all times had access to and from the stable by means of the common 3 foot passage, to the use of which the defendant is lawfully entitled for such access and egress.

8. The present stable is constructed in accordance with plans lawfully approved by the Town Council, showing access as aforesaid by the said 3 foot passage, and until the notice of motion by which this action was commenced, the plaintiff at no time complained of the use made by the defendant of the said passage for his horses and mules.

9. Much use is lawful, and accords with long lawful and accustomed user of the

said passage, by which persons entitled have used it for access and egress of not only horses, but also cows, and even pigs.

10. The defendant has lawfully, and without nuisance or complaint by the plaintiff or any person entitled to the use of the said passage, used the same in a proper and cleanly manner for the removal of refuse or manure from the stable, which must of necessity be so removed by that passage, and such use is in accordance with ancient lawful and established custom with regard to the removal, not only of stable refuse and manure, but also of stercus and house refuse, by that and similar passages in Cape Town.

11. The defendant has not caused or committed, and will not cause or commit, any nuisance or injury to the plaintiff, as by her is alleged, and she has suffered no damage or loss whatsoever to herself or her said property in consequence of any wrongful or unlawful acts on his part.

12. Save as aforesaid, he denies all the allegations in paragraphs 5, 6, 7, and 8 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed, with costs.

For a claim in reconvention, the defendant (now plaintiff) says as follows:

1. About the end of October, 1900, the plaintiff (now defendant) wrongfully and unlawfully placed or caused to be placed in a clean meat cart of the defendant, then standing in Keerom-street ready to receive meat for delivery to his customers, a quantity of rubbish, including kitchen refuse and other filth, moist and dry, whereby the defendant (now plaintiff) was injured and damaged.

2. On various other occasions theretofore the plaintiff (now defendant) has wrongfully and unlawfully, by herself or her servants or agents, dragged one or other of the carts of the plaintiff (now defendant), when lawfully standing in Keerom-street, near her house, and placed such cart across the said street, in order to interfere with traffic there, whereby also the defendant (now plaintiff) has been injured and damaged.

3. The defendant (now plaintiff) says that the said acts have been done maliciously and deliberately, and if repeated, may cause him still more serious damage, and he is entitled to claim damages and an interdict restraining the plaintiff (now defendant) from defiling his carts, or in any manner trespassing upon or interfering with them.

Wherefore the defendant (now plaintiff) prays for:

(a) Judgment for £5, by way of damages sustained as aforesaid.

(b) An interdict restraining the plaintiff (now defendant) from defiling or trespassing upon or in any way interfering with his carts.

Or that he may have such further or other relief as to this Hon. Court may seem meet, together with costs of suit.

Sir H. Juta, K.C. (with him Mr. Buchanan), for the plaintiff.

Mr. Searle, K.C. (with him Mr. McGregor), for defendant.

Anaie Lynch, widow, said she owned No. 44, Keerom-street, called Lot No. 10 in the deed of transfer. On one side of her house there was a lane known as Keerom-lane or Brinck's-alley. She became the owner about twenty years ago. At the end of Keerom-lane there were certain cartsheds put up by defendant, who brought his carts up the lane thereto. He carried on a butcher's business in Long-street, and had a number of carts. In April last year, witness caused a complaint to be made of the obstruction of the lane by defendant, by his leaving his carts there all night and washing them there, so that her tenants could not use the lane. Witness also owned Lot 7, the only entrance to which was from this lane. At one time defendant obstructed the lane in this manner constantly, but after April he did not do it so much. On the 27th December, his yellow spider stood under witness's window in the lane. There had been repeated obstructions of the lane by defendant since April last year, and witness had been with Mr. Syfret in the lane on one occasion when there was an obstruction. Witness had, on many occasions, been prevented from using this land. Her walls had been broken, but defendant would pay nothing for this unless witness could prove by eye-witnesses that the damage was caused by his carts. Respecting the 3-foot passage, witness had known it for thirty years. Her windows and back yard opened out on to this passage, a part of which was only 2½ feet wide. There was originally a door at the end of the passage, but this had been removed by witness, as it had got broken through blowing back and fore when left open at night. There was a step leading up to this door. The door was so low that one had to stoop to get through it. It was also very narrow. This was the only exit before Verster came. Meager, the owner of the property before Verster, had to cut the frame of the door alluded to before they could get a horse through. This was done when he sold the property to

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Verster. Before Verster took the property, no animals had been brought up that passage and no manure taken from there. The boys outspanned before witness's door, gave the horses and mules a whip, and the animals went up the passage. During November, December, and January last, witness had made a note of the number of animals passing through the 3-foot lane. There had been as many as seventeen and eighteen a day. In December witness was going through the lane when a mule rushed up, and would have gone over her had it not been for the intervention of a gentleman who happened to be there. On another occasion—a Sunday—witness only just saved a child from being run over by a mule in the passage. Owing to the danger caused by the animals rushing in the passage, neither witness nor the children could "put a foot" in the passage. The smell was so awful that they got sick over it.

Cross-examined: Witness had sent frequent messages to Verster before April, complaining of the carts obstructing the lane. Witness had complained to a sanitary inspector, who told her he was afraid to go into the passage on account of the stench. She had also complained to the police. Witness had known the lane so obstructed by carts that her tenants had complained to her of having to creep under and get over the vehicles before they could get access to their houses. Witness could only name one tenant of hers who had complained of the obstruction. This was a person named Saban Samuels. She had two other tenants, one of whom had left. The other was a Mr. Fisher, but witness could not say whether he had made complaint. Samuels did not live there now, but the tenant who succeeded him complained. In regard to the claim in re-convention, witness said she was carrying a tin of rubbish through the lane, and laid it on the front of the defendant's cart, as she could not pass. She did not empty the tin in the cart. She spoiled her dress in doing this. The tin, she believed, belonged to the defendant, and was obstructing the passage. She did not think this caused any damage to the defendant. She had never heard a complaint that defendant's carts had been pulled about the place. Witness had never moved one of his carts. Witness complained of the bad conduct of Verster's employees, and especially of their language.

Lydia G. Bau, teacher, said she lived on the opposite side of the street to Mrs. Lynch. Witness had often seen Verster's carts blocking up Brinck's-alley during the winter

months of last year. The smell arising from the small lane was a nuisance.

Katrina Borchards deposed to having seen Terster's carts standing in the lane in April and May last, but not since. She had not passed the lane since.

Wilhelmina Lynch, daughter-in-law of the plaintiff, said she had seen the defendant's carts standing in the alley, and being washed there. She had not seen them so often since April last, and for the last month or so she had not seen them there at all. This witness also complained of the behaviour of the defendant's employees. The smell from the passage arising from the stable refuse was horrible.

Edward Fisher gave evidence to the effect that since last May he had seen carts standing in the lane. He saw them nearly every morning at six o'clock, when going to work. He had seen the carts being washed in the lane on one occasion. He had not seen carts there for the last couple of months.

Mary Mulvihal, daughter of the plaintiff, corroborated as to the nuisance caused by the carts standing in the lane, and by the stable refuse. She also confirmed the plaintiff's evidence as to the latter having been nearly knocked down by a mule in the small passage.

Abdol Mabara, a Malay mason, who lived in Mrs. Lynch's house in Keerom-street 30 years ago, spoke in confirmation of the first witness's statements as to there having originally been a small door to the 3-foot passage. He had never seen a horse or mule going through that door, and did not think it was big enough for horses to pass through.

Homat Alie, a Malay painter, Sadie Lanie, Willem Arendse, and Abdol Kadar gave further evidence. The latter (the interpreter in the Magistrate's Court) said he lost his wife and two children while living near the lane, and attributed their deaths to the unhealthiness of the place caused by the manure, etc., in the stable.

In cross-examination, witness admitted that the doctor's certificates showed that his wife died from consumption, and his two infants from convulsions and acute dyspepsia. In spite of this, he was still of opinion that the nuisances referred to were responsible for the deaths.

Morris Tumbruck said that one of his children when playing in the passage was nearly knocked down by a horse. He reported the occurrence to the defendant's manager. The smells from the manure were bad.

This closed the evidence for the plaintiff.

Certain title deeds having been put in, Mr. Schreiner called

R. Johannes Verster, the defendant. He said that immediately he bought the property in question from Meager, he put it to use as a stable. He then kept three horses, and these were taken in and out by the 3-foot way. There was no step there then, and the doorway was not too small to admit horses. Witness would not have bought had this been so. From the time he took the property until the matter was brought into court no complaint or objection had been made to his using the passage to take his horses through. When he commenced to use the place as a stable, the door was placed farther back on account of the inclination of the ground. The removal of the manure and refuse from the stables was done, as far as witness was aware, in as cleanly a manner as possible. The refuse was never allowed to lie about the passage, and a man was employed to sweep the place every day. After April, when complaint was made by Mrs. Lynch's solicitor, witness gave his men instructions not to allow the carts to stand in the lane under penalty of dismissal, and so far as he was aware no cart had since been permitted to stand there.

Cross-examined: The police had complained to him on one occasion subsequent to April about his carts standing in the streets. The sweepings of the passage were placed in a box and remained there until the sanitary cart came, which was about once a week.

Charles Freeman, architect, deposed to having prepared the plans for the alterations to defendant's premises. The plans were passed by the Town Council. He tried to arrange the alterations so as to make only one entrance, but this he found impracticable.

William John Bush, a coloured man, gave evidence to the effect that he knew the premises before the alterations, when the door spoken of was big enough to admit a horse. He, however, had not seen a horse pass through there.

Johannes Poulson, a coloured mason, said he was 57 years of age. He had known the lane for about 35 years. Before defendant took over the premises the door in question was large enough for a horse to go through, and witness had seen a horse being taken into the passage. The men went through that passage to the Spring Gardens. Tom Kehoe was there then.

Jacobus Erasmus, 53, coloured, said that when Garraty had the Spring Gardens witness had seen horses and a cow going through the passage.

A Malay blockman, employed by the defendant, gave similar evidence, and also said that the defendant, when he received a lawyer's letter last year, called all the men together and told them they must not allow any carts to stand in the lane. After that witness saw no vehicles standing there.

Another Malay corroborated, and further stated that he had seen the place being swept by a Town Council sweeper.

Other witnesses gave evidence as to the custom of using the passage for taking animals through. Witnesses also said they had seen the plaintiff's eight-year-old grandson pull a cart across the street. Drivers employed by the defendant averred that since they received the defendant's instructions in April, carts had not been allowed to stand in the lane. The sweeper deposed to having swept the small passage daily, and a coloured woman stated that she saw Mrs. Lynch empty a bucket of refuse in the defendant's cart.

Mr. Schreiner having put in certain photographs, counsel were heard in argument.

In giving judgment, the Acting Chief Justice said that the defendant had been in the habit of occasionally leaving his carts in Keeron-lane, and of washing them there. Since complaint was made to him, however, he had stopped this wrongful user of the lane. He (the Acting Chief Justice) did not think under these circumstances that the Court could grant an interdict in respect of this. It was true the plaintiff may have been entitled to some nominal damages for the infringement of her rights, but he thought the plaintiff's conduct in doing what she had to the defendant's cart, upon which the claim in reconvention was based, might be set off against this, and would disentitle her to even nominal damages. As regarded the three-foot passage, the question arose how the defendant might use this common passage. Looking at the terms of the grant, the situation of the property, and the nature of the obstructions which had originally existed in the passage, his lordship could not think that at the time that the servitude was granted, it was intended to be used by other than foot passengers, and upon this part of the prayer an interdict would be granted restraining the defendant from leading or driving mules and horses through this alley. The defendant had failed to prove his plea that this had been the ancient,

usual, and accustomed manner of user. It was possible that at one time a horse or a cow might occasionally have been taken along the passage, but even this had for many years been discontinued. The Court did not think that the carrying of the stable refuse through this passage, it being done by men, was a wrongful user of the property, and no interdict would be granted in respect to this. If a nuisance were committed, the remedy would be to call upon the authorities to interfere. As to costs, the substantial judgment the plaintiff had gained would carry costs.

Mr. Schreiner raised the question of the costs of the original motion, which were ordered to be costs in the cause.

After brief argument, the Court intimated that the costs would include this.

Mr. Schreiner asked that the Court would not insist on the interdict operating immediately, as the defendant would need time to make other arrangements.

The Acting Chief Justice said that there would be no contravention of the order if the defendant did not use the lane for horses and mules after one month from this date.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret; Defendant's Attorneys, Messrs. Walker and Jacobsohn.]

ROUX V. THE COLONIAL GOV. { 1901.
ERNMENT. { Mar. 18th.

Costs—Postponement—Witnesses.

Where the nature of a case caused the onus of proof to be on the defendant, and he was not prepared to proceed to proof, the Court in granting a postponement ordered him to pay the costs of the day.

This was an action instituted by Mr. Roux, of Victoria West, against the Commissioner of Public Works, representing the Colonial Government. The action was in respect of the contract for the construction of the Kenhardt dam, which work the plaintiff undertook to carry out for the sum of £36,500. The plaintiff said the work was duly executed, and he now claimed payment of the balance of the amount alleged to be due to him, which was still unpaid by the Government, viz., £5,475, with interest at the rate of 6 per cent. from the 15th January, 1901. There was also an additional claim for payment of a sum of £92 5s. 6d. in respect of certain other work. The defendant, in the plea,

said that the detention of money was in terms of clause 13 of the contract, which provided that the contractor should make good all omissions or defects that might arise within twelve months, subsequent to the issuing of the final certificate. It was alleged that during the month of March, 1900, the dam broke, and that this was due to the work being in certain respects faulty and improperly done. The Government, in reconvention, claimed an order upon the defendant to make good the defects and damage done, whereupon they would pay him the amount claimed. Plaintiff in his replication denied that the bursting of the dam was caused by any defect or omission for which he was liable.

Mr. Schreiner, K.C. (with him Mr. Benjamin), for the plaintiff, said that on the 13th inst. the plaintiff had received a letter from the defendant giving particulars of the alleged defects. He also mentioned that he understood that all the witnesses for the Government were not present, and he objected to only a part of the evidence being heard now and part on a future date. He contended that the onus was upon the defendant to prove that there were such defects as they alleged.

Mr. Searle, K.C. (with him Mr. Joubert), for the defendant, said that a telegram had been received from the Deputy-Sheriff at Kenhardt stating that the subpoenas had only reached him on Saturday, and it was impossible to serve them, as some of the people concerned were living in a part of the country now in open rebellion. He had evidence relating to the quality of the work, but no witnesses to speak as to the actual bursting of the dam. It might not be necessary to call these witnesses. The subpoenas were sent from here a fortnight ago. He suggested that he should call the evidence of the engineers, and that then the plaintiff should call his witnesses. After that, the defendants' witnesses might be heard in regard to the bursting of the dam.

[Jones, J.: But the cause of the bursting of the dam is the chief point.]

Mr. Schreiner, K.C., objected to this course, as he would not be allowed to call supplementary evidence.

Mr. Searle, K.C., said it might not be necessary to call the defendants' local witnesses, as the plaintiff's witness might say exactly what the defendants' witnesses would say. He could not go to trial if the onus was thrown on the defendant, as his witnesses who would speak as to the bursting of the dam were not present. He asked for

a postponement, if the Court would not consent to the course suggested.

[Buchanan, A.C.J.: I suppose you can have your witnesses present in May?]

Mr. Searle, K.C., said he thought so.

Mr. Schreiner, K.C., said that the plaintiff subpoenaed his witnesses by telegram, and that the defendant might have done the same. He submitted that the Government should be ordered to pay the costs of the day.

Buchanan, A.C.J.: It would be unfair under the circumstances to hear the evidence on one side without hearing the evidence on the other. It would be better to hear all at once, and decide on the merits after having heard the evidence in consecutive order. The case will be set down for the 6th and 7th of May, which dates will be specially reserved.

On the question of the costs of the day, Mr. Searle, K.C., said that the labour colony, where some of the witnesses were, was in open rebellion, and no subpoena could be served there. He asked that the question of costs of the day should be allowed to stand over till the trial. If the non-appearance of the witnesses was an accident of war, the Government should not be ordered to pay the costs.

Buchanan, A.C.J.: The wasted costs must be paid by the defendant.

[Plaintiffs' Attorneys, Van Zyl and Bu-sinné; Defendants' Attorneys, Messrs. J. and H. Reid and Nephew.]

GILL V. WOOD. 1901.
(Mar. 18th.)

This was a special application by Mr. Wood arising out of an application which was before the Court at a preliminary stage of an action instituted by Professor Gill against Mr. Wood.

Mr. Schreiner, K.C., appeared for the applicant, and Mr. Searle, K.C., for the respondent.

Mr. Schreiner said that an interdict was originally asked for by Professor Gill, restraining Mr. Wood temporarily from proceeding with certain excavation work on his own property, it being alleged that Mr. Wood was so excavating as to injure and render dangerous a road immediately adjoining the property upon which he was making the excavations. The road was not the one between the two properties, but was a space reserved for a road above. The Court discharged the application for an interdict, but directed that the question of the costs of those proceedings, which were rather volu-

minous, should stand over pending an action being brought by Professor Gill. In that action Professor Gill made further complaints that Mr. Wood had trespassed on reserved spaces and had obstructed the roads by putting his own property upon them. Investigation of the facts showed that Mr. Wood had committed technical trespasses, and he made a tender of £5, together with taxed costs. This was accepted by Professor Gill. The costs of the application for the interdict were now in question, and the applicant now asked that the present respondent should be ordered to pay these.

Mr. Schreiner commented on the strong terms of the affidavit of Professor Gill, on which the rule *nisi* had been granted. It stated that Mr. Wood's excavations constituted not only an injury to his property but to life and limb. All his client had done was to make the mountain slopes available for the purpose for which they had been reserved.

Mr. Searle said the rule *nisi* was not discharged on February 1. He undertook to see his attorney to see if Professor Gill would allow the excavation to go on. The latter consented, without prejudice. Full information was before the Court when the rule *nisi* was granted. The excavation was 50 or 60 feet from the line of fence.

Counsel proceeded to trace the history of the dispute.

[Jones, J.: One cannot help feeling astonishment on reading the affidavits after seeing the place. From the affidavits, one would imagine it was a very serious matter indeed.]

Mr. Searle contended that the affidavits were substantially correct. There was no concealment. The matter was urgent.

[Jones, J.: I confess I do not see the urgency.]

Mr. Searle: If heavy rain came on, and soil washed away, there might have been danger. Mr. Wood had claimed a right to go upon those roads, and do as he liked with them. He had taken stones from the under road, and now he had given up that right.

Buchanan, A.C.J., said that the excavation made by Wood was necessary. He had committed a technical trespass. Professor Gill, in applying for an interdict *ex parte*, adopted a most unjustifiable course. He must pay the costs of the interdict.

[Applicant's Attorney, E. J. Wood; Respondent's Attorneys, Messrs. Fairbridge and Arderne.]

F SHER V. GRAUPNER. } 1901.
Mar. 19th.

This was an application to have a rule *nisi* restraining respondent from administering the assets of the firm of Graupner and Fisher made absolute. Applicants and respondents carried on business as tailors at Mossel Bay. The firm aforesaid had taken over the stock of one Pearlman, a tailor at Mossel Bay, and paid him £150 for the goodwill. Pearlman transferred the lease, which would expire on August 31, 1904. Respondent was the bookkeeper of the firm, and had charge of the cash. On November 26, 1900, petitioner's agent inserted a notice in the "Mossel Bay Advertiser" to the effect that the partnership previously subsisting between applicant and respondent had been dissolved. Thereupon petitioner demanded from respondent a statement as to the state of the business. This statement was never rendered, and petitioner had never been asked to be present by any representative at a valuation of the assets of the partnership. On January 16, 1901, petitioner requested respondent to give public notice that the said partnership had not then been dissolved, but he neglected to comply with this request. It was further alleged that respondent had refused to agree to a liquidation of the partnership business, or to join in appointing a liquidator. Defendant was said to be dealing with the partnership assets as if they were his own, and to be collecting amounts due to the said partnership.

Mr. Searle, K.C., appeared for the applicant, and Mr. Rubie for respondent.

After argument,

The Court appointed Mr. Albert Stanhope White, of Mossel Bay, receiver, to realise and liquidate the affairs of the partnership, with power to carry on the business, pending the liquidation. The receiver was authorised to make any settlement agreed upon by both parties, costs to be paid out of the partnership estate.

Re INSOLVENT ESTATE OF } 1901.
J. G. MULLER. } Mar. 19th.

Insolvency—Funds in possession of the military—Trustee.

This was an application for an order on the Field Paymaster at Naauwpoort to hand over to the trustees all moneys due to the insolvent estate of J. G. Muller. The petitioner was sole trustee in the insolvent estate of Johan George Muller, of Weltevreden Poort, in the district of Colesberg. The said

estate had been placed under final sequestration by an order of the Eastern Districts Court on August 1, 1900, at which time the insolvent was an absent rebel. At the time when the final order for sequestration was made, all the insolvent's stock and belongings had been seized and disposed of by the military authorities. A memorandum signed by the local Commandant showed a balance of £479 4s. 6d. to the credit of the insolvent estate, not including £192, the price of certain sheep sold to the Army Service Corps. The military authorities now refused to hand over these moneys without an order from the Supreme Court, and hence petitioner was unable to proceed with the liquidation of the said estate.

Mr. Benjamin moved.

The order was granted as prayed.

HUNTER V. BARRON. { 1901.
Mar. 19th.

This was an application for the discharge of a certain interdict on applicant, granted in May last. The order of Court was that an interdict should be granted restraining the respondent (now applicant) from interfering with the proper and reasonable use of a certain lane, pending an action to be instituted by the present respondent forthwith to declare his rights. The affidavit of the applicant, Henry James Hunter, stated that the order was given against him on the 17th May, 1900 (10 Sheil, 277); but the respondent had not proceeded to have the action heard.

The defence was that between May, 1900, and July there were negotiations for an amicable settlement, and these failing, summons was issued on the 30th July. There were subsequent negotiations, and the matter was allowed to remain in abeyance until December. The present applicant then wrote that he would have judgment signed against the present respondent for not proceeding. The declaration was then filed. The case was intended to have been set down for February, but the respondent had gone on active service, and the case could not be proceeded with until May.

Mr. Buchanan, for the present applicant. If no definite reply was given to Barron's proposals, he ought to have known that they would not be entertained, and to have gone on with his action. The plaintiff (now respondent) has lain by an unreasonable time. From July 30 to December 19 he did nothing. Then he hurried up, the plea was filed January 9, and that was in ample time for the February term. Instead of that, he goes

off and volunteers for active service. It is said that applicant would not be prejudiced by delay, but he was prejudiced—he wants to sell his property, and cannot do so until the interdict is removed.

Mr. Searle, K.C., for the respondent: The effect of removing the interdict will be to stop the trial.

[Jones, J.; Why?]

Well, if that is not the object, it is hard to see what the object can be. Applicant has condoned the delay by filing his plea in January. He has not been ordered to go to trial, but to institute his action forthwith and he did so. In January applicant was informed that the case could not be heard in the February term.

The filing of the declaration was postponed owing to negotiations, and defendant allowed nearly a month to pass before filing his plea. Defendant ought to have taken up his present position in January, when he was told the case could not be heard in February term. By not doing so he has waived any possible right to the removal of the interdict. If it is removed now he may close up access to plaintiff's property till next term. Under Rule 330 he might have had the case struck off the roll.

[Buchanan, A.C.J.: It was your right, not his, that had to be established.]

The least defendant could have done if he objected to delay was to have said so.

Buchanan, A.C.J., said that the Court had ordered plaintiff to bring his action forthwith. He did nothing either in the August or November term. He had also allowed February term to pass. Applicant had a right to ask that the interdict be discharged. It would be discharged, with costs, unless respondent established his right before May 17.

WILSON V. MOSSEL BAY BOAT- { 1901.
ING COMPANY. { Mar. 19th.

Company—Notice of Motion—Service—Sections 98 and 122 of Act 25 of 1892.

Where a notice of motion was served at the place of business of a company, and not at its registered office in terms of sections 98 and 122 of Act 25 of 1892, the Court ordered fresh service of the notice to be made, the costs to be costs in the cause,

This was an application on notice to have a certain award made a rule of Court. The secretary of the respondent company objected to the application being heard, on the ground that the notice of motion had not been served at the registered office of the company, in terms of sections 98 and 122 of Act 25 of 1892. He stated that he had not had time to communicate with his directors.

Mr. Buchanan moved.

Mr. Searle, K.C., for the respondent.

[Buchanan, A.C.J.: The secretary has had six weeks since the service of the notice.]

I do not know how that is, but he takes up the position that the notice was not properly served.

Mr. Buchanan: He can waive that objection. Surely he can appear without calling a meeting.

[Jones, J.: He is technically right in objecting.]

Mr. Buchanan: Under the terms of the deed of submission, we were not bound to give notice at all.

Buchanan, A.C.J.: The application will stand over for fresh notice. The question of costs will also stand over, and await the result.

LLOYD V. TRUSTEES OF INSOLVENT ESTATE OF ANDERTON BROS. 1901. Mar. 19th.

Insolvency—Property acquired subsequent to rehabilitation.

Anderton Bros. had obtained a provisional grant of certain Government land. Thereafter they became insolvent and their rights in the said land were sold, and the proceeds distributed among the creditors. The Government, however, refused to confirm the provisional grant or to sanction transfer to the purchaser, A. Bros. were rehabilitated in 1893. Some six years later they obtained for fresh consideration a grant of the erven in question and sold the land to applicant. The trustees of the insolvent estate claimed the property as an asset in the said estate, and the Registrar of Deeds refused to pass transfer to the purchaser without their consent.

Held, that the property had never belonged to the estate and that

judgment must be given against the respondents with costs out of the said estate, failing which, de bonis propriis.

This was an application on notice, calling upon Sidney Turner and Robert Heathcote, in their capacity as trustees of the insolvent estate of James Edward Anderton and Frank Anderton, carrying on business as Anderton Bros., to show cause why the Registrar of Deeds should not be ordered to allow transfer to be passed to applicant of certain landed property at Port St. John's, and why the respondent should not pay the costs *de bonis propriis*.

From the affidavit of applicant, it appeared that in or about 1879 St. John's River Territory was purchased from the Pondo Chief Nquiliso by the Colonial Government, and a few people proceeded to settle there, the Magistrate issuing provisional grants of land to admit of their erecting temporary buildings. It was generally understood that the township would be surveyed, and each settler would have his lot at an upset quitrent price. In or about March, 1887, a Commissioner who had been despatched by the Government disallowed a number of claims, and turned off the claimants. Building lots, Nos. 36 and 37, had been occupied by Anderton Bros. under a provisional grant, subject to the approval of Government; but they surrendered their estate as insolvent on Jan. 31, 1888, and the trustees submitted the insolvents' rights to these lots for sale at public auction. The highest bid was refused as insufficient, but eventually they were sold to a certain purchaser, who sold to a second purchaser named Clark, who finally sold the said lots to applicant for £16. Applicant attended at the Magistrate's Office, and offered to pay the reserve price for the land, but he was informed that the two lots had been disallowed, and were required for Government purposes. The said lots were then left vacant from 1888 until October 9, 1899, when the brothers Anderton paid the Government the required price. Applicant purchased from them on September 30, 1899, for £400, but title deeds were not issued by the Government till April 23, 1900. The rights acquired by Anderton Bros. prior to their insolvency had, it appeared, been forfeited, the new grant being made to them personally, on the understanding that their creditors were to have no interest in the property. Anderton Bros. had been rehabilitated on December 12, 1893. They had executed the documents

necessary to admit of transfer being passed to applicant, and on May 31, 1900, a deed of transfer, purporting to convey the property to applicant, was lodged in the Deeds Office. The Registrar of Deeds, however, refused to pass transfer without the consent of the trustees in the insolvent estate of Anderton Bros., and referred to a letter received by him from the respondent Turner, protesting against the transfer. On October 10, 1900, the attorneys of the respondent Turner had written to applicant claiming the erven in question as a portion of the insolvent estate, and demanding delivery of the title deeds thereto forthwith. To this applicant replied, denying that the said erven belonged to the aforesaid insolvent estate, as Anderton Bros. had acquired them long after their rehabilitation.

The respondent Turner stated in an affidavit that he was one of the trustees in the insolvent estate of Anderton Bros., and that the lots in question formed part of the estate, and became vested in the trustees. He continued: "That the estate was rehabilitated, but notwithstanding the rehabilitation, the said lots remained vested in the trustees for the benefit of the creditors of the said estate." That the claim of one G. H. Rennie for £2,254 2s. 9d. and other large claims against the estate had not been satisfied. He denied that the lots had been sold to the applicant by Clark, only the wood and iron buildings situate on the lots having been sold, the lots still remaining registered in the name of Anderton Bros. He contested the validity of the issue of title by the Magistrate of Port St. John's, and said that the applicant had no right to claim transfer of the said lots, as the trustees had never sold the same to him.

In his replying affidavit, the applicant admitted the correctness of respondents' statement with regard to the purchase from Clark, no land having been sold, because it was all Crown land or Government land.

The affidavit of Arthur George Syfret, attorney for the applicant, stated that he had inspected the documents in the Surveyor-General's Office relating to the issue of the grants of lots 36 and 37 at Port St. John's, and that it would appear that the Government considered that all original claims of Anderton Bros. in respect of the plots had been forfeited by insolvency; but that, on the application of said firm, made subsequent to rehabilitation, the said lots had been regranted to them. By letter, dated February 15, 1900, the Under Secretary for Agriculture had authorised the Surveyor-General to issue the title deed to Anderton

Bros., with a view to the lots being transferred to the applicant.

Mr. Benjamin for the applicant.

Mr. Nathan for Sydney Turner, one of the trustees in the insolvent estate of Anderton Bros.

[Buchanan, A.C.J.: Even if the property was vested in the trustees it was sold in the insolvent estate.]

Mr. Nathan: We had a certificate from the Magistrate, and had a right of occupation, which was all the respondents had. Such rights as there were were vested in us. We deny that they were sold in insolvency, because the account was signed only by one trustee. In any case, this matter cannot be decided on motion. The question is one of procedure. The rights became vested in the trustees, and have never been divested nor have Anderson Bros. again acquired them.

[Jones, J.: But how can you come after twelve years and object to the account of your co-trustee?]

[Buchanan, A.C.J.: The account has been accepted, and I suppose your client got his share of the fees.]

[Jones, J.: Why does the trustee object?]

Mr. Nathan: I am not instructed on that point.

Buchanan, A.C.J.: I am of opinion that this property never belonged to the estate, but only vested for the first time in Anderton Brothers in 1900. Now, twelve years after the estate was wound up, the respondent comes into court and puts the applicant to these costs. Without having any good cause of action, the respondent Turner interfered with a transaction over which, as the facts before the Court show, he has no control. As he has done so without good grounds, he must be responsible for the costs, which will be awarded against him *ex officio*. Failing this, Turner will have to pay them *de bonis propriis*.

[Applicant's Attorneys, Messrs. Scanlen and Syfret; Respondents' Attorneys, Messrs. Faure and Zietsman.]

RIES AND CO. V. DUNN AND CO. { 1901.
Mar. 20th.
„ 21st.

Breach of contract—Sale—Delivery.

The plaintiffs' declaration was as follows:

1. The firms of the plaintiffs and defendants are respectively partnerships, carrying on business as merchants and traders at East London in this Colony.

2. On August 23, 1900, the parties entered into a contract whereby the plaintiffs

bought and the defendants sold through the brokers, W. Burns & Co. of Queen's Town, 2,000 bags of good sound Montevidean mealies at 8s. 1½d. per 100 lb., to be delivered in trucks at the wharf at East London.

3. According to the broker's note the said mealies were stipulated to arrive in about six weeks after the said date by the steamship "Woodford."

4. The said steamship did not arrive until about the end of October, 1900, but the plaintiffs raised no objection on the ground of such delay, and were forthwith ready and willing to take delivery of the said mealies and promptly pay in cash the price thereof.

5. All conditions were fulfilled, all things happened, and all times elapsed necessary to entitle the plaintiffs to demand, and from time to time they demanded delivery by the defendants of the said mealies; but the defendants made delivery of only 150 bags of the said mealies, and as to the balance, to wit, 1,850 bags, defendants wrongfully and unlawfully broke their said contract and refused to deliver the same.

6. Plaintiffs have resold in various lots the mealies so purchased by them, and by reason of the breach of contract aforesaid on the part of the defendants the plaintiffs have sustained damages in the sum of £250.

Wherefore plaintiffs pray for judgment for £250, as and for damages so sustained as aforesaid, or for alternative relief, and costs of suit.

To this declaration defendants pleaded:

1. They admit the first four paragraphs, but say that said mealies were sold subject to their arrival in good merchantable condition, as will more fully appear from the terms of the said broker's note.

2. At the date of the said contract and thereafter at all times material to this suit the East London Harbour Board, a body constituted under Act 36, 1898, had and exercised the sole right in accordance with the law of landing and delivering goods arriving at the port of East London, and under an agreement entered into between the said Board and the Railway Department of the Colonial Government, and in force at the said dates, the Board had also the sole right of loading up the said goods into the trucks supplied by the department for delivery from the wharf; of all of which plaintiffs were at all times fully aware.

3. As to paragraph 5 of the declaration, defendants say that the whole cargo of the S.S. "Woodford," to wit, about 43,000 bags of mealies belonged to them; of these about

25,000 bags had been sold "to arrive" on similar terms to the sale to plaintiffs, and nearly 17,000 thereof had been sold prior to the sale to plaintiffs.

4. A considerable portion of the cargo arrived in a damaged and unmerchantable condition, and it therefore became necessary that purchasers who wished their orders fulfilled should examine the mealies and either accept or reject them before they were placed by the Harbour Board authorities on the trucks at the wharf, where delivery was under the said contract to be taken. Plaintiffs accepted this course of procedure, acquiesced therein, and agreed to make such examination.

5. Owing to there being an insufficient supply of trucks by the said Railway Department, a matter for which defendants were in no way responsible, it was agreed between defendants and the different purchasers that the trucks which from day to day were available should be distributed by the Harbour Board authorities as evenly as possible amongst the purchasers interested, and that defendants should from time to time hand to the Harbour Board authorities memoranda as to the number of trucks to be given to each purchaser. Plaintiffs accepted, and were parties to this agreement.

6. In accordance with the above, defendants from time to time requested the Harbour Board authorities to place certain trucks at plaintiffs' disposal, and the said trucks were so placed, but on certain occasions when the said trucks were available plaintiffs failed to send any representative to examine the mealies for acceptance or rejection, and in consequence the said trucks were used for other purchasers; but defendants were not responsible for this, and had no control in the matter.

7. On November 27, 1900, defendants supplied plaintiffs with an invoice of certain of the mealies which had been delivered to them under the arrangements entered into as aforesaid, showing the weights of the mealies as weighed by the Harbour Board authorities at the wharf, but the plaintiffs refused to accept the same or to pay for the said mealies except at the weights given by their own scales at their store, whereupon defendants refused, as they were entitled to do, to make any further arrangements for trucks for plaintiffs as aforesaid until plaintiffs agreed to accept the wharf weights.

8. Defendants have at all times been ready and willing that plaintiffs should receive the 2,000 bags of mealies purchased by them as soon as possible, in accordance with the arrangements above set forth, as

necessary to admit of transfer being passed to applicant, and on May 31, 1900, a deed of transfer, purporting to convey the property to applicant, was lodged in the Deeds Office. The Registrar of Deeds, however, refused to pass transfer without the consent of the trustees in the insolvent estate of Anderton Bros., and referred to a letter received by him from the respondent Turner, protesting against the transfer. On October 10, 1900, the attorneys of the respondent Turner had written to applicant claiming the erven in question as a portion of the insolvent estate, and demanding delivery of the title deeds thereto forthwith. To this applicant replied, denying that the said erven belonged to the aforesaid insolvent estate, as Anderton Bros. had acquired them long after their rehabilitation.

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3. According to the broker's note the said mealies were stipulated to arrive in about six weeks after the said date by the steamship "Woodford."

4. The said steamship did not arrive until about the end of October, 1900, but the plaintiffs raised no objection on the ground of such delay, and were forthwith ready and willing to take delivery of the said mealies and promptly pay in cash the price thereof.

5. All conditions were fulfilled, all things happened, and all times elapsed necessary to entitle the plaintiffs to demand, and from time to time they demanded delivery by the defendants of the said mealies; but the defendants made delivery of only 150 bags of the said mealies, and as to the balance, to wit, 1,850 bags, defendants wrongfully and unlawfully broke their said contract and refused to deliver the same.

6. Plaintiffs have resold in various lots the mealies so purchased by them, and by reason of the breach of contract aforesaid on the part of the defendants the plaintiffs have sustained damages in the sum of £250.

Wherefore plaintiffs pray for judgment for £250, as and for damages so sustained as aforesaid, or for alternative relief, and costs of suit.

To this declaration defendants pleaded:

1. They admit the first four paragraphs, but say that said mealies were sold subject to their arrival in good merchantable condition, as will more fully appear from the terms of the said broker's note.

2. At the date of the said contract and thereafter at all times material to this suit the East London Harbour Board, a body constituted under Act 36, 1898, had and exercised the sole right in accordance with the law of landing and delivering goods arriving at the port of East London, and under an agreement entered into between the said Board and the Railway Department of the Colonial Government, and in force at the said dates, the Board had also the sole right of loading up the said goods into the trucks supplied by the department for delivery from the wharf; of all of which plaintiffs were at all times fully aware.

3. As to paragraph 5 of the declaration, defendants say that the whole cargo of the S.S. "Woodford," to wit, about 43,000 bags of mealies belonged to them; of these about

25,000 bags had been sold "to arrive" on similar terms to the sale to plaintiffs, and nearly 17,000 thereof had been sold prior to the sale to plaintiffs.

4. A considerable portion of the cargo arrived in a damaged and unmerchantable condition, and it therefore became necessary that purchasers who wished their orders fulfilled should examine the mealies and either accept or reject them before they were placed by the Harbour Board authorities on the trucks at the wharf, where delivery was under the said contract to be taken. Plaintiffs accepted this course of procedure, acquiesced therein, and agreed to make such examination.

5. Owing to there being an insufficient supply of trucks by the said Railway Department, a matter for which defendants were in no way responsible, it was agreed between defendants and the different purchasers that the trucks which from day to day were available should be distributed by the Harbour Board authorities as evenly as possible amongst the purchasers interested, and that defendants should from time to time hand to the Harbour Board authorities memoranda as to the number of trucks to be given to each purchaser. Plaintiffs accepted, and were parties to this agreement.

6. In accordance with the above, defendants from time to time requested the Harbour Board authorities to place certain trucks at plaintiffs' disposal, and the said trucks were so placed, but on certain occasions when the said trucks were available plaintiffs failed to send any representative to examine the mealies for acceptance or rejection, and in consequence the said trucks were used for other purchasers; but defendants were not responsible for this, and had no control in the matter.

7. On November 27, 1900, defendants supplied plaintiffs with an invoice of certain of the mealies which had been delivered to them under the arrangements entered into as aforesaid, showing the weights of the mealies as weighed by the Harbour Board authorities at the wharf, but the plaintiffs refused to accept the same or to pay for the said mealies except at the weights given by their own scales at their store, whereupon defendants refused, as they were entitled to do, to make any further arrangements for trucks for plaintiffs as aforesaid until plaintiffs agreed to accept the wharf weights.

8. Defendants have at all times been ready and willing that plaintiffs should receive the 2,000 bags of mealies purchased by them as soon as possible, in accordance with the arrangements above set forth, as

to examination and acceptance at the wharf and according as trucks were available ; plaintiffs to accept the wharf weight ; but plaintiffs wrongfully and unlawfully repudiated their contract and the agreement made as aforesaid and refused to receive mealies which had been previously accepted at the wharf by them, and loaded up for them by the Harbour Board authorities, in consequence whereof defendants submit that plaintiffs have now no further claim upon them (the defendants).

9. Save as above they deny the allegations in paragraph 5.

10. They have no knowledge of the allegations in paragraph 6 of the declaration as to re-sale, but they deny that plaintiffs have sustained any damage for which they (defendants) are responsible.

Wherefore they pray that plaintiffs' claim may be dismissed with costs.

Plaintiffs' replication was as follows :

1. Plaintiffs crave leave to refer to the terms of the broker's note mentioned in paragraph 1, and agreement mentioned in paragraph 2 of the plea.

2. They are not aware of and do not admit the allegations in paragraph 3 of the plea, which, if true, do no affect their rights in this suit as against the defendants.

3. They admit a considerable portion of the cargo mentioned in paragraph 4 of the plea arrived in a damaged and unmerchantable condition ; they specially deny :

(a) That any legal obligation rested upon them to make examination of the mealies which it was the clear duty of the defendants to deliver good and sound in trucks, and

(b) That they were parties bound by the agreement alleged in paragraph 5 of the plea ; but they say that without waiving their legal rights in any way they were willing and anxious, and did endeavour to facilitate the delivery by the defendants of the mealies bought by them, the plaintiffs, though they from time to time lawfully protested against the unreasonable delay on the part of the defendants in completing delivery in accordance with their contract.

4. They deny that they failed at any time to take delivery of any portion of the mealies if tendered in good and sound condition. They deny that they were under any legal obligation to station or send a representative to pass mealies into the trucks, but they say that in fact they did send such a representative to facilitate delivery whenever defendants gave them proper notice of intention

to make delivery of any portion of the mealies.

5. As to paragraph 7 of the plea, they admit receipt of the invoice, they admit that they disputed, and say they were legally justified in disputing the weights therein shown, but they say that since action was brought, they have without prejudice to their rights and under protest, paid the amount of the said invoice ; and they submit that the defendants were not legally entitled to refuse or neglect to continue to make due delivery of the mealies on the ground that they, the plaintiffs, disputed the weights shown in the said invoice.

6. They specially deny that they at any time repudiated their contract, as alleged in paragraph 8 of the plea ; by the terms of which and of no other agreement they and defendants are bound.

7. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the said plea, they deny all allegations of fact and conclusions of law in the said plea, join issue thereon with the defendants, and again, as before, pray for judgment with costs.

Defendants' rejoinder to the above replication was as follows :

Defendants say that save that they admit that plaintiffs have now paid the amount of the invoice referred to in para. 5 of the replication in the manner therein set forth, they rejoin generally.

Mr Schreiner, K.C. (with him Mr. Howel Jones), appeared for the plaintiffs.

Mr. Searle, K.C. (with him Mr. Buchanan), appeared for the defendants.

The evidence for the plaintiffs was in effect as follows : That out of a large shipment of mealies to arrive in the first week in October, 1900, by the "Woodford" they were to receive 2,000 bags. The ship did not arrive to their knowledge until October 23, and having received a bill of entry for 2,000 bags dated October 30, 1900, they endeavoured to get delivery of the mealies, but owing to their inability to get trucks at the wharf no delivery of mealies was made. This failure to obtain trucks was due to the defendants. The defendants were bound to effect delivery by placing sound and merchantable mealies on the trucks which would then be drawn to plaintiffs' stores, and if any of the mealies were found to be unsound the plaintiffs might reject them. Although they were not bound to go down to the wharf and inspect the mealies they had arranged with defendants' agent to do so, and

accordingly sent a man every day. The cargo of mealies was not wholly sound. Of the 150 bags of mealies they got there was a shortage in weight of about 2 lb. in every 100 lb. They objected to their bags being weighed by the weigh-bridge, and insisted on the scales at the wharf being used or those at their stores. The weigh-bridge was not reliable, and the scales at the wharf were convenient, being very close to the trucks. During the course of the discharge of the mealies from the wharf they had only been able to obtain one truck on two separate occasions, the second occasion occurring on December 3, and this although they constantly had a man at the wharf. Their man was frequently told that they could have trucks "the next day," but they never got them. Members of other firms who had received mealies from the same ship said they had objected to the weights passed over the weigh-bridge, and their complaints were acknowledged. A large amount of the cargo of mealies was taken to the defendants' stores, but as this was not sampled by the witnesses for the plaintiffs they could not say whether it was good or bad. The market as far as concerned mealies was rising at that time. Details of the damage sustained, by reason of the plaintiffs' inability to carry out their agreements with other persons to whom they had resold the mealies "to arrive" was given.

The defendants stated that the larger portion of the mealies was damaged, being in a heated condition. It was sweating and weevily, and in consequence the greater portion of it was taken to their store. The plaintiffs complained during the course of the delivery of the cargo that they were getting no mealies, and were told that that was because they did not send anyone down to inspect the mealies. They claimed that the plaintiffs had to come to the wharf to inspect the mealies and to see them weighed by the weigh-bridge. They stated that they were entitled to charge according to the weigh-bridge, the weights whereof were very commonly accepted. There was no other way of weighing a large amount. They admitted making a large number of sales of mealies from their stores afterwards. The only occasion on which they had refused to make delivery of the mealies to plaintiffs was in the letter of November 30. They maintained that the delivery of the mealies had to be made at the wharf, and insisted on the plaintiffs coming to the wharf and submitting to the wharf weights. They admitted that they

advertised the mealies, which they had taken to their stores, as "Best Montevidean—not an ounce of waste in a bag." The manager of the Harbour Board stated that neither the consignor nor the consignee had control of the trucks, that the weigh-bridge which had a short time previously been repaired was used in weighing large cargoes, the scale at the wharf causing too much delay. That traffic at the wharf was congested owing to the military operations. He admitted in cross-examination that if he had had orders to place all the trucks at the disposal of the plaintiffs for one whole day he would have done so.

Mr. Schreiner contended there had been a breach of contract; and as to damages, said that 1s. 3d. per 100 lb. represented the difference at the end of November between good mealies at market price, and the price to be paid by plaintiff. That would work out on 1,880 bags at £230.

Mr. Searle (on the whole case): I do not know what the breach of contract was. Non-delivery is no breach, refusal to deliver is a breach. The declaration does not specify any time within which the mealies must be delivered. The declaration alleges a refusal to deliver and that is the gist of the action. The only approach to a refusal occurred on November 30. The broker's note really set out the terms of the contract, and the mealies were sold subject to the arrival of the whole cargo in good, sound, merchantable condition. This cargo was not (as a whole) in good merchantable condition. Only about a quarter was in good condition. Hence it was incumbent upon the purchaser to select his goods.

[Jones, J.: Where is your authority? The seller usually selects.]

The purchaser had to take delivery at the wharf and therefore had to inspect at the wharf. The vendor there lost all control of his goods. If the goods had perished on their way from the wharf the loss would have fallen on the purchaser. Hence it follows (1) that purchasers are bound to come and take delivery, (2) that purchasers must be content to have quantity ascertained by weighing at the wharf. Plaintiff has taken up an illegal position in his declaration and replication when he states he was not bound to go to the wharf and examine the mealies. If defendant put bad mealies on the trucks plaintiffs could have rejected them.

The plaintiff altered the place of delivery from the Jetty to the store. Unless plaintiff meant that his replication is unmeaning. If

the mealies were not to be examined at the jetty they must be examined at the store. I submit that their contention is bad in law. *Greenshields and Chisholm* (3 Juta, 220) shows that inspection must be made at the place of acceptance. This is a case quite in form with the present one. *Benjamin on Sales* (p. 710) says delivery and acceptance are concurrent conditions. The letters of November 29 and 30 are the only sign of a refusal to perform the contract. When defendants in their letter of November 30 said "we do not expect you to accept wharf weights," they were speaking sarcastically. If delivery had been taken at the wharf they must have been made there.

[Jones, J.: Suppose the weigh-bridge was out of order?]

The vendor would have had to get it put in order, or to have made other arrangements. The regulations under Act 36 of 1896 provided for weighing at the wharf. If the goods had had to go to Aliwal North there would have been a lot of waste. Can the purchaser take up the position that they were short weight. In *Brown v. van Niekerk* (2 Searle, 302) the seller had no evidence of weight, and it was held that had not the purchaser lain by he might have set up his own weights. If the purchaser alleges shortage, he must pay the full price and then recover. On the question of weighing, plaintiff is quite out of court. The shortage is alleged only as to a lot which has been passed at a certain weight by his servant. Plaintiff has refused to pay for mealies if he has not refused to take them. Up to the issue of summons plaintiff had no right to take up the position of saying that he could not accept wharf weights. Dunn's letter of November 30 was not a refusal to deliver. We were entitled to insist on wharf weights being accepted, and plaintiffs' own servant passed these goods at the weight. *Brown v. van Niekerk* is in his favour, for here as to payment plaintiff was in mora. The whole dispute is about some 10s. or 12s. If plaintiff is bound to accept wharf weights it could not be wrong to insist on his doing so. The Harbour Board conveyed the goods from the jetty as the agents of the purchaser. Again on November 19, plaintiff agreed to come to the ship's side for his goods. It is admitted that traffic was congested, and that the trucks were in the hands of the Harbour Board. The evidence shows that Ries and Co. did not exercise proper vigilance. People who were at the ship's side early got trucks. As to the duty of weighing, see *Jamieson and Co. v. Good-*

liffe (1 Juta, 206). The mealies were never weighed, but they were appropriated, and they were held to have been the property of the purchaser, and bags which had not been weighed were taken to have been of the same weight as those which were weighed. As to appropriation, there is the case of *Taylor and Co. v. Mackie, Dunn and Co.* (Buchanan, 1879, p. 176). As to the alleged preference in the matter of trucks, Dunn and Co. only got the trucks in pursuance of the ordinary course of business. Some were sent up-country, and some were rejected. They never got any goods as sound and merchantable. If they had inspected at the wharf a strong point might have been made against them. None of the stuff was really good, but mealies were scarce, and purchasers were not inclined to quarrel with their bargain. Then as to damages, Mr. Ries had no documents to show that he had sold mealies to arrive. He said he had sold to arrive, but he could not say so in the box. If he had bought in mealies they would have had the actual position of affairs. He could have got them like other people for 8s. 9d. His own sales showed 9s. to 9s. 3d., and now he was claiming at 9s. 6d. If plaintiff had acted like other people they would have got their mealies.

Buchanan, A.C.J., in giving judgment, briefly reviewed the evidence, and said that there was no doubt that the Harbour Board did the landing of the mealies and the distribution of trucks, but it also appeared that they acted, in so doing, upon the instructions given them by the defendants, who by the bill of landing were known to the Harbour Board as the owners of the cargo. The defendants, and not the plaintiffs, had the power of arranging and regulating the delivery of these mealies to the various purchasers. The written instructions given by defendants to the Harbour Board showed that on certain days the requirements of particular firms were to be attended to, and it was rather significant that only upon one occasion prior to the summons were instructions given regarding delivery to the plaintiffs. It had been said in argument that the plaintiffs were not very keen on getting the mealies, but the correspondence showed that they were most anxious to get delivery, and he (the Acting Chief Justice) thought that the treatment of the plaintiffs by the defendants seemed rather remarkable by a firm such as the defendants were in this case. After referring to the correspondence, and to the fact that the plaintiffs had sent men

down to the wharf on two occasions without getting delivery, his lordship observed that he was rather struck with the tone of the letters sent by the defendants. There was nothing unreasonable in the plaintiffs' communications, or anything that called for such a tone, and if an ordinary amount of business consideration had been shown to the plaintiffs, this case might never have come into court. The Court was of opinion that the contract had been broken, and the question remained as to the amount of the damages. The Court, considering 8s. 9d. to 9s., as being the selling price, thought it might fairly be taken that the damages were at the rate of about 9d. per 100 lb. Roughly, there would be about 200 lb. in each bag, and at the rate of 1s. 6d. per bag, which the Court estimated would be a fair amount as damages, the damage on the 1,850 undelivered bags would be £138 15s. For this amount plaintiffs were entitled to judgment with costs.

Jones, J., concurred.

[Plaintiffs' Attorneys, Messrs. Silbebauer, Wahl and Fuller; Defendants' Attorneys, Messrs. Findlay and Tait.]

STAMPER AS SECRETARY FOR (1901.
WIENER AND CO. V. ELLERT. (Mar. 25th.

**Guarantee—Novation and delegation
—Fraud.**

Where a guarantor had given an unconditional guarantee in favour of a debtor,

Held, that no conditions alleged to be attached to the guarantee could be taken into account unless fraud were alleged and proved.

This was an action to recover £20 9s. 3d. for goods sold and delivered. Defendant admitted the purchase of the goods, but alleged that he had been discharged from indebtedness by plaintiff in virtue of a certain guarantee.

The plaintiff's declaration was as follows:

1. The plaintiff is William Frederick Stamper, suing in his capacity as the secretary for the time being of Wiener and Co., Ltd., who carry on business in Cape Town. Defendant is Samuel Ellert, of Frenchhoek, in the district of Paarl.

2. In or about the months of December, 1899, and April, 1900, defendant bought from plaintiff and plaintiff sold and delivered to defendant goods for the price of £40 0s. 8d.

3. Defendant has paid to plaintiff £19 11s. 5d. on account of the said sum of £40 0s. 8d., but has neglected and refused to pay the balance, being the sum of £20 9s. 3d., though all things have happened, all times elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to payment of the said balance, wherefore plaintiff claims:

(a) Judgment for the said sum of £20 9s. 3d.

(b) Interest *a tempore morae*.

(c) Costs of suit.

To the above declaration defendant pleaded as follows:

1. Defendant admits the allegations of paragraph 1 of the declaration.

2. In reference to the allegations in paragraphs 2 and 3 he says that during the month of December, 1899, he purchased from the plaintiff's firm goods to the amount of £18 2s. 7d., and in April, 1900, goods to the amount of £21 18s. 1d.

3. In respect to the former amount he says it was subsequently reduced by returns to the amount of £17 19s. 7d., and defendant was fully discharged by the plaintiff from indebtedness therefor, the liability being undertaken by one Jarvits.

4. In respect to the amount of £21 18s. 1d., he says that the said amount was reduced by various credit notes for returns and allowances to £18 7s. 7d., and further that the plaintiff being indebted to defendant in the sum of £2 4s. 6d. in respect of defendant's personal expenses in coming to Cape Town, for and at the request of plaintiff, there was owing to plaintiff on balance of account the sum of £16 3s. 1d., which sum defendant duly paid on or about July 25th, 1900.

5. Save in so far as any of the allegations in paragraphs 2 and 3 of the declaration are hereinbefore admitted, he denies each and every one of the said allegations, and prays dismissal of plaintiff's claim with costs.

Plaintiff's replication was as follows:

Save in so far that he admits defendant has paid him the sum of £16 3s. 1d., and that defendant's liability has been further reduced by returns to the amount claimed in the declaration, to wit, the sum of £20 9s. 3d., he denies all the allegations therein contained, etc.

Mr. Currey for plaintiff and Mr. Benjamin for the defendant.

The facts appear from the judgment.

Buchanan, A.C.J., said: The sum of £17 19s. 7d. is in dispute. The defence is that there has been annovation and delegation of

another debtor. Jacobs gave an out and out guarantee for the defendant's indebtedness, and plaintiff released defendant of all liability. The release was unconditional; conditions have now been alleged, but they cannot be taken into account unless fraud were alleged and proved, and that defence was not raised on the pleadings. Judgment must be for defendant, with costs.

Mr. Benjamin asked for expenses incurred in a motion for removal of bar in this case, stating that costs had been ordered to stand over.

The Court granted the application.

HOPKINS V. BURTON BROS. { 1901.
Mar. 25th.
Partnership — Failure of proof.

This was an appeal from a decision of the Resident Magistrate's Court, Cape Town, in an action in which the present respondents claimed from the present appellant and Lang Bros. the sum of £19 14s. for work and labour done.

The summons set out that the amount was due by the firm of Lang Bros. and Hopkins, for whom the work was done, the parties being in partnership.

The defence on behalf of Hopkins was that the partnership had been dissolved before the work claimed for was undertaken, and on behalf of Lang Bros. the general issue was pleaded, and exception was also taken that at the date of issue of summons the defendants, Lang Bros., were not resident within the jurisdiction of the Court.

The Magistrate, after hearing evidence, found for the plaintiffs (present respondents) and gave the following reasons :

It was admitted that the partnership, as alleged in the summons, at one time existed, and that plaintiff was at one time employed by it. I found that even if it had been dissolved before the work in question was done, and the evidence upon that point I did not consider very reliable—no notice of such dissolution was given to plaintiff, and that he was led by the actions of the defendants to suppose that the firm still existed and that he was employed by it. With regard to the exception that two of the defendants resided beyond the jurisdiction of this Court, it appeared to me that inasmuch as the firm carried on business here and one of the partners actually resided here the Court still had jurisdiction, although the other two partners were at the time that proceedings were

taken residing in another district. It appeared to me from the evidence that the work was properly done in terms of plaintiff's sub-contract with defendants, though it would appear from the architect's evidence that the work was not according to the contract entered into between defendants and the owner of the building. There is no evidence as to the time in which plaintiff was to complete his sub-contract, and it was contended that certain wall-papers should have been found by the plaintiff for the work, but I hold that, under the contract, it was not for him to find them. I found that he had completed his contract with defendants, and that the sum claimed was due.

Against this judgment the defendant Hopkins appealed.

Sir H. Juta, K.C., appeared for the appellant.

Mr. Benjamin for respondents.

Sir H. Juta, K.C. : Only four persons have given evidence, viz., the plaintiff, defendant, and the two brothers Lang. The two latter witnesses denied the partnership, and this was against their own interest. It cannot be held that if a carpenter and a mason agreed to build a house together they are to be ever thereafter held to be partners unless formal notice of dissolution was given. Burton's contract for painting was signed only by Lang Bros., and they came into court and said that they alone were responsible.

Mr. Benjamin (for respondent) : The Magistrate found as a matter of fact that there was a partnership between parties as to particular work.

[Jones, J. : How do you make that out ? Hopkins may have been a partner in Lang Bros. and Hopkins, but not in Lang Bros.]

The name is immaterial if it can be shown that they sometimes signed in one way and sometimes in another. There is again the signboard "Lang Bros. and Hopkins." The fact again that Hopkins made payments for Lang Bros. was significant. The Magistrate found that there was a general partnership, and no notice of its dissolution.

[Jones, J. : Was he justified in drawing that conclusion ? The evidence is contradictory.]

The offer in this case was to Lang Bros. and Hopkins. It was accepted by Lang Bros., but the firm sometimes went by that name. Hopkins's evidence was unsatisfactory. He was a kind of "agnostic" witness, and knew nothing. He admitted having had assets of the firm in his hands, but

said he was acting as a friend, but surely taking all the circumstances into account it is more natural to regard this as a proof of partnership. The fact that they kept no books is also significant.

Buchanan, A.C.J. : There is no proof that Hopkins was a partner in the business of Lang Bros. when the work was done by the respondents. Under such circumstances the appeal must be allowed with costs.

[Appellant's Attorney, C. W. Herold;
Respondents' Attorney, C. Friedlander.]

ANDERSON AND CO. V. SOUTHERN AND CO. { 1901.
Mar. 26th.

This was an appeal from a judgment of the Cape Resident Magistrate's Court, dated January 29, 1901, in an action in which plaintiffs (now appellants) claimed delivery of certain two cases of turpentine entrusted to the care of defendants about November, 1899, or payment of the sum of £3 12s., their value. The summons called upon defendants (now respondents) to restore to plaintiffs certain two cases of turpentine, the property of plaintiffs entrusted to the care of defendants in or about the months of November and December, 1899, to be delivered to plaintiffs by the defendants, or to pay £3 12s., the value thereof.

It appeared that the defendants (present respondents), who were landing and shipping agents, were employed in December, 1899, by the appellants (and plaintiffs) to bring a certain quantity of turpentine from the Docks. Upon their tendering the turpentine, the appellants refused to receive it, alleging that it had been damaged by the respondents. Southern and Co., the respondents, subsequently sued the present appellants in the Magistrate's Court for work done in respect to the turpentine. The defendants in that case admitted most of the claim, but made a counter claim for the price of the turpentine alleged to have been spoiled. Judgment was given by the Magistrate for the present respondents (Southern and Co.), and the counter claim was dismissed. In April, 1900, the appellants wrote to Southern and Co., demanding that they should hand over the turpentine. A reply was received to the effect that they would see their carter about the matter. Appellants wrote again, but failed to get delivery of the turpentine, and in December last they sued Southern and Co. for the restoration of the turpentine or its value (£3).

The defendants pleaded *res judicata*, referring to the previous action.

The Assistant Resident Magistrate gave judgment for the defendants, and his reasons were as follows:

"I overruled the plea of *res judicata* on the ground that the judgment in the previous case (No. 1,184) being in respect of a different cause of action did not bind the parties in the present case. The goods in question were tendered by defendants through another carrier to plaintiffs in November or December. Plaintiffs refused to accept them on the ground, as they alleged, that they were damaged. Thereafter, in April, 1900, the plaintiffs demanded the delivery of the goods in question, and defendants failed to deliver the goods, which could not at that time be traced and have not since been traced. I held that so long a time having elapsed between the date of the tender of goods and plaintiffs' refusal to accept, and the date of their again calling upon defendants to deliver, no liability could at the date in question be attached to defendants."

Sir H. Juta, K.C., appeared for the appellants.

The respondents were in default.

After hearing Sir H. Juta, the Court allowed the appeal with costs.

Buchanan, A.C.J. : The defendants did not deny that they were in possession of the plaintiffs' goods. They were called upon to make delivery of them, but were unable to do so. They must either deliver the goods or pay their value. The appeal will be allowed with costs, and judgment entered in the Court below for the appellants for £3 and costs.

[Appellants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

MCCORMACK V. STEEL. { 1901.
Mar. 26th.

Exception—Pleading.

Plaintiff (now appellant) had sued defendant (now respondent) in the Court below for £25, balance due for work done by plaintiff under a certain agreement, and also for £101 8s. 2d. said to be due for extra work and material. Defendant took the following exceptions (1) that as the work had not been completed, the action was premature as to the first claim; (2) that the summons disclosed no cause of action. The Magis-

trate upheld both of these exceptions.

Held (on appeal) : (1) that there was nothing in the summons or in the agreement annexed to show that the action was premature ; (2) that if there was any ground for holding it to be premature, that ground must arise outside the agreement, and was therefore matter for plea and not for exception ; (3) that the summons on the face of it disclosed a good cause of action and therefore should have been pleaded to. The appeal was therefore allowed and the case remitted, back to the Magistrate for hearing on the merits.

This was an appeal from a judgment of the Resident Magistrate's Court for Butterworth, dated January 25, 1901, in an action in which plaintiff (now appellant) sued defendant (now respondent) for £25 5s. 9d., balance due under a certain agreement, and for £101 8s. 2d., for work done. The defendant took certain exceptions to the summons, which the Resident Magistrate's Court upheld, and dismissed the summons, with costs.

The summons called upon defendant to show cause in the Resident Magistrate's Court at Butterworth why he had not paid to John McCormack, of Iutterworth, the two several sums of £25 5s. 9d., balance due to plaintiff by defendant under a certain agreement entered into at Butterworth on March 19, 1900, and of £101 8s. 2d., being the amount due to plaintiff by defendant for extra work done and performed, and material found and provided by plaintiff for defendant under paragraph 5 of the said agreement, and for which defendant agreed to pay plaintiff under paragraph 6 of the said agreement. The said paragraphs 5 and 6 were as follows :

" (5) The said John McCormack promises and agrees to accept such additions to or deductions from the original contract, as may be agreed upon between the original contracting parties, John Lumsden of the one part, and Hugh Steel of the other, and to bear such portion of said deductions or additions as may fall under the heading of mason work.

" (6) And the said Hugh Steel promises and agrees to pay the sum of £520 in monthly instalments, and to the value of 90 per cent. of actual mason work done, and to pay balance on completion of work, together with any extras that may occur under conditions as stated in paragraph 5."

The circumstances were as follows :

Steel contracted with one Lumsden to erect certain buildings for him, and he then entered into a sub-contract with the appellant to do the mason work. Under this contract, McCormack agreed to carry out all the mason work in the specification, signed, on the one part, by Lumsden, and, on the other part, by Steel. He agreed to accept £520 for the work, which he undertook to carry out strictly in the terms of the specifications, and he further agreed to accept such deviations as might be agreed upon by the original contracting parties, Steel and Lumsden. The former promised to pay the amount in monthly instalments, together with the extras that might occur. Defendant took exception to the claim, on the ground that the action was premature, the work in question not having been wholly executed. In respect of the claim for extras, the defence was that it was provided that no extras would be paid for unless authority for such could be produced by the contractor, and no such authority had been produced. There was a second exception on the ground that the summons disclosed no cause of action.

The Magistrate dismissed the summons with costs, and stated as his reasons for so doing :

" The Court holds that the action is premature, inasmuch as the work has not been completed to the satisfaction of Mr. Lumsden. The plaintiff has also carried out the work without the sanction or authority of the said Lumsden as required by clause 5 of the said specification."

Sir H. Juta, K.C., for the appellant.

Mr. Searle, K.C., for the respondent : The first point is whether the summons was sufficiently in form, and the second is whether Lumsden's approval was a condition precedent to recovering judgment. Paragraph 6 of the contract between the parties incorporated paragraph 5 of the general conditions, which required that Mr. Lumsden should certify for the extras. The general conditions were annexed to the summons. McCormack under section 3 could not do extra work without the authority of Lumsden. The general conditions were imported into the contract between Lums-

den and Steele. It is clear that Lumsden's certificate could be made a condition precedent. The point is, was it necessary to insert such a condition in the summons? The matter is in the same condition as a condition to recover. As to the necessity for inserting the conditions see *Scott v. Synter* (9 Juta, 50), and *Daniel and Co. v. Van Eeden* (9 Juta, 31). It is necessary to show that the condition precedent has been carried out. That applies to the larger claim and also to the smaller. Plaintiff's summons is insufficient. It ought to have been amended.

Sir H. Juta was not called upon.

Buchanan, A.C.J. : The appellant in this case sued the respondent on a contract entered into between them on the 19th March last year, for work done and material found. To the summons was annexed the agreement. Defendant took exception to the claim, on the grounds, first, that the claim was premature, and, secondly, that no cause of action was disclosed. As to the question of taking an action which was premature, there is nothing in the summons or the annexed agreement to show that it was premature. If it was premature, it must arise outside the agreement, and ought to be a matter of plea, not exception. Therefore, that exception is bad. With regard to the exception that the summons did not disclose a cause of action, I am of opinion, looking at the summons, that as clear and distinct a cause of action is shown as it is possible to show. Both are matters of plea, not of exception ; and I regret that these agents in the Magistrate's Court are too fond of taking exceptions, instead of having the case heard on its merits. If these were pleas instead of exceptions, the merits would have been gone into, and the pleas could have been supported. On the summons there are no grounds for exception, and I think that the Magistrate erred in sustaining the exceptions. The appeal will be allowed, with costs, and the case remitted to the Magistrate for hearing on its merits, the Magistrate to decide as to the costs incurred in the Court below.

Jones, J., concurred.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn ; Respondent's Attorneys, Messrs. J. and H. Reid and Nephew.]

HAHNE V. JOSEPHS. { 1901.
Mar. 27th.

Illegal arrest—Brokerage.

Defendant (a broker) had been commissioned by plaintiff to sell the goodwill of a certain hotel. Plaintiff subsequently withdrew that commission, and sold the goodwill himself. Defendant claimed commission in respect of the sale, and had plaintiff arrested under the 8th Rule of Court on the pretext that he was in fuga. Plaintiff was the owner of immovable property. Defendant now admitted that no brokerage was due, Jones, J., instructed the jury that the arrest was illegal, but left it to them to say whether it was malicious and without reasonable and probable cause. The jury found for the plaintiff for £200 damages.

This was an action to recover £1,000 as damages for false imprisonment.

Plaintiff's declaration was as follows :

1. Plaintiff is the registered owner of landed property in this colony, and resides in Cape Town. Defendant is a broker and estate agent, carrying on business in Cape Town.
2. On or about December 6, 1900, defendant issued out of the Honourable the Supreme Court a writ of arrest for the sum of £55, being the amount of liquidated damages alleged to have been owing by plaintiff to defendant. The plaintiff at the said date was not indebted to the defendant in the sum of £55, or any sum whatever, and the defendant in so issuing the said writ, acted wrongfully, unlawfully, maliciously, and without reasonable or probable cause.
3. Under and by virtue of the said writ plaintiff was arrested on December 7, 1900, and lodged in the Cape Town gaol until December 12, 1900, when the writ was discharged by order of this honourable Court, and plaintiff was released.
4. By virtue of the premises, plaintiff has suffered great loss and damage to the extent of £1,000.

Plaintiff claims :

- (a) £1,000 as and for damages aforesaid.
- (b) Alternative relief.
- (c) Costs of suit.

To this declaration defendant pleaded as follows :

1 He admits the allegations in paragraphs 1 and 3.

2. He further admits that on or about December 6, 1900, he issued out of the Honourable the Supreme Court a writ of arrest for the sum of £55, which he claimed from plaintiff as liquidated damages due to him by the plaintiff, and he had good cause to believe, and did believe, that plaintiff was making preparations to remove from the Colony, but he denies that he acted maliciously and without reasonable and probable cause, as alleged in paragraph 2 of the declaration.

3. Since the release of the plaintiff defendant has been advised and admits that the amount claimed by him from the plaintiff is not legally recoverable.

4. By reason of the premises he admits that the arrest of plaintiff was unlawful, and he has tendered and hereby again tenders to pay to plaintiff by way of damages the sum of £50, together with taxed costs to the 28th of January, 1901.

5. Save as aforesaid he denies the allegations in paragraphs 2 and 4 of the declaration.

Wherefore, subject to the above tender, he prays that plaintiff's claim may be dismissed with costs.

Plaintiff's replication was general.

Sir H. Juta, K.C. (with him Mr. Buchanan), for plaintiff.

Mr. Schreiner, K.C. (with him Mr. Currey), for defendant

Charles Hahne, the plaintiff, was then called. He said that after instructing Joseph in regard to the sale of the hotel, he became dissatisfied with what the defendant was doing, and on the 12th November witness wrote withdrawing and cancelling the agreement previously made. On the 3rd December, witness sold the hotel, and afterwards he met Joseph, who demanded £55 as commission upon the sale of the hotel. He threatened to get witness into trouble if he did not pay. Witness was arrested at the Brooklyn Hotel, where he was staying. When witness first instructed the defendant in regard to selling the hotel, he told him that he should tell possible purchasers that the reason for selling was that he was going to Europe. Witness at the same time told him that

he intended remaining in the Colony. Witness was arrested on December 7, and remained in gaol until December 12, on which day he applied to the Supreme Court to discharge the writ, and, though the defendant opposed this, the Court discharged the writ. Witness had property in Cape Town, being interested in the Gardens Estate Syndicate, which property had been mortgaged for costs in this suit. He produced certain title deeds. Witness never intended to go to Europe. He had creditors with whom he had settled. Since his discharge he had made application to various persons for employment in the capacity of either manager or barman, but, saving occasional employment at the race-course bar, he had failed to get work. The witness gave confirmatory evidence as to other matters mentioned by counsel in opening, and said he was unable to find bail, and so was obliged to remain in gaol. Witness was taken to prison in a cab. The witness mentioned specifically that he had been refused employment at the German House Club, where he had applied. People did not care to have a man who had been in gaol.

At this point, the examination-in-chief of the plaintiff having been concluded, Mr. Schreiner asked that counsel for the plaintiff should read the plea.

Sir Henry Juta said that the defendant pleaded that since the release of the plaintiff, he (defendant) had been advised that he could not recover against the plaintiff.

By Mr. Schreiner: The agreement was that, for the consideration of 1s., the plaintiff gave defendant the right to sell the Brooklyn Hotel, and promised not to dispose of it to or through any other person. If sold through any other person, he was to pay the defendant 5 per cent. on the purchase price.

Mr. Schreiner said it had been held by the Court that that agreement was not irrevocable.

In further cross-examination, witness said he entered into this agreement on the 4th October, but never understood the agreement. When he sold the hotel to Mr. Smidt—this was the name of the person who bought it—he had cancelled the agreement with defendant. He sold the hotel in December; but while the agreement still existed, he had agreed with a man named Shenker about the purchase of the hotel. The price arranged was £1,325. He had a copy of the agreement on or about October 12, and entered into the agreement with Shenker on the 16th October.

Mr. Schreiner: So, long before you wrote this letter cancelling the agreement with Joseph, you tried to get behind the back of Mr. Joseph and sell this property yourself?

Witness: I never read a copy of the agreement then.

Four days before you signed the agreement with Shenker without reference to Mr. Joseph, you had a copy of the agreement?

I told Mr. Joseph that someone was introduced to me, and, as I thought he could not find a buyer for me, I would sell it myself. Then he said: "You can't sell it yourself." When I was at Mr. Joseph's office, he said: "If you don't know, I will let you have a copy of the agreement which you signed."

Further cross-examined, witness said he did not think he read the copy when he signed the agreement with Shenker. He understood that Ohlssons would not approve of Shenker, and the sale fell through. On the 3rd December the defendant wrote saying he had a client for the property for £700, and that the person making this offer was accepted by Ohlssons, who also agreed as to the offer. Witness had then sold. He had no contract with Smidt. There was only a receipt. The agreement with Smidt was that the latter should pay £900 and take the stock at valuation. He could not say whether there was a written document. The value of the stock was £136. Witness could not say where the receipt was. He supposed the receipt could be produced by Smidt, whom he had not called as a witness. There were police complaints about the hotel. Joseph had given the names of a number of possible buyers, but the offers were not high enough. The offers made by these persons through Joseph were less in amount than witness gave for the house. Witness was cross-examined as to whether the place had not deteriorated in value during his tenancy owing to the reports of the police and the character of the place. Witness admitted telling a detective (Mr. Simons) that he might be going out of the country. That was previous to the arrest, and the detective asked witness if he was going away. Witness replied that he might be going. Witness did not give people to understand at that time that he was leaving the Colony by an American boat which was to touch at Southampton. Witness never told his barman that he was leaving for Paris within a week. Witness's barman knew that he (witness) was not leaving. Witness did not inform Driefs (Smidt's manager) that he was leaving. Witness did not tell Joseph at Ohlson's office that he

would have to look sharp to get his money. Witness always denied that he owed Joseph any money. Witness admitted a conversation with Simons on the 7th November relative to taking a certain letter to Paris for him (Simons). Witness told Simons that he might be going to Paris or might not. Simons told him of a letter which he wanted witness to take to Paris, and which he (the detective) had left with a servant. Witness said that if it was important, he had better not leave it with him, as he might be going and might not. Witness kept up the pretence of going with Simons because Smidt's new barman was in the room at the time and could hear the conversation. He denied that there was a letter telling him to go to Germany, or that Simons saw this. He only pretended he was going as an excuse for selling the place. He was upset about being arrested; he had never been arrested before. He could not raise money to get out on bail. His partner held a certain promissory note for £100. Witness was cross-examined as to why this could not have been used as a bail bond.

Re-examined: If he could have got the money he would most certainly have come out.

John Henry Gately, Acting Register of the Supreme Court, produced a letter written to him by the defendant's attorneys on the 7th December, objecting to the form of the writ which had been issued. Witness had granted the writ on the previous day, and had inserted words which only made it operative if Hahne were found on board a vessel. In the letter referred to, the attorneys objected to this, and asked that the writ should stand in the ordinary form. In consequence of that, an unconditional writ was issued.

Cross-examined: It was not a Rule of Court form to make writs conditional, but it was sometimes done when the Registrar was not fully satisfied. Witness had the power, when the writ was first asked for, to have refused it.

This closed the case for the plaintiff.

Selim Barnard Joseph was then called. He said he had no ill-feeling or malice towards the plaintiff, but took the action he had as a business protection. Witness carefully read over the documents with the plaintiff before he signed it. Joseph afterwards asked for a copy of the document, and witness sent him a copy. Witness sent people to the plaintiff's place to see about the purchase of the hotel. Witness heard about Shenker through another person (Mr. Friedlander). He understood that Ohlssons re-

refused to accept this man Shenker as tenant. On the morning of the 16th November, plaintiff came to witness's office and said he wanted to cancel the agreement. Witness said he could not do so, and that he must act in accordance with the terms of the agreement. When witness heard, on the 3rd December, that Hahne had sold to Smidt, he demanded payment of the 5 per cent. commission, as provided in the agreement. Hahne refused, and said, "You will have to be very smart to get it." Hahne told witness seriously that he was anxious to go to Europe, and witness did not know that this was merely an excuse for selling. Witness caused inquiries to be made as to the plaintiff's leaving. When witness took out the writ, he believed he was entitled to the £55 under the agreement. He had no grudge against Hahne. From the information witness obtained through the detectives, he honestly believed that Hahne was leaving the country. Witness desired only that he should remain, so that he (witness) might prosecute his claim.

In cross-examination, witness said that he read the report of the action for the discharge of the writ in the papers, and the remarks made by the Chief Justice, who said he was not satisfied that defendant (Hahne) intended to leave the Colony, and, further, that he was not satisfied that the action was a *bona-fide* one.

Sir Henry Juta: You are rather fond of threatening arrests to get money, aren't you?

Witness: No, I am not.

You have never done it before?

I don't remember.

Do you know Brimsoni, of the Continental Restaurant?

Yes.

Do you remember threatening him?

I remember having threatened him.

You know the paper called the "Licensed Victuallers' and Sporting Gazette"?

Yes.

I believe you advertise yourself as the great licensed house broker?

I do not advertise in that paper.

Don't you figure as the great licensed house broker?

Yes, I believe I do.

Did you read this article on yourself which appeared in the "Gazette" on February 15?

Yes, and I answered it. I sent a lengthy reply. If you read that article you should read the reply.

Sir Henry Juta then read copies of correspondence which had passed between the wit-

ness and Brimsoni which was reproduced in the paper named, and in which the witness spoke of obtaining a writ.

Witness: I sent a full reply to that article, which rebutted all the statements made.

In re-examination, the witness said that all the statements he had made in those letters to Brimsoni were true.

Emile Simons, private detective, swore to when the writ was obtained.

Mr. Schreiner put these affidavits in.

Sir Henry Juta: I object to these affidavits going in, because there is hearsay evidence in them.

Mr. Justice Jones: Of course, that cannot be read to the jury.

Mr. Schreiner said he would argue that it could. The point was not what were the actual facts, but what were the facts as known to the mind of the defendant when he took the action in question. There must necessarily be secondary evidence.

In cross-examination, witness spoke to having left the letter referred to with Hahne, and said he saw a letter with the plaintiff which had come from Germany. In this letter witness saw certain three words in German which meant "Come home" or "Are you coming home."

Sir Henry Juta: These are the only words you saw?

Witness: Yes.

And these were just the words you were sent there to find?

Certainly.

Archibald Bultitude, manager of Ohlsson's Cape Breweries, said the Brooklyn Hotel was owned by Ohlssons, and let at present to Smidt. Previously it was let to the plaintiff. The place was not properly managed by Hahne, and witness wanted to have a change. Shenker was approved as tenant, but the police objected. One of the persons obtained by Josephs was approved. Hahne told witness that he was going to Germany.

By Sir Henry Juta: It was usual to give purchasers some reasons for giving up an hotel.

Re-examined: Witness believed Hahne was going to Germany.

Alfred Henry Moore said he was a detective in December last, and made an affidavit when the writ was obtained. That affidavit was true and correct.

Sir Henry Juta objected to this affidavit going in. It did not contain a word of any statement made by the plaintiff to Mr. Moore.

Mr. Schreiner said this was the same point as was raised before. He was putting in the affidavit upon which the writ of arrest was asked for. It was not meant as proof as against Mr. Hahne that he was going. Mr. Joseph had this affidavit before him when he asked for the writ.

Mr. Justice Jones: This was an affidavit which was rejected. His lordship added that in the taxed writ-costs the cost of this affidavit was disallowed. He did not think the affidavit helped the case or that it was admissible.

The witness said that Hahne told him he was leaving the country, and bade him good-bye.

Counsel having been heard in argument,

Mr. Justice Jones addressed the jury. His lordship commented on the agreement as an extraordinary and ridiculous document. Proceeding, he said that the only thing the jury had to consider was how much damages they would give the plaintiff for an act admitted to have been illegally done by the defendant. In assessing the amount, they would have to determine whether or not the act of the defendant was malicious and without reasonable and probable cause. It was most important that the jury should consider the question as to whether the defendant, when told that Hahne was going to Germany, believed that he really intended to go, in which event there would certainly be some justification for his act, or whether he believed that it was, as said by plaintiff, an excuse to offer to possible purchasers of the hotel.

The jury retired to consider their verdict, and upon returning, after an absence of less than ten minutes, announced that they found for plaintiff for £200 damages.

Judgment was thereupon entered for the plaintiff for £200 damages and costs.

[Plaintiff's Attonrey, J. F. G. Bernard ; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

JOSEPHS AND CO. V. GOUS AND { 1901.
OTHERS. { Mar. 28th.

This was an application for an order restraining the respondents, or any other person acting under their authority, from alienating or otherwise disposing of their property, movable or immovable, pending actions to be instituted by the applicants against them for certain sums of money due.

The petition set out that the respondents were indebted to the applicants in various sums of money ; that the applicants were informed and believed that the respondents had joined the Boer forces then invading the Colony and that they intended leaving the Colony with those forces without paying the applicants' claims ; and that the applicants intended taking immediate legal proceedings to recover the amounts due.

There was a further affidavit setting out the various properties of which the respondents were the registered owners.

Mr. Benjamin moved.

The Court made no order.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice) and the Hon.
Mr. Justice JONES.]

PROVISIONAL CASES.

HUMPHREY V. KEMP { 1901.
April 12th.

Mr. Close applied for provisional sentence for £26, due on a mortgage bond, with interest and costs of suit, and that the property specially hypothecated might be declared executable.

Granted.

WICHT V. GOLDBERG.

On the motion of Mr. Maskew, provisional sentence was granted in respect to a sum of £500, due on a mortgage bond, with interest and costs. The property specially hypothecated was declared executable.

BAMFORD V. BROWN.

Mr. Buchanan applied for a writ of civil imprisonment in respect to an unsatisfied judgment.

Granted.

FAIRBRIDGE V. GOUS.

Mr. P. S. Jones applied for and was granted provisional sentence for £200, balance on a mortgage bond, with interest and costs of suit.

S.A. ASSOCIATION V. DAY. { 1901.
April 12th.

Provisional sentence—Liquid liability.

Defendant was sued provisionally on an acknowledgment of debt. She was entitled to a certain share in the estate of her late father, but could not get a statement of accounts from the executor. She claimed that the debt should be paid out of her interest in the said estate.

Held: (1) That for provisional sentence a document showing a clear liquid liability when the case comes into court should be produced. (2) That recourse cannot be had to anything save the document sued on. (3) That as it was not clear that defendant's fidei commissary interest in the estate of her late father would be insufficient to discharge the debt in question, provisional sentence must be refused.

—
This was an application for provisional sentence for the sum of £71 10s., interest at 6 per cent. per annum from January 1, 1899, to October 31, 1900, on a capital sum of £650, the amount of a certain acknowledgment of debt bearing date 16th of June, 1893, and signed by defendant in favour of plaintiffs. Plaintiffs also claimed: (1) £79 15s. 4d., being the amounts of certain premiums for insurance paid by the plaintiffs on account of defendant; (2) £2 2s. 3d., in-

terest due on the above insurance premiums; (3) costs of suit.

The answering affidavit of the defendant stated that the plaintiff company was one of the executors in the estate of her late father, Peter Joseph Vink, and that she, the said defendant, was one of the heirs. Although her father died in 1881 or 1882, she had, up to the present, been unable to obtain from his executors any adequate statement of the position of his estate; that in virtue of her agreement with plaintiff, the amounts due by her were to be paid out of her share in her father's estate; and that about £120 was then and there due to her from the said estate. She admitted that the sum of £71 10s. was due by her to plaintiffs as interest on the acknowledgment of debt, but claimed to set off against this sum the money due to her from plaintiffs out of her father's estate.

The answering affidavit of Gother Charles Mann, assistant secretary and accountant of the plaintiff association, admitted the date of the decease of defendant's father, but denied that she had not been furnished with full statements as to the position of her father's estate. Mann's affidavit also stated that defendant was only entitled to the usufruct of her inheritance out of the said estate, and not to any capital sum. That this interest had, at her request, been applied from time to time towards payment of the interest due by her on a mortgage bond which she owed to her father's estate, but had then (at the date the affidavit was sworn) been paid off, and towards payment of the interest due on the acknowledgment of debt, and that the balance was from time to time paid by defendant. That since the issue of the summons in this case, £38 11s. 10d. had accrued to the defendant, and that plaintiffs reduced the claim against her by this amount.

Mr. McGregor (for plaintiff): The document put in is a liquid document, and provisional sentence can be granted thereon.

[Jones, J.: Is this interest sufficient to pay off the debt or not? How can you ask for provisional sentence if you say that the document on which you sue is varied by another?]

The onus is on the defendant to show that the funds are sufficient. Suppose, owing to a change in the bank rate of interest, the *corpus* of the estate yielded insufficient interest, is plaintiff to go unpaid?

Mr. Searle, K.C. (for defendant) was not called upon.

Buchanan, A.C.J.: There are certain peculiarities in the deed of acknowledgment. In order to obtain provisional sentence, it is necessary to produce a document showing a clear liquid liability when the case comes into court. Recourse cannot be had to anything save the document sued on. In this case it is by no means clear that the fidei-commissary interest is not sufficient to pay the debt. Provisional sentence must be refused, with costs.

[Plaintiffs' Attorneys, Messrs. Sauer and Standen; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

VILJOEN V. VILJOEN. { 1901.
April 12th.

Mr. Rubie moved that a provisional order of sequestration, granted in Chambers by the Hon. Mr. Justice Jones, be made absolute. Defendant was said to have left his residence, and to be with the Republican forces on commando. Service had been made on his housekeeper at his late residence. Counsel stated that he had been absent a very long time.

[Jones, J.: There ought to have been publication in the "Gazette."]

[Buchanan, A.C.J.: Section 17 of the Insolvent Ordinance requires publication in the "Gazette." The case must stand over until you can ascertain whether this has been done.]

The return day was subsequently extended to May 1, and a fresh service of summons was ordered.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant in default.]

FAIRBRIDGE, ARDERNE AND LAWTON V. LUCKE.

Mr. Gardiner applied for provisional sentence for £850, interest and costs, on a certain mortgage bond, and for the hypothecated property to be declared executable.

Granted.

LEIBBRANDT V. LUCKE.

Mr. Gardiner moved for similar judgment in respect to a sum of £746 10s.

A similar order was made.

FOURIE V. SWART.

Mr. De Waal applied for provisional sentence for the sum of £66 on a promissory note, with interest and costs of suit.

Granted.

VENTER V. WEINBERG.

Mr. De Villiers applied for provisional sentence for a sum of £40 on an acknowledgment of debt, with interest and costs.
Granted.

ATTWELL V. BOOYSEN.

Mr. Buchanan moved for provisional sentence for a sum of £42 on a promissory note, with interest and costs.
Granted.

SCHUCKBURG V. NIEKERK.

Mr. P. S. Jones moved for provisional sentence on a mortgage bond for £50, interest and costs, and for the mortgaged property to be declared executable.
Granted.

ABF AND CO. V. GELDENHUYB.

Mr. Gardiner similarly moved in this case, the amount in question being £60.

The case was ordered to stand over for explanation by the Deputy-Sheriff as to service.

VAN ZYL V. VAN ZYL.

Mr. Buchanan moved for the final adjudication of defendant's estate. The provisional order was granted on the 12th March last.

Notice had not been published in the "Gazette," and the time was extended till the 9th May, to allow this to be done.

NOCHAMSON V. WESTHUYSEN.

On the motion of Mr. Gardiner, the estate of the defendant was finally sequestrated.

VILJOEN V. WOLFAARDT.

Mr. Benjamin applied for a similar order in this case. The provisional order was granted on the 27th March.

The application was granted.

ILLIQUID ROLL.

LITHMAN AND CO. V. WENTZEL.

Mr. Gardiner applied, under Rule 329d, for judgment in respect to the sum of £153 5s. for goods sold.
Granted.

WELCH V. WHITE.

Mr. Maskew applied, under the same rule, for judgment for the sum of £60.
Granted.

ESTATE BORCHERT V. DICKSON.

Mr. Howel Jones moved, under Rule 329, for judgment for costs.
Granted.

GOVERNMENT V. BRECHER.

Mr. Howel Jones applied for judgment for £21 11s. for rent.
Granted.

BOLT V. GOUWB.

Mr. McGregor moved, under Rule 329d, in respect to the sum of £61 9s. 2d.
Granted.

SAUER V. DAY.

Mr. De Waal applied, under Rule 319, for an amount due for services rendered.
Granted.

SPILHAUS V. KOHLER.

Mr. Nathan applied, under Rule 329d, in regard to a sum due as balance for goods sold and delivered.
Granted.

ESTATE OF ROBERTSON V. BERLYN.

Mr. Buchanan made application, under the same rule, in respect to a sum of £20 due for hire of furniture.
Granted.

LABE V. GAFFOOR.

Mr. Benjamin applied for an order under Rule 319. The application, which was granted, was in respect to the purchase price of certain property.

MULDER V. LUCKE.

Mr. Buchanan applied under the same rule in this case, and the order was granted as asked.

BAM V. MANSCHETER.

Mr. Maskew applied for judgment under Rule 329d for the sum of £27, arrears of rent.
Granted.

REHABILITATION.

On the motion of Mr. Close, Emanuel Kruger was rehabilitated.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE ROBERT MCKAY.

Mr. P. S. Jones applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF CAROLINA HENDRIKSE.

Mr. McGregor moved that a rule *nisi* authorising the Master to amend certain names in letters of administration be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF RICHARD RANDALL.

Mr. Benjamin moved for a rule *nisi* authorising the passing of transfer to be made absolute.

Granted.

THE MINORS SMALL V. SMALL AND ANOTHER.

Mr. Gardiner moved that a rule *nisi* calling upon respondents to show cause why applicant should not be permitted to sue *in forma pauperis* be made absolute.

The application was granted, Mr. Gardiner being appointed counsel and Messrs. Walker and Jacobsohn attorneys.

IN THE MATTER OF THE MINORS REED.

Mr. Close moved for an order authorising the guardian of the minors to sell certain property at present held by him in trust for them.

The application was granted in terms of the Master's report.

STEYTLER, N.O. V. JAMES SCOTT. { 1901.
April 12th.

Mr. Close applied for an order compelling respondent, in his capacity as co-trustee in the above insolvent estate, to sign a power of attorney for the purpose of instituting proceedings and issuing a summons against himself in his private capacity.

Counsel said that the applicant was Mr. G. W. Steytler, the other trustee. The circumstances were that the respondent had in his private capacity purchased some of the property of the insolvent, and the applica-

tion was to compel him to sign a power of attorney to proceed against himself in connection with this.

Buchanan, A.C.J.: The better course would have been to have removed him from his trusteeship. You may take an order.

BRINKMAN V. RESIDENT MAGISTRATE, VICTORIA WEST.

This was a motion for an order compelling respondent to enrol applicant as a law agent for the division of Victoria West.

Mr. Searle, K.C., appeared for the applicant, and Mr. Howel Jones for the respondent.

The case was ordered to stand over, in order that it might be ascertained whether the applicant was still in practice at Piquetberg.

HOLDER V. SAUER AND ORSMOND.

Mr. Maskew applied for an order to have judgment signed against plaintiff for not proceeding with his action.

Granted.

VAN ZYL AND OTHERS V. VAN DER VYVER AND OTHERS.

Mr. Schreiner, K.C., applied for an order calling on Philip Lodewyk le Grange, in his capacity as executor testamentary of the late J. A. van der Vyver, to show cause why he shall not be joined as a defendant in the above suit.

Counsel explained that Mr. Le Grange had no interest in the matter, but was required to be formally joined.

The order was granted.

Ex parte GUSH. { 1901.
April 12th.

Articled clerk—Service—Sufficiency.

An articled clerk who had served articles from December 14, 1895, till the end of September, 1897, was then sent by his principal to manage a branch business. He continued to do this for five months and then returned to his service, in which he remained about one month. He was again absent, with consent of his principal, for the purposes of private study till June, 1898. He remained in service from June,

1898, till September, 1899. He then, with his principal's consent, left for military service; in which he remained till October, 1900. From that time till the date of the present application he had served as an articled clerk.

Held: (1) That there had been no break in applicant's legal studies which the Court might not fairly condone. (2) That the break in his service was not such as to be considered an objection on the ground of want of continuity. (3) That the time he managed the branch office could not be allowed to count in his period of service.

This was the petition of Henry Wood Gush. On December 14, 1895, the petitioner, then a minor, was apprenticed to Ernest Edward Webb, of Idutywa, an attorney-at-law, notary, and conveyancer, for a period of five years, or, at the option of his principal, for three years, calculated from December 14, 1895. The petitioner served until May 31, 1897, and at that date his articles were ceded to Walter Ernest Warner, an attorney practising at Idutywa, with the consent of the petitioner (who was then a major), for the unexpired period of his term of apprenticeship.

At the end of September, 1897, the petitioner proceeded to Nqamakwe, and remained in charge of a branch business of his principal during five months, returning to his service at Idutywa in the beginning of March, 1898. He continued his service until April, 1898, when he left Mr. Warner's service, with the consent of his principal, to prepare himself by private study for the Matriculation Examination of the Cape University. He returned to his duties in June, 1898, following.

Thereafter the petitioner remained in Mr. Warner's service until September, 1899, when he left, with his principal's consent, to join the Protectorate Regiment, in which he served until October, 1900, when he returned to Mr. Warner's service, in which he has continued up to date.

The Incorporated Law Society having doubts as to the sufficiency of petitioner's service, he now applied to the Court for relief, and prayed that the service under his articles should be considered sufficient ser-

vice to entitle him to admission as an attorney and notary.

Sir H. Juta, K.C., moved that applicant's petition be granted. The Law Society does not appear to oppose, and applicant has exceeded the prescribed term of service by about a year.

The Court held that there had been no break in the applicant's legal study, and that the break in his service was not such as should be considered as an objection on the ground of want of continuity. The time during which he was employed at the branch office would not, however, be allowed to count in the term of his service.

MITCHELL V. MITCHELL.

Mr. Buchanan moved that the rule nisi for dissolution of marriage be made absolute.

The notice had not been published in the "Gazette," and the return day was extended till May 23, in order that this might be done.

LEGG V. FINDLAY AND CO. { 1901. April 12th.

Trade mark—Registration.

The words "Irish" and "Crown" whether used separately or in combination are not words registrable as a trade mark under Act No. 12, 1895, section 2, subsection (e).

Mr. Schreiner, K.C., applied for an order removing certain trade mark from the Register of Trade Marks.

Mr. Searle, K.C., appeared for Mr. Alexander Findlay, manufacturer, who registered the trade mark in question.

The trade mark was "Irish Crown," which the respondent registered as the distinctive mark of a certain soap manufactured by him. This trade mark was registered in the Colony in 1897, but it was not registered in England.

Affidavits were read on both sides. The applicant, who was at one time an agent for the respondent, contended that "Irish Crown" was a term significant of a quality and not of a particular proprietary soap. The affidavits in support of the application were to this effect, and it was further stated that "Irish Crown" was in common use as applied to soaps, and was a well-known term to the trade.

The respondent's affidavits stated that he introduced "Irish Crown" to the English market, but before the term could be registered, it was in general use. He had, however, registered it here before it had been sold by anyone else, or imported into the Colony.

Mr. Schreiner, K.C. (for applicants): The term "Irish Crown" is well known in England as a trade term used in connection with soap. It is admitted that there it would not be registered as a trade mark, just as such words as "Glenfield Starch" and "Worcester Sauce" cannot be registered. Such terms have, by general use, become public property. Again, "Irish Crown" is partly a geographical term, and partly a term denoting a certain quality of goods. The term "Crown" is supposed to imply some special excellence in the goods thus designated. Neither term, therefore, is registerable.

Mr. Searle, K.C. (for respondents): The real point is, does "Irish Crown soap" come within the terms of section 2, sub-section (e), of Act 12 of 1895? Applicant contends that (1) "Irish Crown" is used in trade in connection with soap; (2) that it is a geographical term. As to the first term, it may be well known to trade in another country, but if not known here, it may be registered here. If a term is well known in the United Kingdom, but not known here, it can be registered here as a trade mark. Nobody in this country has sold this soap in appreciable quantities save respondents. It has been largely sold in the United Kingdom possibly, but not here. Cases like "Glenfield Starch" and "Worcester Sauce" are not in point. These trade marks may not be registerable in the United Kingdom, but if introduced into this country by one firm alone, that firm could protect such terms by registration. The object of the Trade Mark Act is to protect the maker, inventor, or importer to this country. Hence the fact that the term "Irish Crown" is commonly used elsewhere in connection with soap does not militate against its being registered in this country. No doubt, as these words had come into common use in the United Kingdom, they were not registerable there. But they have no reference to the kind or quality of the goods (*Kerly on Trade Marks*, p. 153). It has been decided that the words "Cafe Noir" could not be registered as a trade mark for biscuits, and in that case the whole argument turned upon the question whether the phrase was descriptive and came under sub-section (e) of section 2 of Act 12 of 1895.

[Buchanan, A.C.J.: Then the first man who comes out here and registers a trade mark here may have a monopoly in an article which is not registetred elsewhere?]

Yes. The object of these Acts is to protect enterprise, and if a man wants to protect his interests he must register in every country in which he wishes to introduce his goods. The only question is, is the term in common use in a country when it is registered there?

Mr. Schreiner, K.C. (in reply): I am prepared to argue that the words "Irish Crown" are not registerable (*Sebastian on Trade Marks*, p. 381). Our law (Act 22 of 1877) does not allow trade marks to be registered here which cannot be registered in England. A man might go to England, find out the special names given by some good firm to their goods—names not yet in general use in this colony, but commonly used in England, though not registered there. He might then come out here, register such a name as his own trade mark, and keep out every other firm by preventing them from using that mark. If one claims to register a trade mark under Act 22 of 1877 he must prove that he has used the mark in this colony; but if he wants to register *de novo* he can do so only in respect of a term which would be registered in the United Kingdom. See *Sebastian*, pp. 48, 82, 88, 67, 364, 384, 399 to 401. The *Trade Marks Journal* shows that if a man registers a trade mark in England, he must disclaim the use of a word, or even of a part of a word, if he did not mean to claim the whole. The use of either of the words "Irish" or "Crown" is inadmissible under the Trade Mark Act. See *In re Goodhall* (42 Ch. D. p. 566) on disclaimer. If both "Irish" and "Crown" were disclaimed, there would be nothing left. There is no doctrine in trade marks to the effect that words which may not be used separately may be used in combination.

Mr. Searle, K.C.: Our position is that we may disclaim the combination, even after registration.

Buchanan, A.C.J., in giving judgment, said: The applicant was formerly the agent of the respondents, and as such imported and sold for them quantities of soap bearing the distinctive names or marks of "Silkstone" and "Irish Crown." After some years he ceased his agency, and has since imported from other manufacturers soap bearing the mark of "Irish Crown." Meanwhile the respondents had registered as trade marks in this colony both "Silkstone" and "Irish Crown." The applicant, on discover-

ing this registration, obtained a rule nisi calling on respondents to show cause why "Irish Crown" should not be removed from the register. "Silkstone" had been registered as a trade mark in England, but "Irish Crown" had not, as it appeared that it was a name in use by soap makers in Belfast, where the respondents had their business, as descriptive of a well-known quality of soap. The soap manufacturers in the North of Ireland had formed themselves into an association, which met at stated intervals, and fixed the trade price of the different qualities of soap, and it was shown that "Irish Crown" soap was a quality of soap in common manufacture by the different members of the association. It has not been shown that any other manufacturers sent soap so described to this country before the respondents traded here. The registration of the word "Silkstone" has not been attacked, but the registration of "Irish Crown" has been, on the ground that it contravenes the provisions of sub-section (e) of sec. 2 of Act No. 12, 1895, which provides that a trade mark shall be a word or words having no reference to the character or quality of the goods, and not be a geographical name. In the affidavits, though not in the register, the respondents disclaim the sole right to the use of the word "Crown," and counsel in argument has admitted that the word "Irish" could not be registered, but it is contended that the combination of the words "Irish Crown" is registerable under the Act. Independently of the disclaimer, the affidavits show that the word "Crown" is in common use in trade as deciding a superior class of goods, and has been applied in addition to soaps, to candles, perfumery, china, and earthenware, and also to articles of food, such as hams and the like. Strictly construed, no doubt the word "Crown" would not be a word having reference to the quality and character of the goods, but by usage there is little doubt it has acquired such a meaning. In a previous case before this Court the word "Royal" was in question, and it was held under the Act of 1877 that it was not a special and distinctive word (*Wright, Crossley and Co. v. Royal Baking Powder Company*, 15 S.C. Rep., 9). That decision I think materially helps the Court in deciding this case. There it was laid down that "Royal," as used in trade, had come to have a wider meaning than "kingly," and was synonymous to "splendid" or "magnificent." The two words "Royal" and "Crown" have a close affinity in signification. True one is an adjective, but the other can also be used

adjectively, as a "Crown" *desmesne*, which would imply the same meaning as a "Royal" *desmesne*. It was contended that as the respondents were the first to export "Irish Crown" soap to this country they had a right to be protected in the trade. But the intention of the Trade Mark Act was not to give a monopoly in dealing with a well-known article of commerce. The object was to protect a man in his invention, or in the character and special quality of his manufacture. In my opinion the register must be corrected by removing the trade mark "Irish Crown," as offending the provisions of the sub-section in question. The rule will be made absolute, with costs.

Mr. Justice Jones: I concur, and for the same reasons.

Rule absolute accordingly, with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondents' Attorney: Gus. Trollip.]

SUPREME COURT

DIOCESAN COLLEGE V. RONDEBOSCH MUNICIPALITY. { 1901.
{ April 16th.

Municipal rates—Section 115 of Act 45 of 1882—Educational purposes.

The Council of the Diocesan College at Rondebosch claimed exemption from municipal rates, under Act 45 of 1882, section 115, sub-section (3) in respect of (inter alia) certain boarding houses, the principal's residence, and certain land not at present used for any definite purpose.

Held, that none of the aforesaid properties were applied exclusively to religious or educational purposes, and hence were not exempted from municipal rates by the terms of section 115, sub-section (3), of Act 45 of 1882.

This was an application by the Council of the Diocesan College at Rondebosch for an order declaring that their property was exempt from the payment of municipal rates.

Mr. Schreiner (for the applicants) read the affidavit of Mr. F. G. Gardiner, the secretary of the Diocesan College Council, which stated that the land

in question was known as Woodlands, and was about 25 morgen in extent. On this land there were the Diocesan College, the chapel, and the Diocesan College School, recently removed there from Claremont. There were also two boarding-houses for students, and the principal's residence. About 19 morgen of the land was occupied by the Diocesan College and buildings and ground connected with it, and the remaining 6 morgen were occupied by the Diocesan College School. At the last sitting of the Rondebosch Municipal Valuation Court an application to have all this property declared exempt from rates was set aside, and a valuation of £7,500 fixed. It was contended that all the lands and buildings were used solely and entirely for educational purposes, and were necessary for the intellectual, religious, and physical training of the pupils.

For the respondents, Sir Henry Juta read the affidavit of Mr. Jenkinson, Mayor of Rondebosch, in which it was alleged that the Municipal Council did not wish to rate all the 25 morgen of land referred to, but only a portion of such land and some buildings that were not used for educational purposes. It was only intended to rate the boarding-houses, and the principal's residence, and not those buildings which were used strictly for educational purposes. Further, the recreation grounds were not rated, but much of the ground round the College it was impossible to use for recreative purposes for the pupils, as it was densely wooded, and this land had apparently been set aside by the College Council for building lots; as a matter of fact, some years ago nine lots were so sold. Hitherto no objection had been raised to the payment of rates on this property. In replying affidavits for the applicants it was alleged that the land in question would be used for recreation purposes and for residences for the professors, etc., and that there was no intention on the part of the applicants to sell it as building plots.

Mr. Schreiner, K.C.: We do not question the amount of the valuation, but we wish to raise the question whether, as a matter of principle, we should be exempt or not. It is necessary that an institution of this kind should be surrounded with grounds to secure the necessary seclusion and retreat. Such ground is really being used for educational purposes, and should therefore be exempt from taxation. Were the ground lying by for speculative purposes, I admit we should have to pay rates, but we have no intention of selling the land. As to the boarding-houses, education is not confined to mere book-learning. It is impossible to over-

estimate the value of the discipline and training of the minds of the students which result from residence in such places. Surely such discipline is a part of their education, and a very important part too. As to the masters' residences, if it is the duty of the masters to be on the spot, in order that they may the more effectively supervise the students, the buildings which accommodate them are used for educational purposes, and should not be rated.

[Buchanan, A.C.J.: Suppose a master does not take boarders, would not his residence be ratable?]

It would; but in the case of this school the profits from the boarding establishments are used for educational purposes, even if they form part of the emoluments of the master, for if he did not receive these profits he would have to be paid the amount in some other way.

Sir H. Juta, K.C. (for respondents): The difference between cricket and recreation fields, which are not rated, and boarding-houses is that the former do not yield any pecuniary return—the latter do so. Hence these places are not on the same footing. Boarding-houses are not used exclusively for educational purposes, and the Act used the word "exclusively." It does not say "incidental to" or "connected with" educational purposes.

Again, one of applicants' affidavits practically gives the case away. It says that it is "contemplated" that the "future" development of the College will necessitate the use of these grounds. That shows that the grounds are not required at present.

Mr. Schreiner, K.C., was heard in reply.

Buchanan, A.C.J.: The Diocesan College authorities apply to have their property, situated within the Rondebosch Municipality, declared exempt from payment of municipal rates. The question to be decided depends entirely on the construction of section 115 of Act 45 of 1882. This section prescribes that all lands within a municipality shall be ratable property subject to certain exceptions, and the *onus* is on the applicants in this case to show that this property comes within one or other of those exceptions. The 3rd subsection of the clause is the one relied upon. It says "that places used exclusively for public worship, or for public worship and for educational purposes, or for public schools," shall be exempt. The property in question is some 25 acres in extent, and is used for a college—a school—for playgrounds, and also for a principal's residence and for two boarding-houses. The Municipal Council say that they have not rated any of the property used

exclusively for school or college purposes, but that they have rated residences, boarding-houses, and vacant lands not used for school purposes. The question as to the amount of the valuation is not before the Court, and cannot be dealt with now. What is to be decided is a question of principle, namely, whether or not the principal's residence, the boarding-houses, and the vacant land should be rated or not. Looking at the exception to rating mentioned, it is certainly restricted to places used exclusively for educational and religious purposes. Not every school has residences for masters and boarding-houses attached to it. It is not necessary for a school or for a place of public worship to have residences for the master or for the minister attached to it, nor is a boarding-house necessary to a school. The question whether or not the Diocesan College was a public school, in the sense of being undenominational, has, I am glad to say, not been raised. It is clear that a place of worship would be denominational, and so I think a public school may be. Taking the view I do of the Act, I am bound to come to the conclusion that a master's residence, a boarding-house, or vacant land not in use is not included in the exemptions provided for by the Act. Whether or not all the land rated was unused vacant land is not now before us; but I may express as my own opinion that the Municipal Council would not be justified in cutting up such land into little lots and making the value of such lots the basis of a valuation of the entire property. If there should be any dispute as to the amount of the valuation, that question may be raised before the proper tribunal; but that proper tribunal is not this Court. The present application must be refused, with costs.

[Applicants' Attorneys, Van Zyl and Buissinné; Respondents' Attorney, Gus Trollip.]

SUPREME COURT

OHLSOON V. KUHR'S TRUSTEE. } 1901.
" V. PARSONS. { April 17th.

Licensed premises—Transfer of licence—Insolvency—Trustee—Ejectment—Motion.

O. leased certain premises to K., it being provided inter alia in the lease that on the expiry of his tenancy K. should deliver, assign,

Z

or transfer to O. or to his nominee all licences belonging to, or granted or issued to him, or to be granted or issued in respect of such premises as O. should direct or require.

K. subsequently became insolvent and his trustee obtained a temporary transfer under Act 28 of 1883, but declined to transfer the licence to O.

Held, that the trustee was bound in terms of K.'s lease to hand over the licence to O.

Semle, that ejectment may be granted on motion in cases of urgent necessity or where irreparable damage is likely to ensue.

See Elder's Executors v. Coxhead (8 Sheil, 236); Mills v. Jones Bros. (9 Sheil, 543) and compare Oliver v. Potgieter (6 Sheil, 312).

These were two applications in connection with the hotel called His Lordship's Larder, Cape Town. As the two motions dealt with the same matter, they were heard together. The first, Ohlsson v. the trustee of the insolvent estate of Franz Kuhr, was for an order compelling the respondent to transfer the liquor licence of the hotel in question, while the second application, Ohlsson v. Parsons, was for an order on respondent to deliver up to applicant possession of the hotel.

With regard to the first application, it appeared that Kuhr leased the hotel on a monthly tenancy at a rent of £50 per month. By the agreement between Ohlsson, the owner of the hotel, and Kuhr, it was agreed that on the expiry of his tenancy Kuhr should peacefully and quietly deliver up possession of the said premises to the landlord, and should deliver, assign, or transfer to the landlord or his nominee, all licences belonging to or granted or issued to him or to be granted or issued in respect of such hotel as the landlord should direct or require. The licence when Kuhr took the hotel over was in the name of one Jackson, and Kuhr was, in terms of the Act of 1883, granted a temporary transfer by the Magistrate and two members of the Licensing Court. During the continuance of his tenancy Kuhr wished to transfer his right in the premises to Parsons, and to this the

landlord consented, but when they went to have a temporary transfer taken out the Magistrate considered that one temporary transfer having already been taken out during the year, a second could not be issued, but so that Parsons might have the benefit of his agreement, the Magistrate appointed him manager for Kuhr for the unexpired portion of the time which the licence had to run, so that on the sitting of the Licensing Court he could have the licence transferred to his own name. Under an agreement entered into between Ohlsson and Parsons, the latter was to lease the place for seven years at a rental of £60 per month, but in case of Parsons being convicted of contravening the liquor law the lease was to be terminated. Parsons, while acting as manager, was convicted for allowing drunkenness on the premises, and before the Licensing Court came round Kuhr had absconded, and his estate had been placed under sequestration. At the Licensing Court, Ohlsson, in Kuhr's name, applied in terms of the lease between them, for a renewal of the licence, but owing to the conviction of Parsons referred to there was some question as to whether or not the licence should be renewed, and consideration of the matter was adjourned. Before the adjourned meeting was held the trustee in Kuhr's insolvent estate gave notice that for the benefit of the creditors in the estate he would apply to have the licence transferred into his own name. Mr. Ohlsson, not wishing to jeopardise the licence, said he would not oppose, but that on it being granted he would claim it in terms of the agreement with Kuhr. The licence was granted, but as there was some dispute between Kuhr's estate and Parsons as to the payment by the latter of some portion of the £3,000 agreed to be paid by Parsons for the good-will of the hotel, the trustee had not complied with the owner's demand, and taken out the licence and handed it over. Accordingly the matter came before the Supreme Court by way of motion, while as indicated above the second motion, which was heard along with it, was to have Parsons ejected from the hotel, he having violated the conditions of his lease.

Mr. Gardiner was heard in support of the applications. Mr. Searle, K.C., for the trustee.

On behalf of the respondent Parsons, Sir Henry Juta contended that Parsons had not been convicted rightly, the drunkenness having occurred while he was sick in hospital, and therefore he submitted that it could not be held that Parsons had permitted that.

In the second place, he contended that at the time of the conviction Parsons was not the licensee of the hotel, being at that time the manager for Kuhr. In the third place, he contended that no special urgency or irreparable damage had been shown by the applicant, and therefore he submitted that it was a matter which should not be heard on motion but by action.

Buchanan, A.C.J.: The trustee cannot have any greater rights than the person he represents, and if Kuhr had given notice of his intention to renew the licence upon the termination of his lease, he would have had to assign or transfer it to the landlord, Ohlsson. According to the agreement, this proviso applies not only to the then subsisting licence, but to any licence issued or granted in respect of these premises. The trustee obtained a renewal of the licence only on the strength of the previous licence, and not independently of it, and it fell under the control of the agreement entered into between Ohlsson and Kuhr. The lease of the premises having been terminated, the trustee, upon obtaining the renewal, was bound to hand over the licence, he having got it only as the representative of the lessee, in terms of the agreement. Neither Kuhr nor the trustee had any right whatever to that licence after the expiration of the lease. Neither of them, contrary to the lease, could have the licence transferred to other premises. Therefore the application, as far as concerns Kuhr's trustee, must be granted, and the trustee will, in terms of the agreement, be ordered forthwith to deliver and assign or transfer to the landlord, or his nominee, all and every licence or licences which may be granted or issued for and in respect of these premises.

As to the second application, for a writ of ejectment against Parsons, to whom the premises were afterwards leased, it has been several times pointed out that, although as a rule ejectment should be obtained upon action brought, it may be granted on motion in cases of urgent necessity, or where irreparable damage would ensue. Several important questions have been raised in this case, but no urgency or irreparable damage has been shown. Therefore, as regards the second application, it will be better, under all the circumstances, that an action of ejectment should be brought against Parsons. As there will be an action, I do not wish to say whether the conviction of Parsons justified the termination of the contract between Parsons and Ohlsson. On this application therefore the Court will order that an action for

ejectment be brought forthwith, the respondent to be prepared to go to trial by next term. Costs will be costs in the cause.

Jones and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant Kuhr, Brady; Defendant Parsons, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN.]

ABT V. GELDENHUY. } 1901.
April 18th.

This was an application for provisional sentence for £60 due on a mortgage bond, together with £14 2s. 7d., taxed costs. The case had been mentioned on the 12th April, but was ordered to stand over till to-day. The return of the Deputy Sheriff was as follows: "Being unable to find either the defendant or any of his household after diligent search for him and them, I have on this 18th day of March, 1901, duly served the within summons by leaving a copy thereof, as also of the mortgage bond, at his last known dwelling-place, but there being no buildings on the same, I fixed it to the ground thereof."

Mr. Gardiner, for plaintiff, stated that the defendant lived in a wagon, and when last heard of had outspanned on the land where summons was served.

The Court granted provisional sentence as prayed, with costs.

Ex parte JAMES MURPHY. } 1901.
April 18th.

Mr. Gardiner moved for leave to the petitioner, James Murphy, as father and natural guardian of his minor daughter, to sue one Donnithorpe *in forma pauperis* for damages. The petitioner's affidavit set forth that his wife and ten-year-old daughter, Elizabeth Murphy, went to the shop of E. S. Donnithorpe, at Wynberg. Mr. Donnithorpe was showing a friend a rifle over the counter, and it is alleged that through his negligent handling the rifle was discharged and petitioner's daughter shot in the shoulder. Petitioner believed that Donnithorpe was paying the medical expenses, but he had made no proposal to pay compensation for the permanent injury done the child, and as petitioner was not in a position to provide for the child in the

future, this action for damages was brought.

Mr. Gardiner was appointed to take the reference in the case.

Re THE ESTATE OF THE LATE } 1901.
MARIA J. DE WET. } April 18th.

Mr. McGregor, in making an application for leave to transfer certain property, stated that the Master refused to sanction the transfer, as he feared that future heirs who might be hereafter born of one of the beneficiaries would be prejudiced. The said beneficiary was now 50 years of age. *In re Estate Meyer* (13 S.C.R., 2), the Court had held that under similar circumstances a woman aged 54 would not be supposed to be capable of having any future issue.

Order granted, subject to production of affidavit in terms similar to that produced in Meyer's case.

Re THE ESTATE OF THE LATE IGNATIUS
STEPHANUS LE ROUX.

Mr. Gardiner moved in this matter, which was for authority to the executors to pass a mortgage bond.

The application was ordered to stand over until May 1, so that further information might be obtained as to the amount the minor concerned would receive out of the estate.

Ex parte WILSON (BORN MURKIN).

Mr. McGregor moved for leave to the petitioner to sue her husband by edictal citation for restitution of conjugal rights, failing which for divorce. The parties were married without community of property in England, and came out to the Cape in May, 1896. They resided at Woodstock until 1898, where the respondent, Thomas Wilson, carried on business as an engineer. In that year the respondent deserted petitioner. For three months previous to the desertion he had been of drunken habits, and had failed to contribute to petitioner's support. She had been unable to ascertain respondent's whereabouts, and he was presumed to be out of the jurisdiction of the Court. It seemed that the respondent was last heard of at Port Elizabeth in 1899. The parties belonged to Grimsby, England.

The Court granted leave to sue by edictal citation, personal service to be effected if possible, failing that, publication to be made in the "Government Gazette" and in a Port Elizabeth and Grimsby newspaper. Leave

was also given to serve the intendment and notice of trial with the citation. The citation to be returnable on July 12.

Ex parte WALTER SPENCER WALTON.

Mr. Gardiner moved in this matter, which was for an order authorising the Master to pay out of £600 in his hands for the benefit of the minor, W. H. M. Walton, son of the petitioner, a sum of £40 per year for five years, for the purpose of properly educating the said minor at a school in England.

The Master's report being favourable, an order was granted as prayed.

Re ESTATE OF THE LATE HESTER ADRIANA LOTIER (BORN JOUBERT).

Mr. Benjamin moved for leave to the executors in the above estate to transfer certain immovable property in the estate to one of the executors. This land had been sold at public auction, and affidavits were put in showing that the price to be paid was a fair one.

Order granted as prayed.

Ex parte MARY ANN NICOL (BORN KELLY).

This was an application for leave to mortgage certain property in Hanover-street, Cape Town, in which the petitioner had a life interest. It was stated on affidavit that the Town Council had called upon petitioner to have the houses connected with the drainage system, and that the houses were also in need of repairs. The drainage of the houses would, according to tenders received, cost £120, and the repairs £80. Authority was therefore asked to raise £220 to cover the cost of drainage, repairs, the application, and raising the bond. It was stated that the rental of the houses was £108 per annum, and the municipal valuation £750.

An order was granted as prayed.

Ex parte THE EXECUTORS OF { 1901.
THE ESTATE OF THE LATE } April 18th.
KLAAS ADRIAANSE.

This was an application for an order authorising the sale of certain fiduciary property.

On February 6, 1884, the late Klaas Adriaanse (who was possessed of certain immovable property at Claremont) made a will, by which he appointed his reputed wife Maaimoena (to whom he had been married according to the rites of the Mohammedan faith) as his sole heiress. He, however, forbade the said landed property at Claremont

to be sold, mortgaged, or otherwise encumbered during the lifetime of Maaimoena. During her lifetime she was to enjoy the usufruct of the said property, and after her death it was to be sold, and the proceeds divided among Nakierdien, Abdol, Gadya, Haroen, Kajamdien, children of Maaimoena by a former marriage, and also Malea, Gasibaen, and Gadya, children of testator's late cousin Omaar and his deceased wife Amea.

The petition of the executors stated that Gasibaen and Gadya are now dead, and that the remaining six persons were willing and desirous that the said property should be sold, and had signified their consent thereto by a document annexed to the petition. Maaimoena had also similarly signified her consent. Petitioners had accordingly sold the property to one Baasier van der Schyff for £1,000; but in view of the terms of the will the Registrar of Deeds declined to pass transfer.

Sir H. Juta, K.C. (for applicants) : This is clearly fidei-commissary property, and the *fidei-commissum* has not yet vested, as the fiduciary (Maaimoena) is still alive. She has, however, surrendered her rights in consideration of a monthly payment of £10. The Master says that it would be for the benefit of all concerned to sell the property at the price offered, which is far above the Divisional Council valuation. He does not, however, advise the sale, unless the purchase price is invested, or paid to one of the trust companies for the benefit of Maaimoena during her lifetime. We are quite willing that this should be done.

The Acting Chief Justice said: It was clearly the intention of the testator to provide a home for his widow during her lifetime, but as the widow has agreed to surrender her rights upon the heirs each paying to her a certain amount, the order will be granted as prayed.

Re ESTATE OF THE LATE JACOBUS HERMANUS VAN DER MERWE.

Mr. Benjamin moved in this matter, which had been previously before the Court, and which was for an order authorising the Registrar of Deeds to register a certain contract, enabling the Municipality of Woodstock to purchase for £200 a right-of-way over a certain farm.

On the previous occasion, the Court intimated that the consent of the bondholder should be obtained, and as this was now produced, an order was granted in terms of the Master's report.

Ex parte GEORGINA CONNELL (BORN HOLTMAN).

Mr. Buchanan moved for an order on the Colonial Orphan Chamber and Trust Company to pay out of a certain sum of £600 in their hands the sum of £50, to assist in the maintenance of the minors interested in the said amount of £600.

The Court granted the order as prayed.

Ex parte SOLOMON. { 1901.
April 18th.

Martial Law—Parole—*Habeas corpus*.

The Court will not grant a writ of Habeas Corpus in favour of a man who has been released from a military prison on parole, and subject to the condition that he is to report himself daily.

This was an application for an order calling upon the military authorities to show cause why a writ of Habeas Corpus should not issue in favour of petitioner pending an application for his discharge.

Mr. Buchanan (for petitioner): As this application has to be made within a certain time, notice was served upon the Attorney-General, but as accused has now been allowed out on bail, he can not be prejudiced by the matter being allowed to stand over.

The Court ordered the matter to stand over accordingly, saying that it would not interfere in the case of a man who had given his parole and was now at liberty.

PRINCUS AND GORDON V. MOSTERT AND ANOTHER.

Mr. Benjamin moved for an order to have judgment signed against plaintiffs for not proceeding with their action.

Order granted as prayed.

Ex parte VAN DRUTEN. { 1901.
April 18th.

This was an application for an order for an inquiry into the cause of petitioner's detention in the Griquatown Gaol.

Mr. Buchanan, who appeared for the petitioner, said that the position had been somewhat altered since the case was referred to on April 12. Then petitioner was detained in Griquatown Gaol, but he had now been removed by the military authorities to Kimberley, and released on parole there. Counsel contended however, that petitioner was still

practically under arrest, and could not return to his home, and had never been brought before any proper tribunal or informed of the nature of the charge against him. Counsel then read the petition drawn up before the removal to Kimberley, in which Van Druten said he was a British subject, and had resided in the Griquatown district for about eighteen years, during the greater portion of which time he carried on the business of a farmer. He retired from that some years ago and carried on the business of a speculator. On the reoccupation of Hay by the British troops he acted as an interpreter. He was afterwards arrested and lodged in the Griquatown Gaol, and although he had addressed a letter to the Attorney-General asking to be informed as to the nature of the charge against him, he had received no reply. He had also been disallowed the use of telegraphic communication. Proceeding, petitioner stated that he had committed no offence to justify his detention.

After hearing counsel, the Acting Chief Justice said that the petitioner had now been released from custody, and if he had any fresh facts to bring before the Court, he would have to make another affidavit. No order could therefore be made on the application.

IN THE ESTATE OF THE LATE JOHN FLETCHER.

Mr. Benjamin appeared in this matter, for the cancellation of a mortgage bond.

The matter was again ordered to stand over.

JORDAN V. DREYER.

Mr. McGregor applied for the extension of the return day of a rule *nisi* until May 31. Extension granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice JONES.]

ADMISSIONS. { 1901.
May 1st.

On the motion of Mr. Nathan, Mr. Petrus Albertus Groenewald was admitted as a translator, the oath to be taken before the Resident Magistrate at Ceres,

On the motion of Mr. Maskew, Mr. Henry Arthur Villet was admitted as a conveyancer.

On the motion of Mr. Benjamin, Mr. Henry Ralph Harris Buchanan was admitted as a conveyancer.

On the motion of Mr. Benjamin, Mr. John Abraham Muller was admitted as an attorney and notary.

On the motion of Mr. De Waal, Mr. Jacobus Marthinus Theunissen was admitted as an attorney and notary.

PROVISIONAL ROLL.

GRANT V. REID.

Mr. Benjamin applied on behalf of Messrs. Grant and Co. for the compulsory sequestration (final order) of the partnership and private estates of H. G. Reid.

Judgment as prayed.

VILJOEN V. VILJOEN.

On the motion of Mr. Currey, a provisional order for the compulsory sequestration of the respondent's estate was made absolute.

FREEMAN V. HAYWARD.

On the motion of Mr. Benjamin, provisional sentence was granted against respondent for £500 on a mortgage bond, with interest at 7 per cent. from June 30, 1900, the property specially hypothecated being declared executable.

F. GERBER V. J. J. HORN AND ANOTHER.

Mr. Benjamin, who appeared for plaintiff, asked for provisional sentence in the sum of £850, interest at rate of 6 per cent. from 23rd September, 1900, and costs of suit, the sum being due by virtue of a promissory note.

Granted.

GERBER V. KOTZE.

Mr. Benjamin appeared for plaintiff, and prayed for provisional sentence in the sum of £820 on a promissory note.

Granted.

BROWN AND CO. V. DU PLESSIS.

On the motion of Mr. Close, a writ of civil imprisonment was granted against the respondent, who resides at Lady Grey. The respondent was in default.

HEWAT V. BORMAN AND ANOTHER.

On the motion of Mr. Close, provisional sentence was granted against the respondent for £200 on a mortgage bond, with interest and costs, the property specially hypothecated was declared executable.

VAN ZYL V. VERWEY.

On the motion of Mr. Close, provisional sentence was granted against respondent for £50 on a mortgage bond, with interest at 7 per cent., the property specially nypothecated being declared executable.

LEWIS V. KAPLAN.

On the motion of Mr. Close, provisional sentence was given against respondent for £400 on a mortgage bond, with interest. the property specially hypothecated being declared executable.

PICKARD V. GROENEWALD.

On the motion of Mr. Close, provisional sentence was granted against the respondent for £12 10s. on a promissory note, with interest and costs.

FIELD AND CO. V. MCCULLOCK.

On the motion of Mr. Close, the final sequestration of the respondent's estate was adjudicated.

OLIFANT'S RIVER SYNDICATE V. UYS.

On the motion of Mr. De Waal, judgment was given against the respondent for £51 10s., on an agreement of lease, with interest *a tempore morae*, and costs, being balance of rents, the Court at the same time imposing a penalty on plaintiff equal to five times the value of the stamps which according to law should have been attached to the lease, that document having been left unstamped.

SOUTH AFRICAN MUTUAL LIFE V. ESTATE OF MGOCO.

Mr. Close appeared for the applicant, and asked for judgment against respondent for £250 on a mortgage bond, with interest, the property specially hypothecated to be declared executable.

Mr. Benjamin, for respondent, said he had no objection to the granting of sentence for the amount claimed, but opposed the declaring of the property executable. The respondent was the executrix in the estate,

and had not yet had the six months allowed by law in which to liquidate it. If execution were delayed the amount could be paid with better advantage to the estate than by now disposing of the property specially hypothecated. Meantime the security was ample.

The Court granted judgment for the amount claimed, and ordered execution to be delayed until August 25, 1901

LLOYD V. PARSONS AND OTHERS. { 1901.
May 1st.
" 9th.
" 16th.

This was a motion for provisional sentence.

The plaintiff was Henry Llewellyn Lloyd. The defendants were Geo. M. Parsons, Geo. Boys, Otto Meyer, Richard L. Elliott, and Wm. G. Popham.

The affidavit of the defendant Popham stated that he had been induced to endorse the promissory note by James Scott, estate agent (of Cape Town), who informed him (Popham) that his signature was required only as a matter of form, and that he would not be held liable in any way, and that on the bill being discounted he was to receive from the said Scott as a consideration, £100.

That on or about January 14, 1901, he (defendant Popham) received certain information that the bill was being offered to various persons for the purpose of discounting the same. On this he (said defendant) applied to Mr. Scott for £100, under intimation that unless he (the said Scott) would grant this, he (the said Lloyd) would withdraw his name. Subsequently he made a similar intimation to Kuhr, and he verbally informed the other endorsers that he had withdrawn his name. That subsequently the plaintiff Lloyd offered him the bill for £750. This offer he (defendant) refused. Thereafter Kuhr offered him the bill for £1,200. This offer he (defendant) refused. He had interviewed the endorsers and also the maker of the said note, and informed them by letter or otherwise that he had withdrawn from the said bill in January, 1901. He therefore considered himself free from further liability, took no further action, and left this colony for England in the early part of February. He did not return till May 7, and was then informed that he had been served with a summons. He had received no "consideration," and the rules of Court had not been complied with, inasmuch as the copy of the promissory note was not signed.

The affidavit of the plaintiff Lloyd stated that when he purchased the note in suit he was not aware of any negotiations that had passed between Popham and Scott. He told Popham that he was willing to let him have the promissory note at what it had cost him. He did not think £750 was mentioned. Popham endeavoured to free himself from responsibility for his endorsement, but as the holder of the note, deponent (Lloyd) declined to release him. As to Kuhr's offer, deponent believed that Popham was instrumental in obtaining it, with a view to influencing deponent to release the said Popham from his obligation. Deponent disclaimed all knowledge of Popham's interviews with other persons, but pointed out that as consideration for his signature he was to receive £100 from Scott as soon as the note should have been discounted. Deponent purchased the promissory note on the faith of the endorsements on the back thereof, and particularly on that of Popham. Popham had never repudiated his liability.

The affidavit of the defendant Meyer stated that in December, 1900, Kuhr, accompanied by Scott, came to his hotel and asked him to endorse the promissory note for £1,745 6s. 8d. He was assured that he would not be called upon to pay any portion of the said note. He received no consideration for his endorsement. He subsequently learned that other persons had endorsed the said note, and that it was being hawked about the town for negotiation, and that as such a proceeding was calculated to do him harm in his business, he told Kuhr that he objected to it, and requested him to remove his (defendant's) name from the bill. Kuhr promised to do this on the same day as soon as he should have obtained the note from Scott. Two or three days thereafter deponent heard that the note had been pledged to plaintiff for £600. Kuhr asserted that the said note had been pledged to plaintiff by Scott without his (Kuhr's) consent, and that the proceeds had been paid to Ohlssons to pay claims due from Parsons, and that he (Kuhr) had commenced legal proceedings against Parsons and Scott to recover the note or its value.

A letter (marked A) from plaintiff's attorneys to Messrs. Sauerlander and Kruger, and a notice in the "Cape Times" of January 29, 1901, gave plaintiff ample notice of Kuhr's proceedings, and of the fact that the authority to pledge the note was questioned, and that further dealings with it would be repudiated.

Kuhr absconded on February 14, 1901, and his estate was finally sequestered on February 28. At the third meeting of creditors

held April 26, 1901, the trustee reported that subsequent to the pledge of the said note to plaintiff for £600, and just before Kuhr absconded, he (Kuhr) appeared to have obtained a further sum of £200 from plaintiff, and that plaintiff now claimed to have purchased the promissory note out and out, but that he was willing to relinquish all claim thereto for £800.

About 14 days before the note became due, deponent saw plaintiff at "His Lordship's Larder." He explained the circumstances under which he signed the note and his inability to pay it. He further told deponent that he (plaintiff) had advanced £600 on the note, which was to have been repaid the next day. Scott then informed him that it would be taken back after Ohlsson had been settled with. Plaintiff said that the £600 was not repaid to him as arranged, and that subsequently he paid to Kuhr a further sum of £200 for the note, but that all he wanted was £800 to settle the matter, and offered to release deponent from any claim on his (plaintiff's) part if he (deponent) would pay to him (plaintiff) one-fifth of £800 (i.e., £160). The balance he proposed to get in like proportion from the other four signatories of the aforesaid note. Deponent refused to have anything further to do with the note, on account of disputes arising in connection therewith, and of the fact that other signatories had endorsed subsequently to himself. Plaintiff subsequently told deponent that he (deponent) need not trouble any further about it, as it would be paid when due. He had received no consideration for his signature, and it was only after some days after the note had become due that he received the letter D from plaintiff's attorney, dated April 9, 1901. He was advised that as the note was an accommodation note, even if it was pledged by Kuhr (which is denied), it was pledged as security only for a smaller amount, and he could only be held liable for such amount (if any) as pledgee (the plaintiff) *bona fide* advanced, and which amount could not be ascertained upon a provisional summons and without trial.

Mr. Schreiner, K.C., appeared for the applicant. The defendant Parsons was not represented. Mr. Wilkinson appeared for respondent Meyer, and Mr. Benjamin for Elliott and Popham.

After argument by counsel, the Court granted provisional sentence against Parsons, the case against the endorsers of the note being ordered to stand over till the 9th inst.

Postea (May 9th.)

Provisional sentence was granted against Boys and Meyer, with costs. As to the defendant Elliott, provisional sentence was refused; and as to Popham and Meyer, the case was ordered to stand over till the 15th May, on the ground of irregularity.

Postea (May 17th).

Provisional sentence, with costs, was granted against Popham. The expenses arising from the irregularity of summons (by consent) to be paid by plaintiff.

[Attorneys for Plaintiff, Van Zyl and Buisinné; Defendant Meyer, Brady; Defendant Popham, Tennant]

DUMINY V. TRAUT. { 1901.
May 1st.

Mr. Close applied for judgment for £500, due in respect of a certain agreement of sale and purchase of certain machinery, tools, and material at D'Urban-road. The said agreement was entered into on September 27, 1898.

In his affidavit, defendant stated that the said machinery and tools were not of the quality represented by applicant, and that certain three wagons, worth at least £45 each, and a cart, also worth £45, which he (defendant) had understood to be included in his purchase, had been removed from his possession by order of applicant. Defendant also alleged that applicant had wrongfully built a shop and store upon the ground which had by him been leased to defendant, and tendered £250, with taxed costs to date, in satisfaction of applicant's claim, or alternately to cancel the sale. These allegations were denied by applicant in his answering affidavit.

Mr. Schreiner, K.C., appeared for the respondent.

After argument, the Court refused provisional sentence with costs. Parties (if so advised) to go into the principal case, with leave to recover costs of the present application.

ILLIQUID ROLL.

GABRIEL V. HARRIS AND ANOTHER.

On the motion of Mr. Benjamin, provisional judgment was given against respondents for £921 12s 2d., under Rule 329.

BROERS V. LUCKE.

On the motion of Mr. Benjamin, an order was granted, under Rule 319, calling upon respondent to render an account of certain moneys received and disbursed by him, and to pay over the balance.

REHABILITATIONS.

On the motion of Mr. McGregor, Harris Leviticus Burman was rehabilitated.

On the motion of Mr. Close, William Stephen Webber was rehabilitated.

The matter of the rehabilitation of Michael Nicolaas Smuts was ordered to stand over.

GENERAL MOTIONS.

Ex parte HENRY BENNINGHOFF SIEBERT.

On the application of Mr. Benjamin, a rule nisi granted under the Derelict Lands Act was made absolute.

SIMES V. SIMES. { 1901.
{ May 1st.

This was a petition by plaintiff for an order on respondent to pay applicant a sum of money in order to enable her to proceed with an action for divorce.

Mr. Wilkinson appeared for the applicant.

Mr. Close appeared for the respondent.

The Court made no order in the matter, as it did not appear from the affidavits that there was any likelihood, owing to the respondent's financial condition, of any order as prayed for being complied with. The plaintiff was supporting herself, and as summons had already been issued, the Court suggested that the best course was to proceed with her action as best she could.

IN THE ESTATE OF THE LATE IGNATIUS STEPHANUS LE ROUX.

On the motion of Mr. Benjamin, leave was granted the executors in this estate to raise certain money on mortgage.

Ex parte WILLIAM JOSEPH SOLOMON.

This was an application for a writ of *habeas corpus*.

The matter was ordered to stand over *sine die*.

SHERWOOD V. CARTER.

On the motion of Mr. Searle, an order was granted authorising the Sheriff to attach the half shares interests of defendant in certain letters patent, defendant having gone to England.

Ex parte DAVIDSON. { 1901,
{ May 1st.

Attorney—Service of articles.

A clerk who had been articled to a firm of solicitors in Scotland, and had served with them from September 2nd, 1889, till November 17th, 1892, when his articles were ceded by the said firm to another firm of solicitors with whom he had served continuously till November 22nd, 1894; was allowed to enter into articles with an attorney and notary of this colony for one year.

Applicant's affidavit showed that he had passed the preliminary examination as prescribed by the Law Agents' (Scotland) Act of 1873, and had, on September 2, 1889, been articled to the firm of Anderson and Shaw, solicitors, of Inverness, Scotland, for a period of five years. That on November 17, 1892, Messrs. Anderson and Shaw assigned petitioner's articles to one David Hunter, a solicitor in the Supreme Court of Scotland.

That on November 22, 1894, on the expiry of the said articles, the said Hunter granted a discharge, whereof a copy was annexed to the petition.

That during the period served with the said Hunter petitioner attended the classes of Scots Law and Conveyancing in the University of Edinburgh, but that before he could qualify as a solicitor and notary in Scotland his health broke down, and he was consequently obliged to come to this colony, where he has resided since December, 1894.

That since June 1, 1895, he has been employed by Mr. Hedley Wright in all the departments of his practice as an attorney and notary in Graham's Town.

That he holds a Cape University certificate in Law and Jurisprudence, is of full age, and desires to be admitted as an attorney and notary in this colony, and with a view thereto prays that the Court will grant an order authorising him to enter into articles of indenture with an attorney and notary of this colony for the space of one year.

Mr. Benjamin moved.

The Law Society did not oppose.

The Court granted the order as prayed.

Re THE ESTATE OF THE LATE } 1901.
JOHANNES HERMANUS CASTELYN, SEN. } May 1st.

Executor dative—Removal.

On the application of his sureties the Court ordered the removal of an executor dative who had joined the King's enemies and left the Colony.

This was an application for the removal of Johannes Hermanus Castelyn, jun., from the office of executor dative in the above estate of his late father. The petition of Samuel J. Annear and Hans Jurie Coetzee stated that respondent was appointed executor dative to the said estate on November 22, 1860. Petitioners became his sureties to the Master of the Supreme Court. In March, 1901, the said Castelyn was seen with Kritzinger's commando, which had invaded the district of Somerset East, and petitioners stated that they verily believed he had left the district with the said commando.

Mr. Benjamin (for petitioners) argued that in all probability respondent had left the country; he had certainly withdrawn himself from the jurisdiction of the Court by joining the enemies of His Majesty, and had made no provision for the discharge of his duties as executor.

The Court granted a rule *nisi*, calling on respondent to show cause why he should not be removed from the office of executor dative, returnable on the last day of the term. The Court directed that service should be personal if possible, failing which one publication in the "Gazette" and one in the Somerset East paper.

Postea (May 31).

The rule was made absolute.

Ex parte MARGARET CORNELIA BEEHO
(BORN PEARCE.)

On the application of Mr. McGregor, the Court granted the applicant leave to sue her husband by edictal citation for a decree of nullity of marriage. It was alleged that he married applicant in this country while his first wife, Sarah Beeho, whom he had married in England, was still alive. Respondent is now residing at Cardiff.

The order was made returnable on July 12. Personal service to be effected.

MANNERING V. MANNERING.

This was an application for an order on plaintiff in the principal case pending, to pay defendant (petitioner in this matter) £50, to enable her to defend herself in an action for divorce.

Mr. Benjamin appeared for the applicant, defendant in the principal case.

Mr. Close appeared for respondent, plaintiff in the principal case.

It appeared from the respondent's affidavit that his wife was in England, and had refused to come out to the Cape with him. The affidavit also alleged that petitioner had sufficient means to prosecute her action. Petitioner, on the other hand, denied that she had means, and refused to cohabit with her husband any longer, on the ground of his profligate and immoral habits.

The Acting Chief Justice, in giving judgment, said the Court had power to make a husband pay a sum to enable a wife to sue him, but it would be influenced by all the circumstances of the case. In this case the wife appeared to have a good cause of action. As the husband only earned £12 10s. a month, the Court would order the payment of £20 by him towards the costs of the action. Costs to be costs in the cause.

IN THE INSOLVENT ESTATE OF ELLEN M. STOKES.

Mr. Nathan, for the creditors in this estate, moved for an order of Court, authorising the appointment of a new trustee in the place of E. T. Jones, deceased.

Order granted as prayed.

Ex parte JENSEN. } 1901.
 } May 1st.
 } .. 15th.

Children—Custody—Mother.

The Court ordered a governess, who on instructions from their father was about to take his two children to England, to deliver them to their mother, who objected to their removal.

This was an application for an order authorising the Sheriff to take petitioner's children from the custody of one Amelia D'Aubrey.

It appeared from applicant's affidavit that the said Amelia D'Aubrey was a governess engaged by applicant's husband, and about to proceed to England in the "German"

with two of the children at his direction, but against applicant's wishes. Petitioner did not consider the said governess a fitting guardian for the children, and wished to have them removed from her charge.

The Court ordered that as the "German" did not sail from Cape Town until the 15th instant, notice should be served upon Miss D'Aubrey of the application, which would be set down for hearing on May 9.

Postea (May 11).

Several affidavits were read on both sides. Those of Mrs. Jensen denied that Miss D'Aubrey was a fit and proper person to have the care of the children. Those of Mr. Jensen denied that there was foundation for any imputation on the character of Miss D'Aubrey, and charged Mrs. Jensen with violent and unseemly conduct, and with total disregard to the children's educational interests.

Sir Henry Juts, K.C., moved in accordance with the terms of the petition aforesaid.

Buchanan, A.C.J.: In this case the father's conduct seems to ignore the maternal rights of the applicant. There has been no separation of the spouses, and, as parents, they both have rights as well as duties towards their offspring. These minors are of the ages of 12 and 14 respectively, and in the absence of any reason to the contrary, the proper place for minor children to be is at home, that is to say, where their mother is. If either of the parties had misconducted themselves in such a way as to be deprived of their natural rights, then the Court would have given an order, but in this case there has been no ground for suspicion against the mother. In this matter the appellant was the mother of the children, and the respondent (Miss D'Aubrey) has no right whatever to retain these children against the mother's wishes. As to the charges against the lady, the Court does not wish to express an opinion. The father in his affidavit says that the reason for not leaving the children at school at Graham's Town is that they are not physically strong. This is, *prima facie*, in the interests of the children themselves, a very strong ground for the children remaining with their mother. An order will therefore be given that Miss D'Aubrey deliver up the children at once. As to costs, the respondent was in default by having the children in charge; but at present the only order would be that the children be delivered up, and the Court would make no order as to costs.

In re THE MINORS ESTERHUYSE.

On the motion of Mr. Close, an order was granted authorising the Master to pay out certain moneys.

In re THE PETITION OF DANIEL HENDRIK BENEKE.

Mr. Close applied on behalf of the parents for leave to transfer certain property in the Oudtshoorn district, known as Paardedrift, to the children, and to raise £400 thereon for the payment of debts.

The Court granted permission to raise the £400, but made no order in regard to the transfer of the property.

Ex parte LEWIN.

Mr. Nathan moved for the appointment of a *curator ad litem* to one Reuben Manshefski, of Oudtshoorn, to defend an action brought against Manshefski by applicant, the said Manshefski having become mentally deranged.

The Acting Chief Justice: Has the wife received notice of this?

Mr. Nathan: I believe not, my lord.

The Court ordered that the application stand over until the wife of the alleged lunatic had been heard in the matter.

Ex parte BULT.

The petitioner applied for leave to sue his wife by edictal citation in an action for restitution of conjugal rights.

Mr. Searle, K.C., appeared for the petitioner.

The Court granted a rule *nisi* as prayed, service to be personal, and the rule to be returnable on July 12.

NOCHAMSON V. VAN DER WESTHUYSEN.

In this matter leave was applied for to amend the record by altering defendant's name from Matthew to Johannes Mattheus van der Westhuyzen.

Mr. Searle, K.C., appeared for the applicants.

An order was granted as prayed.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice JONES.]

REHABILITATION. } 1901.
 } May 2nd.

On the motion of Mr. Benjamin, Willem Johannes van Heerden was rehabilitated.

On the motion of Mr. Close, an order was granted discharging the order of rehabilitation affecting Michael Nicholas Smuts.

CAPORN AND CAPORN V. CHARLWOOD.

The final adjudication of defendant's estate was granted on the motion of Mr. Close

NEWMAN V. BOOTY, N.O. } 1901.
 } May 2nd.

Arbitrators—Award—Irregularity—
Act 29 of 1898.

The Court refused to make an award of arbitrators a rule of Court on the grounds of the following irregularities in their proceedings. (1) They did not accept the trust till after the date fixed for making their award had expired. (2) They had not appointed the umpire before commencing the arbitration. (3) Without hearing the respondent they decided against him.

Semle: It is not necessary that the notice given to parties by arbitrators of the date of their meeting should be in writing.

This was an application to have an award of arbitrators made a rule of Court.

By deed of submission, bearing date 10th August, 1900, Angus William Newman, of East London, and William Frederick Booty, of the same place (in his capacity as *curator bonis* of John McGrath), had engaged to submit a certain matter of accounts to the final award of Arthur Charles Meredith Bolton, Norman McDonald, and an umpire, who should be by them appointed prior to entering on the arbitration. Parties further agreed by the said deed to attend and to

cause their witnesses to attend the said arbitrators or umpire, in case an umpire should be deemed necessary, and submit to be examined relative to the matters in dispute between them. They further agreed to abide by, observe, perform, fulfil, and keep the final award of the said arbitrators, such final award to be made in writing and signed by them on or before 31st August, 1900. If the said arbitrators did not make their final award within the time limited, then the parties agreed to abide by the award of the umpire, given in writing.

On December 19, 1900, the said arbitrators gave their award, which award it was now sought to have made a rule of Court.

Mr. Close (for applicant) relied on the terms of the deed of submission.

Mr. Schreiner, K.C., for respondent: The arbitration proceedings were wholly irregular. No notice of the arbitration was given to respondent, nor was he heard in the matter. No evidence was taken for him during the arbitration, and no umpire was appointed within the time specified. As soon as respondent's attorneys were informed of the award, they repudiated the whole of these irregular proceedings.

Mr. Close read the affidavit of Arthur C. N. Bolton, which stated that the sittings of the arbitrators were commenced during the time limit of the deed, but as it was found impossible to finish by the 31st August, the time was extended by consent of himself and his co-arbitrator. That in going through applicant's accounts, the arbitrators found that he had in certain instances omitted regular and customary charges for commission, etc., from the said account. That he was of opinion that neither the said John McGrath nor any of the members of his family nor the respondent could have, by giving evidence, caused the arbitrators to disallow any further item, nor could they have come to any other conclusion than that arrived at.

The answering affidavit of Angus W. Newman, the applicant, stated (*inter alia*) that respondent had notice of the commencement of the arbitration, and that W. H. Stone (respondent's attorney) was aware that the arbitration was being proceeded with. He denied that John McGrath was mentally infirm, and stated that the said McGrath had acted in connection with his said claim in a vexatious and obstructive manner.

Mr. Schreiner: There was no proper intimation that the arbitrators had commenced their sittings. The arbitration proceedings were allowed to go on without respondent being communicated with, and five months

later the award was sprung upon him. The respondent McGrath has not the administration of his property, which, on account of his mental and physical infirmities, has been placed under curatorship. The curator, however, quite admits the correctness of the account tendered by the arbitrators. We only object to the irregularity and informality of the proceedings in the arbitration.

Buchanan, A.C.J. : I am glad that in this case no imputation whatsoever has been cast upon the *bona fides* of the arbitrators. The only question is : Have there not been such irregularities in their proceedings that these cannot now be supported by the Court ? The deed of submission was dated the 10th of August, and required the award to be made before the 31st August, unless the time was extended by the arbitrators. The deed also provided that the provisions of No. 29, 1898, should apply to the proceedings. The first irregularity was that, according to the endorsement on the award, the arbitrators did not accept the trust till the 5th October, after the time fixed for making the award had expired. The arbitrators, however, say that they in fact accepted the trust, and commenced the work shortly after the 10th August. If so, there was no extension of time made, which, according to the Act, must be done in writing. Again, the Act requires the appointment of the umpire to be made before commencing the arbitration. If the arbitrators commenced shortly after the 10th August, the nomination of umpire was not made till the 5th October. I would not, however, have attached great weight to this objection in this case if it had been the sole one, for the services of the umpire were never required. Again, although an arbitration is looked upon as a more or less informal procedure, it is a procedure governed by certain legal principles. One of these principles is that parties cannot have a decision given against them without being heard. The respondent was not heard. It does not appear that due notice was given to the respondent that the proceedings were to commence, or when the arbitrators would meet. I will not go so far as to say that such notice must be in writing, but it is desirable that it should be. The only notice given in this case was of such an informal nature that it could not be regarded as sufficient. I consider that this want of proper notice is a most vital objection in this case. The arbitrators were not justified in going into the case *ex parte*. They said that they regarded it as simply a matter of account, and therefore not one in which it was necessary to take evidence; but the re-

spondent was entitled to be heard, even if it was only a matter of account. On the ground of irregularity alone, the Court cannot make this award a rule of Court, and the application must be refused, with costs.

[Attorneys for Applicant, Reid and Nephew; Respondent, Findlay and Tait.]

Ex parte THE MINOR POWER.

Mr. Upington applied, on behalf of Ellen Power, for an order authorising the Master to pay out £250 of the minor's money for his education and maintenance. The minor was at St. Andrew's College in Graham's Town, and was desirous of qualifying as a Government land surveyor. The Master's report was favourable.

The application was granted, £250 to be paid out in terms of the Master's report.

Ex parte STRADLING, N.O. } 1901.
May 2nd.

Will—Construction.

This was an application for authority to the Registrar of Deeds to pass transfer of certain property.

The petition of Robert A. B. Stradling, secretary of the Guardian Assurance and Trust Company of Port Elizabeth, and as such executor dative to the estate of the late Alfred Cadel, set forth :

1. That by a will executed on August 13, 1870, the said Alfred Cadel, after declaring that he wished to avail himself of Lord Charles Somerset's proclamation of July 12, 1822, bequeathed to his wife, Jane Cadel (born Piers), the whole of his property in trust for his children, she to enjoy the same so long as she should continue unmarried.

2. Should she wish to enter into a second marriage, she was directed previous to such marriage to convert into money all the estate which might then remain, and divide, pay over, or transfer and assign the portions due to the children, should they then have attained their majority, and secure, by bond or otherwise, to the satisfaction of the Master of the Supreme Court, the portions due to the minor children, in equal shares.

3. By codicil, dated March 13, 1873, if either the testator himself or his wife should predecease his mother, Elizabeth Cadel, or his mother-in-law, Elizabeth Pearce, in such case he appointed the said Elizabeth Cadel and Elizabeth Pearce to be his sole and universal heirs in equal proportions.

4. The testator thereafter took his wife and family to Europe, and thereafter died pos-

essed of certain property situate in Port Elizabeth.

5. The testator predeceased his wife, Jane Cadel, his mother, Elizabeth Cadel, and his mother-in-law, Elizabeth Pearce, and the said Jane Cadel died before testator's mother, Elizabeth Cadel, but after the death of Elizabeth Pearce.

6. Upon the death of the said Jane Cadel, petitioner, having been duly appointed executor dative to the estate of the said Alfred Cadel, proceeded to wind up the estate by transferring the landed property therein to the children of the deceased. In so doing he acted upon the account of administration framed by one James Brister, his predecessor in the office of executor dative. The said James Brister, after deducting certain charges, had awarded one-half of the balance of the estate to each of the two children of the said Alfred Cadel, but had never transferred the landed property to the said children.

7. The Registrar of Deeds refused the transfer, on the ground that the children of the deceased were not his heirs, as the mother and mother-in-law of deceased were his heirs.

8. Petitioner denies the correctness of the Registrar's interpretation of the terms of the will and the codicil, and prays for an order authorising and directing the Registrar to permit transfer to pass to the two children of the late Alfred Cadel.

In his report the Registrar says: "Constructing the will and codicil strictly, it would seem that upon the testator's death the whole estate devolved upon the heirs appointed under the latter. I have little doubt that the children are the proper heirs, but under the circumstances I think I am bound to require that the question should be submitted to the Court for decision."

Mr. Schreiner, K.C., for petitioner, contended that "or" was really intended to be "and," the obvious intention of testator being that in event of the decease of his wife her powers as trustee should pass to the children. In the fulness of time testator died, then Mrs. Pearce, then Mrs. Cadel, and to-day there were only two children, majors, left as sole representatives of the family, Mrs. Cadel (*mere*) also being dead. Upon the death of Mrs. Cadel, an executor dative was appointed, but no transfer of the property was passed to the children. The Master now refused to pass such transfer, because of the terms of the codicil. No counterclaim to the property

has been set up, and, in fact, no one has ever thought of a counter-claim.

The Court granted a rule *nisi* calling upon any persons to show cause why the petition of applicant should not be granted, the rule to be published in the Cape and London "Gazettes," and to be returned on July 12.

Postea (July 12).

The return day was extended to September 12, on which date it was made absolute.

[Petitioner's Attorney, Gus. Trollip.]

Ex parte JARVIS.

On the motion of Mr. Schreiner, leave was granted petitioner to amend a certain deed of trust. The deed affected both major and minor children. The Court also gave power, in case of the death of one or other of the trustees, to appoint a fresh trustee.

Ex parte WILLIAMS.

Mr. De Villiers, for the petitioner, applied for leave to sue her husband *in forma pauperis* in an action for restitution of conjugal rights, owing to his desertion and neglect to support her.

The Court appointed Mr. De Villiers to report on the matter.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

HOUSTON V. HOUSTON. { 1901.
May 3ad.

This was an action for divorce brought by the husband, George Alexander Houston, against his wife, Sarah Jane Houston, on the ground of alleged adultery.

The defendant was in default.

Mr. Close appeared for the plaintiff.

The parties were married in 1894 at St Mary's Church, Woodstock. There were no children of the marriage. The plaintiff, a West Coast negro, and employed at the Docks, said he and his wife lived happily together until 1899. He was engaged on night duty at the Docks. In consequence of what he heard, he returned unexpectedly from work one night, and met his wife on the Sea Point road with a certain Lewis. She

returned home late that night. He spoke kindly to her, but she went out the next day and did not return. After this she wrote asking to be forgiven.

After further evidence proving the alleged misconduct had been heard, the Court granted a decree of divorce as prayed.

VENTURA V. VENTURA.

This was an action for divorce brought by the husband, Louis Francois Ventura, against his wife, Sarah Catherine, a coloured woman, on the ground of the latter's adultery.

Mr. Currey appeared for the plaintiff.

The parties were married at Cape Town on December 4, 1897, before the Resident Magistrate. There was one child of the marriage, aged five. Defendant deserted plaintiff in November, 1897, and had since lived with a certain Thomas Lee at Woodstock.

The defendant appeared in court, and admitted adultery.

Evidence was taken, to the effect that defendant and Lee had lived together in Woodstock for the last two years.

The Court granted a decree of divorce as prayed, plaintiff to have the custody of the child, at present in defendant's possession.

VAN DER SPUY V. VAN DER SPUY.

This was an action for judicial separation brought by Sarah Helen van der Spuy against her husband, Andries Ludwig van der Spuy, on the ground of his intemperate habits and of his ill-usage of plaintiff. She claimed the custody of the children, and £10 a month as aliment.

Mr. Nathan appeared for the plaintiff.

The parties lived at Paarl, and were married on February 28, 1888. There were five children of the marriage, aged respectively twelve, ten, eight, five, and four years. Since the marriage defendant had given way to intemperate habits, and became so violent in his conduct towards plaintiff that at the end of 1897 they entered into a deed of separation. Shortly afterwards a reconciliation was effected, and they cohabited together, but in consequence of his cruel conduct towards plaintiff her health had been ruined, and it was impossible for her to live with him. Plaintiff stated that defendant frequently assaulted her. She kept a shop. The house was hers, and defendant refused to leave.

The Court granted an order of judicial separation, plaintiff to have the custody of the children, defendant to pay the costs of the action. No order was made as to the payment by defendant of a monthly maintenance, owing to his apparent inability to make such payment, but leave was given to plaintiff to make further application to the Court for a maintenance order should defendant later appear to have means.

ABRAHAMS V. ABRAHAM.

This was an action for restitution of conjugal rights, and failing that, for divorce, brought by Henry Abrahams against his wife Cecilia, on the ground of the latter's desertion.

Mr. Benjamin appeared for the plaintiff.

The defendant was in default.

It appeared that the parties were married at St. James, Middlesex, on February 22, 1886, and that there was one child, a girl, of the marriage.

Henry Abrahams, the plaintiff, deposed that he and his wife lived happily together in England until 1895. In that year he left her and came out to Cape Colony. He left her in charge of a business. She was to dispose of the business and follow him to the Cape. She did not do this. He established a business in the Cape. He wrote regularly to her every week. He got replies until 1898. Then he did not get a letter for four weeks, so he wrote her that he was coming home. She wrote back that it was unnecessary. Then her letters became very incoherent, and she admitted committing adultery and running away with another man. Since then he had not been able to discover her whereabouts. He wrote to her and sent her money, but letters were returned marked "address unknown." He was anxious to get the child. She refused to come out. He kept none of the letters.

The Court granted an order for the restitution of conjugal rights, failing which defendant to show cause why a decree of divorce should not be granted, and plaintiff have the custody of the child. The order was made returnable on July 15, the defendant to show cause on August 1.

CAMPBELL V. CAMPBELL.

This was an action for divorce.

Mr. Nathan applied for a postponement until August 1, owing to the plaintiff (the husband) being ill with plague.

The postponement was granted.

WILSON V. WILSON.

This was an action for judicial separation, brought by Catherine Wilson against her husband, James Wilson, on the ground of his ill-treatment of plaintiff.

Mr. Benjamin appeared for the plaintiff.

Mr. Close appeared for the respondent.

The parties resided in Wynberg, and were married in Cape Town on March 29, 1880. There were five children of the marriage. During the last six years defendant had given way to drunken habits, and, according to plaintiff, had constantly ill-treated her. He also claimed the custody of the children, and reasonable contribution towards their maintenance by defendant.

The defendant in his plea denied the charge of cruelty. In reconvention he claimed a judicial separation from his wife, because of the latter's ungovernable temper. He alleged she had, on different occasions, knocked him down, attacked him with a spade, and done various other things. He also claimed the custody of the children.

Mr. Benjamin: It will be seen that the parties are at one, save in regard to the custody of the children. That, however, has been arranged, parties agreeing to a judicial separation, the plaintiff to have the custody of the children, and the defendant to pay 10s. a week towards their maintenance.

The Court accordingly granted an order in these terms, each party to pay their own costs.

KIRK V. XIKISA AND ANOTHER. { 1901.
May 3rd.

Master and servant—Minor—Verbal agreement with minor's father.

The Court on appeal refused to reverse a Magistrate's decision, dismissing a claim brought against a minor's father for sheep alleged to have been lost by the minor whilst in the appellant's employment.

This was an appeal from a judgment of the R.M. of Willowvale, in an action in which the present appellant (plaintiff in the court below) sued the respondents for the value of certain sheep, alleged to have been lost by the first-named respondent, whilst alleged she had, on different occasions, herd in his employment.

Appellant (plaintiff in the court below) is a trader residing at Toleni. Respondents reside at Willowvale. The first respondent Xikisa is a minor of 17 or 18 years of age. The second respondent is one Mjila, the father of Xikisa. With the consent of Mjila, appellant on June 1, 1899, hired Xikisa as a herd. Appellant then told Mjila that he would hold the said Mjila responsible for any sheep lost by Xikisa. Xikisa remained in the service of appellant for three months, and during that time lost seventeen sheep, which appellant stated in evidence in the Court below to be worth 12s. each. The boy was engaged at a monthly wage of 5s., with a gradual rise till the expiry of his term of six months. He was dismissed at the end of three months on account of the loss of the sheep. He had drawn 10s. of his wages and appellant kept the balance. The boy had sole charge of a flock of 479 sheep. The Court below dismissed the case as against both defendants.

The reasons given by the R.M. for his judgment were as follows:

(1) No formal written contract as between master and servant appears to have been entered into, and there are no witnesses to prove the alleged informal verbal contract which alleges that the father was to be held responsible for any sheep lost by the minor during the term of his employment.

(2) Gross negligence is shown in the action of the plaintiff in placing a flock of 479 sheep under the charge of a boy, whose services he considered only worth 5s. per mensem, and this in the midst of a native location where numerous other flocks grazed.

(3) After the loss of the first twelve sheep no opportunity appears to have been given to the herd to search for the lost animals by relieving him of the charge of the remaining 467, and during the following month, after losing five more he is summarily dismissed and his wages retained by the employer.

(4) Plaintiff in his evidence values the missing sheep at 12s. each, whereas in the summons he claims at the rate of 20s. each.

(5) There is nothing on the record to show that defendant Mjila received notice that the case would be proceeded with on January 17, 1901.

(6) Defendant Xikisa is no longer in the district, his whereabouts are unknown, and as he had no property the Court has no jurisdiction.

(7) Taking all these circumstances into consideration, I do not consider that it would be either justice or equity to adjudge Mjila to pay for the lost sheep.

Mr. McGregor, for appellant, briefly dealt with the above points.

Mr. Close, for respondent, was not called upon.

The Court dismissed the appeal, entirely endorsing the action of the Magistrate.

BOUX V. THE COLONIAL GOV-
ERNMENT. 1901.
May 6th.
" 7th.
" 8th.
" 9th.

Interpretation of contract—Maintenance clause—Responsibility of contractor.

Plaintiff entered into a contract with defendant to construct a certain embankment. The work was completed and a final settlement made between the parties; defendants retaining (as per contract) a certain percentage of the contract price for twelve months after the final settlement. During this period a serious breach was made in the said embankment by the flood of water in the river. Plaintiff now sued for this retention money, which defendants refused to pay, alleging that by the terms of the contract plaintiff was bound to warrant and maintain the embankment for the period of twelve months after he had received the final certificate. The clause of the contract, the interpretation of which was in dispute, was as follows:

" . . . During this period (viz.: the 12 months aforesaid) the contractor must make good at his own cost all omissions and defects that may appear or arise subsequent to the issuing of the final certificate."

Held (1) *That this did not amount to a maintenance clause and that thereunder plaintiff was answerable only for omissions and defects due to his own default.*
(2) *That it had not been proved, that the injury to the dam was due*

to any default on the part of the plaintiff, and that he was therefore entitled to judgment, with costs of suit.

This was an action for £5,475, with interest from 15th January, 1901, at six per cent. per annum, and for £92 5s. 6d., instituted by the plaintiff against the Commissioner. The declaration alleged that on the 22nd January, 1898, an agreement was duly executed between the plaintiff and one Westhoven acting on behalf of the Government whereby the plaintiff undertook, in terms of certain drawings, specifications and general conditions to do and execute certain work in connection with the Kenhardt Irrigation Dam.

The sum payable to the plaintiff for the due performance of his contract was £36,500.

The plaintiff duly executed the work undertaken, but was liable to certain deductions for delay on completion thereof in terms of the agreement and for other items: and on or about the 15th January, 1900, the Colonial Government and himself agreed upon a statement of account (copy annexed), and paid to the plaintiff the sums of £2,502 18s. and £156 11s. 6d., the balances shown thereon: retaining, however, in terms of the agreement the sum of £5,475 for twelve months, which sum became finally due and payable on the 15th January, 1901, in terms of the said statement.

The planting of Hottentot figs for which a deduction of £92 5s. 6d. was made in the said statement was subsequently duly carried out by the plaintiff at the instance of the Colonial Government, to the approval of the official appointed to supervise the work, and the Colonial Government is now indebted to the plaintiff in the sum of £92 5s. 6d.

The plea, after admitting the terms of the contract and the formal allegations, alleged that on the 26th March, 1900, the dam broke owing to the work having in certain respects been faultily and improperly done, and great damage was thereby caused, and the dam was rendered valueless.

It was provided by clause 13 of the agreement that the contractor should make good at his own cost all omissions and defects that might appear or arise during the period of twelve months subsequent to the issue of the final certificate by the Chief Inspector.

In addition, it was the duty of the contractor to have exercised supervision over the

dam by himself, his servants or agents in order to open the sluices when required, but he failed to do this, and such failure contributed to the damage done.

There was a claim in reconvention for an order on the plaintiff (Roux) to make good the defects and to complete the dam, and render it secure to the satisfaction of such person as the Court might appoint, the defendant tendering upon this being done to pay the plaintiff the retention money.

As the Court held that the onus was on the defendant,

Mr. Scarle called

Joseph Newey, Chief Inspector of Public Works in the Colony, who gave evidence as to the design and specifications in connection with the construction of the dam, which he stated to be, approximately, 2,690 feet wide. It was about 23 feet deep in the deepest part. The witness also deposed to the nature of the construction of the dam. On the 26th March the dam broke, and witness inspected it on the 15th May. Approximately, 300 feet of the dam had washed away. (Photographs were here handed in showing the dam before and after the breach.) Witness found that the different layers were not consolidated on making an examination, and the material was not properly mixed. Witness found some layers of almost pure sand, the sand having been dumped down and spread instead of having been either not used or mixed with other material. He also found lumps of hard material which had never been broken up. The estimated cost of repairing the breach was £4,000. Witness also spoke as to other alleged defects.

Cross-examined by Mr. Schreiner: Witness did not say that the sluices would have saved the dam had they been opened. When the dam broke the Government representative was not present. Witness was not aware that Joubert, the representative of the contractor, who should have been there, was commandeered when the invasion occurred.

Willem Westhofen, engineer, of the Public Works Department, gave evidence as to certain correspondence and interviews, and further deposed that he knew the contractor's workmen were using material in the construction of the dam which had been rejected by the engineers there. He did not, however, consider it his business to take any action in the matter.

Cross-examined: Witness had communicated with the contractor respecting the delay, but he had never objected to the materials used.

Percy Ashenden, civil engineer, in the Public Works Department, said he was Resident Engineer in connection with the construction of the dam from March to October, 1898, the contractor had a responsible man present, but he was not a practical foreman. He prepared the site for the dam, and, with Mr. Lichfield, made the design. Witness had had occasion to complain about the construction of the embankment, and had written to Roux about it, calling his attention to the fact that the stones were, at times, carted on without being broken or wetted.

By Mr. Justice Jones: When witness last saw the dam he did not think it would break.

Cross-examined: He could not recollect any instance in which defects to which he had objected were not remedied. The bulk of the material, had it been properly mixed, would have been excellent. He approved of the soil where it was ploughed up and taken out.

Re-examined by Mr. Seare: He had written to the contractor about the breaking up of the material he used, to which he attached great importance. The contractor could have obtained sufficiently good stuff on the spot.

By the Court: Witness left the dam in October. The layers were properly moistened while he was there.

Thomas Earle Scaife, Civil Engineer, employed in the Public Works Department, said he arrived at the dam in November, 1898, and was there until August, 1899. While there he complained that the stones were not properly broken up, and that the material was not sufficiently welded together. It was impossible at any one time for him to see the whole of the work going on on the embankment. He required about half a day to go round the entire works. The men working were not skilled labourers save the concrete men and the masons. He inspected the dam in October. There was great trouble in obtaining sufficient water. He considered the embankment strong enough to withstand the rush of water.

Thomas Thomas, Clerk of Works in the Public Works Department, said he acted as clerk of the works at the dam from 1898, when the embankment was from four to five feet high, until the completion of the work. Witness had acted as engineer for a short

time, and had complained about too sandy material being brought, and about the material not being broken. Witness could not see all the material brought to the embankment. As far as he was able he saw that proper stuff was put in. There was a scarcity of water, and he remembered the work having stopped on one occasion in consequence of this. Witness had had material removed when he did not approve of it.

Joseph Newey (recalled) said he saw the dam after it had broken. There was very little water in the dam. The nature of the soil struck by boring was pot-clay and porous soil.

Henry Charles Lichfield, engineer, Public Works Department, said he designed the dam, and considered the design a good one. In May, 1898, the work appeared satisfactory, the embankment then being about four feet high. In January, 1900, the dam appeared satisfactory. At the beginning of April, after the dam had broken, the masonry showed a distinct water mark. There was no sign of leakage underneath. The wall was breaking away from the top, and the stream of water flowing through was about 200 feet broad. He found streaks of different kinds of soil on the embankment, with streaks of sand. Towards the top it was porous. The stuff in the embankment was very lumpy on both sides of the breach. These lumps should not have been there. The water had evidently risen to a level where the embankment was not compact, and apparently percolation resulted. If the stuff had been properly consolidated the breach would not, in his opinion, have happened.

Cross-examined: He regarded the 1895 flood as a kind of high water mark in constructing plans for the dam. He had made provision for a puddle-core in the design originally. A puddle-core would not necessarily make the dam stronger. He had never heard of a work of this magnitude being constructed without a puddle-core. In his report in June, 1900, witness stated that too much water had been used in the formation of the clay. This was his opinion from the appearance of the embankment. The instructions had been too literally carried out by the contractor. He never said the break was due to any omission or defect on the part of plaintiff. Witness admitted having made a report in April, 1900, when he visited the dam. This was after the breach, and he therein made no criticism of the way in which the embankment had been constructed.

George Kilgour stated that he was a civil engineer. He had great experience in the construction of dams. He had looked through the plans and specifications of the dam. Where he could construct a dam without puddle-cores he would always do so. The best sort of clay for puddle-cores was not available where this dam was built. The general dimensions of the dam were satisfactory.

Cross-examined by Mr. Schreiner: There was no resistance necessary to counteract the velocity in the time of the flood. No allowance was made for velocity at the time of flood. He did not estimate the contents of the area or drainage area of this dam.

By the Court: He had not seen the dam.

Petrus Jacobus Buys stated that he lived at Upington, where he farmed. He was employed by Roux in the construction of the dam. He never came to the dam wall. He lived near the dam after its completion, about 200 yards from the overflow. He was there when the dam broke. The dam broke on Monday. The rains began on Saturday. That day the water rose very little, but somewhat more on Sunday. It rose very much on Monday. He was on the dam wall on Monday at about 2 p.m. At that time the water was just beginning to come over at the overflow. He did not return to the dam after 2 p.m. He did not see the dam break. The dam broke about 10 or 11 o'clock that night. He saw no leakage at 2 p.m. There were no rebels at the dam. At 2 p.m., when he was on the embankment, he walked up and down the whole length of the embankment. He noticed no cracks in the dam wall. He did not look for cracks.

Cross-examined by Mr. Schreiner: He loaded up stones for the section worked by Mr. Roux. Van der Westhuizen superintended the loading. He was instructed never to load up sand. He always loaded up the proper stuff. Joubert was away some time before the dam broke. He was away for some days with the rebels. The rebels were not there when the dam broke. When he was paid off he had nothing more to do with the dam.

Petrus Jacobus G. Buys said he was the son of the last witness. He was away with his father. They returned on the Thursday before the dam broke. The water began rising on Saturday. He was on the embankment at about 2 p.m. on Monday. He went across to the sluice. He was on the wall when the water began to overflow. The dam broke between 10 and 11 o'clock on Monday night. When he was on the em-

bankment that afternoon he noticed no signs of leakage. He saw no rebels at the time the dam broke.

Cross-examined by Mr. Schreiner : He tried to lift the sluices. He and Paul did everything possible to lift the sluices on Monday afternoon, but could not manage it.

Mr. Searle, after putting in the various plans and specifications, closed his case.

Petrus Benjamin van der Westhuizen deposed that he was a farmer, and partner of the plaintiff in connection with the Kenhardt dam contract. He said that, at the outset, Mr. De Villiers was the contractors' engineer. Mr. Phillips came as engineer afterwards. The work was done in three sections. For the middle portion, the material, as far as witness could remember, was never objected to by the Government engineers. The land from which the material was taken was ploughed over, and the stuff exposed for inspection by the Government engineers before being carted over to the embankment. Witness superintended the work on this section of the embankment. He was careful to see that the right material was put down in the right way on the embankment. Mr. Ashenden altogether disapproved of the use of sand. No complaint was ever made to witness as to too much water being used, or about the material having insufficient sand mixed.

Cross-examined by Mr. Searle : Roux was regarded as the responsible person, and when he was on the works, it was to him that complaints were made—not witness. He had an interest in the contract. The embankment was not constructed of the same material throughout. Their attention was sometimes drawn to the fact that the lumps had not been sufficiently broken.

Francois Gerhardus Roux, the plaintiff, was then called. He said that the last witness looked after the actual work more than he (the present witness), who was occupied with matters of supplies and finance. Witness corroborated the previous witness as to how the material was approved and brought to the embankment. There was constant supervision by the Government engineers. There was never any complaint about enough water not having been used on De Klerck's (the middle portion). Witness had received letters complaining of lumps being used unbroken, and of the use of sand. Witness was at the dam with Mr. Lichfield after the breach, and the latter did not then say it was due to any defects. He said he was at a loss to account for the breach.

Francis Philip Phillips, civil engineer, said he was engaged by Mr. Roux as engineer at the dam. The material was approved, after being ploughed up. Witness had never heard the question of mixing raised. The material was not pure clay. Witness had never seen lumps put in.

Cross-examined : He had never told Mr. Newey or Mr. Ashenden that he had warned Roux about putting bad work into the dam.

Francis F. Phillips stated that he was a civil engineer. He had five years' experience in South Africa. He was engaged by Mr. Roux on the recommendation of Mr. Lichfield. The work as set out by De Villiers was correct. He was on the works constantly. He left in October, 1899. There was then no more setting out. The work was almost completed. He was familiar with all the different portions. According to photographs the break occurred in De Klerck's section. Van der Westhuizen supervised the whole bank. The work was carried on in the way pointed out by the Government engineers. There was never any question of mixing materials. The Government engineers never raised the question. The material was selected and approved by the Government engineers. The material used was a mixed clay. Water was used. No work was done dry. He never heard of any objection raised as to the material used in De Klerck's section. He was constantly along the works, and as far as he could see the work was always carried out according to instructions. Mr. Ashenden did complain at times about lumps. As far as witness was aware the lumps were always broken. The workmanship was the same all through. Each gang had a foreman.

Cross-examined by Mr. Searle : He had no previous experience in the construction of dams. When he noticed anything wrong he told Van der Westhuizen of the fact. He had studied the specifications. There was no special mixing of material. The material used for De Klerck's portion was nearly pure clay.

Re-examined by Mr. Schreiner : He saw lumps broken up by picks. After lumps had been broken up the earth was moistened. The spreading took place with spades. Although the material used in the different sections was not quite the same, it was yet in every instance approved by the Government engineers.

Jacob de Klerck stated that he did piece work on the dam. He worked in the centre. He had about fifteen to twenty men under him. He was paid by the yard. He was on

the work constantly. He was always instructed as to the manner of putting in the material. There were no complaints at the commencement of the work. Afterwards a complaint was made that the layers were too thick. The layers were then reduced to nine inches. He used clay from below the dam. Thomas on one occasion objected to some material as being sand. The different layers were always well watered. The lumps were regularly broken. There were special men for that work.

Cross-examined by Mr. Searle: He was generally on the embankment. He at times went to the spot where the material was fetched from. He only tilted the ground on to the embankment and spread it. Mr. Roux's men then put the water on. No complaints were made to him. He separated the lumps from the soil, but did not break them up.

By the Court: His theory was that the dam broke because too much water had been used. He could see no cracks on the embankment. The crust was covered with gravel. He saw the dam on the Monday. It was then full, just beginning to come over the overflow. That afternoon he noticed two cracks in the dam wall. The one was in his section, the other was in Faul's section. There were no rebels there when the dam broke. The break occurred in his section. That was about where he noticed the cracks.

Willem Adriaan Joubert stated that he worked under Roux on the west section. He never worked on De Klerck's section. He saw the material used by De Klerck. He remained at the dam after its completion. He left on the 28th February. He went to Brandvlei. He was before a Krygsraad at Kenhardt; the Boers gave him eight days to get across the line. He did not return before the dam broke. He was not there when Roux and Lichfield were at the dam. He was afterwards instructed to plant the Hottentot figs. He was also told to take any instructions from Mr. Hunter, who was there on behalf of the Government. Mr. Hunter was taken away by the Boers, as a prisoner.

Cross-examined by Mr. Searle: The rebels came there in February. They did not do any harm to any of the farmers in the neighbourhood. After the completion of the dam, Mr. Hunter remained there to survey certain irrigation works.

Mr. Schreiner closed his case.

Mr. Schreiner (with him Mr. Benjamin), for plaintiff: This case is founded on the contract entered into by the parties on Jan. 22. By clause 2 the contractor was bound

to provide material, subject to the approval of a Government inspector or his deputy. He was not supposed to bring material from a distance (section 75 of the contract) and the money was to have been paid on the certificate of completion being granted by the Chief Inspector, subject to a deduction of 15 per cent. as "retention money."

[The Acting Chief Justice: The 15 per cent. was kept out of the agreement?]

Mr. Schreiner: No; we hold that we are entitled to the 15 per cent. The proper course for Government to have adopted would have been to have made a tender. Defendant's proper issue would have been on a question of damages. Defendant complained that the work was faulty and improperly done. Some of his witnesses said too much sand was used; some said too little; but no allegations of this kind appeared on the pleadings. There was not a word to show that plaintiff was obliged to maintain the works after he had completed them. It was common cause that he had so completed them, and received a most satisfactory certificate.

[Maasdorp, J.: But then as to the 15 per cent. detention money—what is that for?]

Mr. Schreiner: That does not show we were under any obligation to repair the dam. *Dies cessit* on May 31 and *dies venit* on June 6. On that date the money was claimable; some of it was paid, but we have not got all. Again, Mr. Lichfield's report of April 20 showed that the work had been satisfactorily completed. It was not until plaintiff had sent in his demand and filed his declaration that he could learn anything. The case had been set down for March 18, and it was not till March 13 that they heard the first complaint as to the material being faulty and not properly mixed. If the material was approved *in situ* as properly mixed by the inspector we have fulfilled the terms of our contract. Both parties agree that clay should be mixed with sand. I am quite willing to admit that the supervision of a Government inspector does not discharge a contractor from his duty. But here the duty has been performed. "Slick" is a certain kind of fine sand. It is not solidified clay. Would any Government witness (even Mr. Kilgour) say that they were bound down to a judicious mixture of "slick" and sand? Government witnesses have said that too much water was used in one portion of the works, and too little in another; but surely that is not a fair way of stating a plea. The

evidence goes to show that the work was held over until water was obtainable. There is no evidence to show that water was sometimes used too freely and at other times too sparingly. The Government engineers have made a mistake in insisting on the use of too much water, and if more sand had been mixed with the material the cracks would never have appeared. As to the lumpy formation I may refer to Mr. Lichfield's evidence. When Mr. Newey saw the bank it was all lumpy, more or less. Defendants have not even stated in what way the work was defective, and plaintiff has been prejudiced by not being able to get at Mr. Lichfield's reports.

Mr. Searle : We had no intention to keep any reports out of Court.

Mr. Schreiner : I accept my learned friend's explanation. The report of June 16, 1880, showed that plaintiff had no intention of withholding anything from the Court. Then, as to material. It had been approved of by defendant's agents and now defendant takes the position that it was not satisfactory. Plaintiff had done what he was told to do ; he has done all he could, and if the material used by him was suitable he is clearly entitled to judgment. *Hudson on Building Contracts and Engineering* (Vol. 7. chap. 6, page 258.) This Court, I submit, will never hold that plaintiff is liable for any defects which do not imply default on his part. There had been no default on plaintiff's part, he has carried out the work in accordance with defendant's own orders.

Mr. Searle, K.C. (with him Mr. Joubert), for defendant : Exception has been taken by my learned friend to the terms of the plea. The point at issue is chiefly a matter of law and of the construction of the contract. Clause 13, particularly if read with section 20, freed defendant from all liability. The contractor was bound to maintain the dam for twelve months. He recognised that obligation by going up to Kenhardt ; why else should he have gone near the dam ? If the damage had clearly resulted from *vis major* (e.g., an earthquake) he would not have been responsible, and he might possibly be excused if he could prove to the Court that the design was bad. The mere fact that the work was done under the superintendence of the Government engineers did not relieve plaintiff from responsibility.

[The Acting Chief Justice : Mr. Schreiner never said that. He only held that they were there to show how the work was to be done.]

That comes to the same thing. The evidence is scanty, but if a dam breaks at such

a place at 10 p.m. one cannot expect to have much evidence. *Prima facie*, the dam broke owing to defective workmanship. The materials were good enough if they had been properly used ; but Mr. Newey's evidence showed that they had been used injudiciously. Layers of sand were found in the dam.

[Jones, J. : The Government engineers thought it a good dam ; how could the contractor know it was not ?]

Mr. Lichfield only saw it when it was completed, he did not know what was in it. Roux was bound to maintain the dam for a year : that was the object of the retention money. It was as a safeguard against defects showing themselves during the year. The certificate was only to show that the work was completed.

[Maasdorp, J. : It certifies that there was no defective work.]

It cannot mean that the dam was well built. It took a long time to go round the works, and the surveyor could not see everything that was done. The report made in April did not refer to the breaking of the dam. In his report of June 18, Mr. Newey went more deeply into the matter than in his April report, but even then he took up the position that the contractor was liable for defects.

[Maasdorp, J. : Does he draw the conclusion that the dam burst on account of these defects ?]

[Jones, J. : If the dam burst on account of these defects why was the suggestion of its having been blown up with dynamite made ?]

There were rebels in the neighbourhood, and it was thought possible they might have blown up the dam ; but that theory was not seriously adopted. The theory accepted was that the leakage began at the top of the dam.

[The Acting Chief Justice : Why was not notice of this leakage given to the contractor ?]

There was the wire of April 4. We did not put in the reports after the date of the breach because we did not regard these as evidence. Government was not obliged under the contract to give notice of defects to plaintiff.

Mr. Schreiner was heard in reply.

Curia ad vult.

Postea (May 15).

The Acting Chief Justice, in giving judgment, after stating the pleadings, said : The issue in this case depends mainly upon the true construction of the 13th

section of the general conditions of the contract, which is as follows :

"(13) Payments on account of work done, or material brought to the site of the work, will be made monthly at the rate of 85 per cent. of the value of such work or material, on the production of the certificate of the Chief Inspector, and the balance of the contract sum shall be paid to the contractor within twelve months after the date of the final certificate of the Chief Inspector, to the effect that the works have been completed in terms of the contract, and during this period the contractor must make good at his own cost all omissions and defects that may appear or arise subsequent to the issuing of the said final certificate." The parties are in direct conflict as to the meaning to be attached to the latter words of this section. It is evident that these general conditions have been adopted, though perhaps with some want of aptness, from a draft of a building contract. For instance, the sixth clause, which throws the care of the works on the contractor, and makes him responsible for all loss due to any cause whatever during construction, requires the contractor also to insure against fire. It is needless to say no insurance was ever effected, or called for by the department. So again the forms given in the books of precedents were not closely followed in regard to the 13th clause itself. On reference to the books it will be found that there are three distinct classes of undertakings which are commonly entered into in regard to retention money, the first being a repairing clause, the second a clause that the builder shall rectify all defects appearing within a certain period, and the third a maintaining and upholding clause. The department contend that clause 13 of this contract comes under the third class, while for the plaintiff it is urged that it properly falls under the second category, and that thereunder the plaintiff is answerable only for his omissions and defects. Following the forms given in the text books there would be little difficulty in at once determining under which class the clause would fall; here the difficulty arises from the baldness of the language used. Giving the words the most careful consideration, I am unable to find that they amount to an undertaking by the plaintiff to maintain and uphold the works for a year after completion. The contractor binds himself firstly to make good all "omissions." This can only mean omissions to

do work he had undertaken to do under the contract. From where else than a reference to the contract can omissions be gathered? Then as to "defects," in the clauses usually inserted in contracts, they would be found to be confined to such defects as arose from the contractor's own default, for instance, such as would arise from improper or defective construction, or from the use of improper material contrary to the terms of the contract. He would not, under such a clause, be bound to restore if the premises were destroyed through some outside cause nor would he be answerable for a defect inherent in the project itself, or for the insufficiency of the material, if it complied with the specifications. An apt illustration of the meaning of defects is cited by *Hudson on Building Contracts* (Vol. I., p. 258), from the American case of *District of Columbia v. Clephane*. In that case A agreed to pave parts of certain streets with "Muller's wood pavement," and agreed that, if within three years any part of the pavement should become defective from *improper material or construction*, he would, upon notice, repair the same. It was held that the city, and not A, assumed the responsibility of the pavement's capacity for resisting weather and use. This decision will also be in point when considering the facts of this case. If any doubt existed as to the meaning of the words, we certainly ought not to give them an extended construction, so as to lay an additional burden on the contractor beyond what the words themselves would clearly justify. Construing this 13th clause by the light of what is usually understood by the term defects in contracts of this nature, we have come to the conclusion that the plaintiff did not thereby take upon himself to be answerable at all risks for any damage which might happen during the twelve months, but only for any injury which was the result of any default on his part. It necessarily follows, upon such a construction being placed on the contract, that it is not sufficient merely to show that an injury has been sustained to the dam, but that it must be affirmatively proved that this injury was the consequence of some omission or defect on the part of the contractor. The defendant has, to some extent, himself accepted this position, as the plea alleges that the work was faultily and improperly executed. The plea also alleges that it was the duty of the contractor to open the sluices to the dam when required, and that he failed to do so, and that this failure contributed to the damage done. As to

this, it will be sufficient to say that the evidence does not support the allegations, either of duty, or that the breaking of the dam was due to a failure to open the sluices. The correspondence after plea shows that the main cause of complaint made by the department was in regard to the way in which the material was worked up after being placed on the embankment. As to the material itself, paragraph 11 of the specifications provided that it was to be obtained by excavation in the river bed, not nearer than 200 feet from the embankment, or from such places as might be selected by the engineer. As to construction, sub-section (c) of the same paragraph provides for the selected material being well mixed with clay, well moistened with water, and worked up with spades or other approved means, as deposited; then that the whole top surface of the embankment be rammed, or tramped and driven on with cattle as often as, and with the number required by, the engineer, until perfect solidity was secured. There has been considerable criticism bestowed on the scheme of the embankment as provided for in the specifications, and it has been suggested that this dam was being built as an experiment. When originally submitted to Parliament, the proposal was to have a puddle core in the centre of the embankment, running throughout its length, but this was omitted from the contract on account of the expense. The officers of the department have given their opinions that the plan ultimately adopted was a good one, and one which, if properly constructed, ought to have stood. Only one professional expert outside the department has been called in support of this view, but he, unfortunately, has not seen the dam, nor could he express an opinion as to the fitness of the material used, except in so far as could be gathered from the samples produced in court. Whether or not it was intended for the Court to form its own opinion from these samples is not clear. The elementary testing applied in court, by putting the so-called clay and slick in water, did not impress us favourably, but in face of the professional opinion expressed, we are not prepared to say that the project was inherently faulty. As to the material used, the evidence shows that the places from where it was taken were selected by the engineer in charge, by whom also the material itself was approved of while *in situ*. This was not a case in which the contractor had to select the material at his own risk, and should, in consequence, be specially answer-

able for its quality. The Government officials themselves considered that the material answered to what the specifications required. The only question is, was it properly worked up when placed on the embankment? The evidence on this point is that occasionally some pure sand was brought up the bank and objected to, but when that was the case it was removed. The only other complaint made by the supervising Government officials was that occasionally clay was deposited in unbroken lumps. As to this it was shown that the pulverisation of the lumps was always attended to, and any directions given by the engineer were obeyed. The means employed in the deposit of the material were all approved of and passed. If there had been any defective working up of the material which escaped the notice of the engineers, and such defective work contributed to the breakage of the dam, the plaintiff might still be held liable, but the difficulty is to find such facts to have been proved. Mr. Litchfield was the Government engineer supervising the works shortly after their commencement, and he remained there till their completion. He seems to have been very active and vigilant in his supervision, and his report on the final inspection is strongly favourable to the plaintiff. When the work was completed, and the final certificate about to be given, he reported that the work, as a whole, had been satisfactorily done, and he recommended the payment of the contractor. As to the embankment, he reported specially that it had been done according to specification under keen supervision. After the dam broke Mr. Litchfield reported that the sections of the breach showed that the material was not selected or mixed with the care it should have been, and that the nodular strata in the upper portions of the embankment rendered it apparent that too much water was used in the formation of the dam. This is certainly in contradiction to all the evidence led as to the way the work was carried out during construction, and also to Mr. Litchfield's own previous report. As to the alleged too free use of water, if that was actually the case, it was the result of express instructions from the head of the department against the suggestion made at the time by the local engineer. There is unfortunately a want of evidence as to the circumstances attending the breaching of the embankment. This was probably due to the disturbed state of the district caused by the invasion of the

enemy, and the rebellion of some of the residents in the neighbourhood. The idea was mooted that the dam had been damaged by the rebels. The witnesses Buys, father and son, who had joined the enemy, but had returned before the breach occurred, were called by the Government, but did not throw any light on the cause of damage. The evidence of Joubert, the person left in charge by the plaintiff, was even more unsatisfactory, and his avoidance of the dam after the breach occurred was inexplicable. There is, however, absolutely nothing put before us to support the suggestion of wilful damage. Mr. Litchfield, in his report on the 18th June, 1900, states that he had collected what evidence he could from those on the spot, and that the result seemed to show that the heavy flood apparently reached the dam at eleven o'clock a.m. on the 24th March, and had risen to the overflow levels at two p.m. on the 26th, that the water continued rising till about eleven p.m., when the stream overflowing at the weirs was one foot six inches above the sill, and that the dam gave way that night. Mr. Litchfield's hypothesis is that the cause of disaster was due to leakage on account of the evaporation of moisture from the upper strata of the embankment having left successive cavities in the pure clayey material, and had the rise of water not been so rapid, the dam might have been saved, owing to the longer time for capillary attraction to have taken effect in swelling the clay. That the water found its way through the upper, and not through the centre or lower part of the dam, Mr. Litchfield attributed, not so much to the fact of any difference in the mode of construction, but greatly to the test the lower portion of the embankment underwent, and to the soaking it got in 1899, when water was standing against it for a considerable period. The rest of the structure had not had the advantage of such a soaking, or it might have also have stood. It is not clear that at that time the department were even of opinion that the damage was due to any default on the part of the contractor, and certainly no intimation to that effect was given to the plaintiff. There was considerable correspondence between the parties, but it all had reference to stating and settling the account, and though such settlement might not be a bar against any claim on the ground of omission or defect, the want of notice to the contractor is an element to be considered. The final

certificate was given on the 15th January, and the dam broke on the 26th March; but it is not till the 29th December, about a fortnight before the retention money was payable, that the first intimation of such an opinion was given to the plaintiff, and then in the following terms: "I have the honour to call your attention to clause 13 of the conditions of contract, and to request you to state what your intentions are with regard to the obligations which you have undertaken under the concluding portion of that clause." It will be noticed that even here no omission or defect is specifically mentioned, and it would seem that at that time the department relied on the clause as being in the nature of a maintaining and upholding clause. As the plaintiff put another construction on the clause, his reply naturally was that he did not acknowledge any legal obligations as devolving upon him, and that, in terms of the contract, he expected to receive the retention money at due date. All through the case the defendant has relied more on the legal question of the construction of the conditions than on proof of any default on the part of the contractor. Under these circumstances, holding as we do that this 13th clause did not impose upon the contractor the burden of maintaining and upholding the work for twelve months, we cannot find as a fact that the breakage of the dam has been shown to be due to any defect or omission on the part of the plaintiff, and that, therefore, he is entitled to be paid the retention money due on the 15th January last. As to the claim for planting the Hottentot fig, as the work was done and passed by the engineer after the dam was broken, it should be paid for, though some deduction on the total should be made, as the whole of the extent contracted for was not planted. A fair amount to allow will be £80, and judgment will, in addition, be entered for this sum. The plaintiff is entitled to costs of suit.

[Attorneys for Plaintiff, Messrs. Van Zyl and Buissinne; Attorneys for Defendant, Messrs. Reid and Nephew.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1901.
May 9th.

On the motion of Mr. McGregor, Paul Clement Anders was admitted as an attorney, the oath to be taken before the Registrar of the High Court of Kimberley.

Mr. Benjamin moved for the admission of Frederick van Zyl Kook as attorney and notary.

The application was ordered to stand over owing to an irregularity.

PROVISIONAL CASES.

VAN ZYL V. VAN ZYL.

Mr. Benjamin moved for the final adjudication of the defendant's estate.

Grant d.

ANDREWS V. MARAIS.

Mr. Wilkinson asked for provisional sentence on a bill of exchange.

Granted.

VENTER V. WEINBERG AND ANOTHER.

Mr. De Villiers applied for a decree of civil imprisonment against defendants, against whom judgment had been obtained.

Mr. Alexander appeared for the defendants, and read an affidavit, wherein they offered to pay £2 a month and to settle the claim when they resumed trading.

A decree of civil imprisonment was granted, execution to be stayed on payment of £2 per month, commencing on the 20th instant, leave being reserved to plaintiff to move for an increase of amount.

SAWKINS V. WATSON.

Mr. Benjamin applied for a decree of civil imprisonment.

Defendant appeared in person, and said he had paid some of the money. He had had an accident six weeks ago, and had been unable to work. He was a carpenter, earning £3 12s. a week, and was a married man, with one child. He made an offer to pay £1 a month off the judgment.

Plaintiff was prepared to accept £2 a month, but this defendant said he could not pay. He said he had other debts.

A decree was granted as prayed, execution being suspended on payment of £1 per month, the first payment to be made on the 15th instant.

BECKER V. LANGE.

Provisional sentence was granted against defendant in respect of a cheque for £30 15s. Mr. Solomon made application.

VAN DER SPUY V. LE ROUX.

On the motion of Mr. Alexander, provisional sentence was given against defendant for an amount due on a mortgage bond, with interest and costs. Property specially hypothecated was declared executable.

ILLIQUID ROLL.

Judgment was given under Rule 329d, with costs, in each of the following cases: Heyns v. J. Fick (for meat sold), Mr. De Waal applied; Heyns v. C. Fick (for sheep sold and delivered), Mr. De Waal applied; Joseph v. M. Fourie (goods sold and delivered), Mr. Solomon applied; Joseph v. L. Fourie (goods sold and delivered), Mr. Solomon applied; Meintjes v. Church (money lent), Mr. Currey applied; Luyt v. Pretorius (money lent), Mr. Upington applied; Mitchell v. Strumpher (balance of account for goods sold and delivered), Mr. Currey applied; and Fredericks v. Lucas (for money lent), Mr. Close applied.

GEDULT V. GEDULT.

This was an action for divorce, defendant, the husband, being in default.

Mr. De Villiers appeared for the plaintiff, who alleged adultery on the part of her husband with one Mary Seel. The parties were married at Worcester in 1890 in community of property. The plaintiff asked for a divorce, for the husband's forfeiture of the benefits of marriage in community, for the custody of two minor children, and for costs.

After evidence of the adultery had been given.

Judgment was given as prayed.

BRINKMAN V. R.M. OF VICTORIA WEST. { 1901.
May 9th.

Law agent—Change of domicile to a foreign country—Acts 43 of 1885 and 31 of 1886.

A law agent, enrolled previous to 1885, does not forfeit the rights conferred by section 1 of Act 31 of 1886, by acquiring a foreign domicile should he subsequently revert to his domicile in this colony. An agent admitted prior to 1885, who has afterwards been struck off the rolls, is in the position of a new applicant, should he again seek enrolment.

This was an application for an order on the respondent to admit applicant as a law agent to practise in the Victoria West Court.

The affidavit of the applicant stated that up to 1889 he practised at Piquetberg, where before 1885, he was enrolled as a law agent. In 1899, he proceeded to the Transvaal, but owing to the outbreak of hostilities he returned to the Colony in September, and was appointed Town Clerk of Victoria West. He had applied to the Magistrate of Victoria West for admission as a law agent of that court, but the application was refused, though he produced excellent testimonials.

In his affidavit, the respondent gave several grounds for refusing the application. In the first place, Act 43 of 1885 provided that no law agent could be enrolled where there were two or more attorneys in practice. There were three in Victoria West. Act 31 of 1886 provided that this did not refer to a law agent enrolled before 1885 changing from one court to another. The Magistrate held that this latter provision did not apply in Brinkman's case, as he had forfeited his privilege by leaving the Colony. The Magistrate also advanced the reasons that the applicant had previously applied to be appointed a justice of the peace, and that from information received from the military authorities the applicant was considered undesirable.

The replying affidavit of the applicant was to the effect that two of the attorneys enrolled in Victoria West were employed as clerks or were partners with a third. He (applicant) was still enrolled as an agent in the Magistrate's Court at Piquetberg.

Mr. Searle, K.C., moved.

Mr. Howel Jones for the Magistrate.

The Court granted the application, the Acting Chief Justice saying that the applicant had produced testimonials as to his good name and character, and there was nothing to show that he was undesirable. If applicant had been struck off the roll at Piquetberg he would then be in the position of a new applicant seeking for enrolment. No order was made as to costs.

[Attorney for Applicant, Gus. Trollip; Attorneys for Respondent, Messrs. Reid and Nephew.]

WORDON AND PEGRAM V. { 1901.
CANTRELL AND COCHRANE. { May 9th.

Trade mark—"Cape Club Soda."

The words "Club Soda," having acquired a descriptive meaning in this colony, cannot be registered here as a trade mark.

Held, that respondents must disclaim the sole right to the use of the word "Club."

This was a motion for an order for the cancellation of a certain trade mark.

The trade mark in question was constituted by the words "Cape Club Soda" as applied to mineral and aerated waters. From the affidavits it appeared that the term was first registered by the applicants, who afterwards disclaimed the exclusive use of the words, and had them removed from the trade marks register, acting, they alleged, on advice that the word "club" was not registerable. The respondents had since registered the word, and they claimed to be entitled to its use as a trade mark, stating that it had been associated with their name for a long time, and had a wide repute. The trade mark was registered in England and elsewhere by the respondents, and it was alleged that after threatened proceedings by respondents against applicants, the latter withdrew the word from the Colonial Register, upon which they had caused it to be placed as their trade mark, at the same time informing respondents that it was not registerable. Respondents alleged that they imported a considerable quantity of "club" soda to the Colony.

Mr. Schreiner, K.C., for the applicants.

Mr. Searle, K.C., for the respondents.

The Court held that "club" was a descriptive word, and had been so used in respect of soda in this colony for many

years. The word was registered in England before the restriction was applied to the use of words of description, or geographical terms. It had acquired a descriptive meaning in this colony, and so could not be registered here as a trade mark. Respondents were ordered to disclaim the sole right to the use of the word "club," costs being given against them.

LUJUBIC V. ISOINIK.

This was an application for an order interdicting Messrs. Pauling and Co. from parting with any moneys, the property of the respondent, pending action to be instituted by applicant against respondent for an account.

Mr. Benjamin appeared for the plaintiff.

Ordered as prayed, pending action to be instituted by applicant.

In re EATON, ROBINS AND CO.

This was a petition for an order restraining the executors of the estate of Allen Chase Taylor from paying an inheritance to Christian John Taylor, an insolvent, who is indebted to petitioners.

The Court ordered that notice should be served, personally if possible, according to section 127 of the Insolvent Ordinance, or service be substituted by publication in a paper in Ashburton, New Zealand, and in the "Government Gazette," New Zealand. Further that an order restraining meanwhile the executors of the estate of Allen Chase Taylor from paying an inheritance to Christian John Taylor, an insolvent, be granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

MUSGRAVE V. MUSGRAVE. } 1901.
} May 10th.

Mr. McGregor appeared for plaintiff (the husband) in an action for divorce, defendant being in default.

Plaintiff, who was in the military service, was unable to appear, and on the application of counsel, the case was ordered to stand over *sine die*.

STRAKER V. LUCKE.

This was an action for transfer and damages, defendant being in default.

Mr. Solomon represented the plaintiff.

The plaintiff (Edward H. Straker) deposed that on the 4th June, 1898, he bought six lots of land from the defendant at D'Urban-road. Later, Lucke wrote to witness asking him to pay the purchase price (£42), and transfer costs, £19 17s. 8d., upon which he would pass transfer. In November witness paid the defendant's clerk £30 on account, and gave a promissory note for the balance. When this became due, witness paid £12 off it, and gave similar security for the balance, which was paid off. Though witness had written to the defendant, the latter had not delivered the transfer deeds to him. Witness had had several opportunities of selling the land in the meantime, and had suffered damage in consequence of defendant's neglect to pass transfer.

The Court granted the order for transfer, but ruled that the only damage plaintiff had shown he had sustained was the loss of interest. Damages were awarded to the amount of £5 with costs.

BARRON V. HUNTER.

In this case the plaintiff, Alexander Barron, of Woodstock, sued for a declaration of rights.

Mr. Searle, K.C. (with him Mr. Upington), appeared for the plaintiff, and Mr. Benjamin for the defendant.

The parties are the owners of certain lots of land, which adjoin each other at Woodstock. Between their properties runs a lane or passage, and it was in regard to this lane that action was taken, plaintiff seeking to have it declared that he was entitled to a right of way through the passage, and to the use thereof, defendant having obstructed the same.

After hearing the plaintiff's evidence, the Court adjourned for fifteen minutes in order to give the parties an opportunity to come to a settlement.

On resuming, judgment was given, by consent, for plaintiff for a servitude of right of way, and of the existing drain; the servitude to be registered on the defendant's title; plaintiff to pay £50, and costs of the action and of registration.

SPITZ V. LUDOLPH. } 1901.
} May 10th.

This was an appeal from the decision of the Assistant Resident Magistrate of Wyn-

berg in a case in which the appellant (Isaac Spitz) sued the respondent (Mrs. J. R. Ludolph) for £20 damages for breach of contract. The Magistrate upheld an exception taken by the defendant in the action, on the ground that the Court had no jurisdiction, by reason of there being a lease by which future rights were affected.

Mr. Searle, K.C., who appeared for appellant, briefly stated the circumstances, from which it appeared that the lease was not in question.

In giving judgment, the Acting Chief Justice said that the lease was never in dispute, and no future rights were affected. It was only a question of whether plaintiff was entitled to damages for breach of contract. The exception would be overruled, with costs, and the case would be gone into on its merits. The case was accordingly remitted to the Magistrate.

GENERAL MOTIONS.

HIGGINS V FLETCHER. { 1901.
May 10th.
Practice Removal of bar Affidavit of merits—Plea.

On behalf of the defendant, Mr. Benjamin moved for the removal of bar, and leave to plead.

Mr. McGregor appeared for Higgins.

An affidavit by the defendant was read, setting forth his reasons for the application. His plea in the action had been prepared, and was submitted.

Mr. McGregor opposed, on the ground that the rules of Court required that a barred person should furnish an affidavit on the merits.

In giving judgment, the Acting Chief Justice said that the affidavit filed by applicant did not go into the merits, but he tendered his plea, which was equivalent to an affidavit on the merits. It was not strictly in form, but in a case like this, where fraud was involved, the Court would go out of its way to allow the question to be gone into. The bar would be removed, and the costs of this application would stand over.

IN THE ESTATE OF THE LATE JOHN FLETCHER.

On the motion of Mr. Benjamin, an order was granted calling on all persons interested to show cause why an order should not be made authorising the Registrar of Deeds to

cancel a certain bond. The rule was made returnable on the 23rd May, and was ordered to be published in the "Cape Times" and the "Government Gazette."

IN THE INSOLVENT ESTATE OF WM. AIGIE.

Mr. Benjamin moved for an order on the Master to call *de novo* the first and second meetings in the above estate.

Granted.

IN THE MATTER OF THE PETITION OF CAROLINE FINE.

Mr. De Villiers moved for leave to sue the husband for separation by edictal citation.

The matter was ordered to stand over.

BURNARD V. WARD.

Mr. Benjamin appeared for the plaintiff.

Mr. Searle for the defendant.

This was an application for an order to have judgment signed against defendant for not proceeding with his action. The suit was brought on a judgment obtained in England. The judgment was obtained in default.

Mr. Searle applied for a postponement till the 12th June in order to communicate with his client, who was in England. If the affidavit be not filed by that date, judgment to be given against them.

The Court ordered that the case be put down for final hearing on the 12th of June; costs to be costs in the cause.

CHAMBERLAIN V. HULLEY. { 1901.
May 10th.
Grant—Reservation of roads.

This was an appeal from the decision of the Resident Magistrate of Umzimkulu in a case in which the Rev. Thomas Chamberlain, rector of Clydesdale (the present appellant), claimed a declaration that he was solely entitled to use a certain road, and that defendant (a farmer, of Clydesdale) had no right to the use thereof. He also claimed £25 damages. The plea was that defendant had a prescriptive right to the use of the road. The Magistrate ruled that a right of way had been acquired by prescription.

Mr. Benjamin appeared for appellant, and Mr. Searle, K.C., for the respondent.

The defendant's (now respondent) contention was that before the grant of 1883 the road in question existed as a road. The

grant reserved all existing roads. One of defendant's witnesses, named Strong, spoke to having known the road for over thirty years.

After reading the record of evidence and the Magistrate's reasons, Mr. Benjamin contended on the facts that the road was not shown in the diagram put in, and that no one had complained of the fencing in of the road except Mr. Hulley. The place originally belonged to the Griqua Government.

The Acting Chief Justice remarked that the chief point seemed to be whether the road was reserved by the grant.

Mr. Searle urged that it was proved satisfactorily that it was a public road, as pleaded by the defendant, before the grant, and was reserved by the grant.

The Acting Chief Justice, in giving judgment, said that the Magistrate had founded his judgment solely on the ground of prescription, and for several reasons he was wrong in deciding that a prescriptive right had been acquired. But he (the Acting Chief Justice) thought that this case might be decided on the grant, which made the condition that all roads and thoroughfares existing at the time the grant was made should remain free and uninterrupted. No roads were specified in the grant or in the diagram annexed to it, but there were certain marks on the diagram which indicated roads, of which the one now in question was not one. But the fact that it was not so indicated was not proof that it did not then exist. If the road had been mentioned in the grant it would have been almost impossible to contest the claim that it was a public road. The evidence in this case, and especially that of Strong, certainly showed that this road existed long before the date of the grant, and it was on the narrow ground that this road was in existence at the time of the grant and was reserved by Government for the public use, that the plaintiff must fail. Under the circumstances the appeal must be dismissed with costs.

SUPREME COURT

[Before the Hon. Justice JONES and the Hon. Justice MAASDORP.]

LOCHNER V. VAN DER SPUY. { 1901.
May 13th.

This was an action to recover the sum of £288, being the balance of the purchase price of certain mules.

The plaintiff is a dealer in stock, living at Somerset West. Defendant is a farmer residing near D'Urban-road in the Cape Division.

On or about February 16, 1901, plaintiff sold and delivered to defendant forty-six mules at £28 each.

Of the total purchase price (viz., £1,288) defendant has paid only £1,000. The plaintiff now claims the balance of £288, with interest *a tempore morae* and costs of suit.

Defendant pleaded a counter claim for £210, and tendered the balance of £78.

Defendant (plaintiff in reconvention) stated in his claim that on or about February 16, 1901, plaintiff (defendant in reconvention) had contracted to supply him with forty good and sound wagons, at £55 each, within fourteen days. On February 28, plaintiff tendered twenty-eight wagons to defendant in part fulfilment of this contract; but only ten of these were good and sound. These ten wagons were accepted and paid for, and plaintiff promised to deliver the remaining thirty as soon as the defects in those previously tendered could be remedied, and as soon as he could make up the balance, which he had failed to provide. This he had not done, and defendant, who had sold the forty wagons to a third party, had to purchase thirty wagons at a total cost of £1,860 to supply the place of those which plaintiff had failed to deliver. Defendant claimed in reconvention £210, the difference between £1,860 and £1,650, the price at which plaintiff had agreed to supply the thirty wagons.

To this claim in reconvention plaintiff (defendant in reconvention) pleaded generally as to the alleged contract. He admitted having sold ten wagons to defendant at £55 each, and said he was willing to sell eighteen other wagons to defendant but that defendant would not accept them.

Defendant's rejoinder to this plea admitted the sale of ten wagons, and also his refusal to accept the eighteen offered. These eighteen, he said, were not approved as according to contract.

Mr. Upington appeared for the plaintiff.

Mr. Searle, K.C., for the defendant.

The Court decided to hear evidence in support of defendant's claim in reconvention, the principal claim not being disputed.

The defendant said he paid £1,000 on the mule transaction, leaving a balance of £288. He also bought forty wagons from plaintiff at £55 apiece. Plaintiff had offered to supply him with any number up to 200 wagons at £55 each. Plaintiff purchased ten wagons more under this agreement (though the agreement was denied by plaintiff), and it was in regard to these that the counter-claim of £210 was made. He paid plaintiff £550 for these ten wagons. He was at Malmesbury, and he paid for the wagons under the old agreement that he should get any number up to 200 for £55 each. Lochner never objected to the amount in any way. He wanted the wagons for one Bam, of Cape Town, who was supplying them to the Imperial Government.

Cross-examined: He and Traut were not in partnership. When he was in Malmesbury completing the transaction in regard to the ten wagons, he did not wait until the last moment before handing Lochner the cheque. Plaintiff made no objection in regard to the amount. He never heard plaintiff calling after him about the amount not being right.

Nicholas Andries Traut, a wagon-builder, at D'Urban-road, testified to plaintiff agreeing to supply defendant with any number of wagons up to 200 at £55 apiece. Defendant agreed to take forty wagons to begin with. On the wagons being inspected, some were condemned as too old and defective. He was present when defendant paid plaintiff £550 by cheque for the last ten wagons, bringing the number up to fifty. It was at the hotel. Lochner took the cheque, looked at it, folded it leisurely, and put it in his pocket. He raised no question about the amount. He considered these wagons brought up for inspection worth between £30 and £60. As the market then was, £60 was a good price for a new wagon.

Cross-examined: He was not interested with Van der Spuy in this transaction. He was always present with Van der Spuy at any interviews in regard to this transaction at Van der Spuy's request, because he did not understand about wagons. Defendant had no experience of dealing in wagons. He was not a wagon-maker. Witness simply accompanied him in a friendly way, and expected to be paid a day's wages. He was not going to get any commission out of the

transaction. At the interview between plaintiff and defendant the only amount mentioned was £55. He never heard the sum of £60 per wagon referred to. At the railway-station at D'Urban-road it was definitely fixed that plaintiff should deliver not less than forty wagons. He never despatched any telegrams for Van der Spuy. The wagons, he understood, were for the Imperial Government. Witness was not present at the second inspection of the wagons. He did not arrange with Van der Spuy to be present at this inspection. He remembered all the details of the various stages of the transaction, because he had such an excellent memory. He recollected things for years. He never forgot anything.

John Dirk Cloete, called, deposed that he was a farmer at D'Urban-road. He was present at an interview between Van der Spuy and Lochner at D'Urban-road. Traut was also present. It was arranged that some wagons should be delivered at £55 apiece. He did not know the number. The wagons were to be delivered at Malmesbury or D'Urban-road. He was quite sure that £55 was the price mentioned by Mr. Lochner.

Cross-examined: He was not interested in this matter. He only paid attention to the conversation because he was interested in the price of wagons. A fair value at that time was £60 £62. But wagons could be got for £30. He never heard £60 mentioned in connection with the transaction. Only £55.

Gerhardus Jacobus Bam said he lived at Observatory-road. He had a contract in February last to supply wagons to the Imperial Government. He remembered meeting Lochner and Van der Spuy at D'Urban-road Station on February 18. He heard them talking about wagons. Witness entered into a contract with Van der Spuy to deliver forty wagons. Subsequently on the same day the number was increased to fifty wagons. He wired from Paarl about the ten additional wagons. He was present at the inspection. He heard Van der Spuy say to Lochner that he would have to supply the fifty wagons. Van der Spuy had now settled with witness in regard to this transaction. He had paid witness £133 for loss sustained by him (witness) on the transaction.

Cross-examined: He did not know that Traut and Van der Spuy were standing in together.

Mr. Searle closed his case.

Mr. Upington called

Johannes Tobias Albertus Lochner, the plaintiff. He said he was a dealer in live-stock, and resided at Somerset West. He told Van der Spuy that he could supply wagons at from £55 to £60. There was no specific number mentioned. Van der Spuy said he wanted them for £55. Witness said that if he was the first man in the field he could deliver them at that price. They saw Traut, who promised to get information about wagons. Van der Spuy said he had no order for wagons, but Traut had one from Bam. Van der Spuy also said that he and Traut were "going shares." On February 16 Van der Spuy undertook to take forty wagons subject to approval. That was the first mention of a specific number of wagons. There was no obligation on witness to supply all the wagons at that price.

Mr. Uington closed his case.

Mr. Searle, K.C. (with him Mr. Close), for defendant: Plaintiff never took up the position that there was no contract till the matter had got into the attorney's hands.

Mr. Uington (for plaintiff): There is no proof of any formal contract. Plaintiff produced a certain number of wagons and defendant rejected eighteen of them. Plaintiff was not bound to supply any more. The wagons had not been approved, and such approval was a condition precedent to the formation of the contract (*Benjamin on Sales*, 3rd edition, p. 590). This principle does not apply merely to the case of goods delivered over, but also to that of goods purchased by sample. There is no ground for making any distinction between the two cases (*Blackburn on Sales*, p. 196). If a sale is on approval, such approval is a condition precedent to the contract. If there was any contract in this case, such contract must be gathered from the telegrams which passed between the parties. The passage quoted from Benjamin was cited and approved in *Elfic v. Barnes* (C.P., Vol. 5, p. 326). Mr. Searle in reply.

The Court gave judgment for plaintiff for £288, with costs; and allowed plaintiff his expenses as a material witness.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendant's Attorney, C. W. Herold.]

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

GREENFIELD V. FRIESLAAR. (1901.
(May 14th.

This was an action for damages.

The facts of this case sufficiently appear from the judgment of Mr. Justice Jones.

Mr. Gardiner for plaintiff.

Mr. Benjamin for defendant.

Wilson John Gerard Cullen, military doctor, of Simon's Town, said that on the 18th May he was asked to attend plaintiff. Witness visited him, and found that his right thigh was fractured. He bore bruises, and was generally shaken. He was in bed for three months. The limb was now from $\frac{1}{2}$ to $\frac{3}{4}$ of an inch short, which was a very good result after so serious an injury. In a case of a patient of that age, there would probably be an improvement as he grew up. Witness's account was £26 5s.

Benjamin Anthony Milward, a coloured man, in the employ of Mr. Barraball, of Simon's Town, said that when the defendant's cart started the boy Greenfield hung on to the back. There was a rope hanging to the back of the cart, trailing along the ground. The boy was entangled with the rope. Witness shouted to the driver two or three times to stop. Other people also shouted, but the boy was dragged 30 or 40 yards before the driver stopped.

Cross-examined: Witness only saw the boy when he had the rope around him. Witness was in front of the cart when it started. The driver stopped after he heard the people shout.

Arthur Greenfield, a boy of eight years, said that he ran after the cart, and caught hold of the rope attached to it. He afterwards let the rope go, and it caught him by the legs. He slipped and fell, and he heard some soldiers going to the camp trying to stop the cart. Witness was trying to jump on behind the cart.

Cross-examined: The driver did not whip round. The driver had been taking some luggage to the station. The rope was not lying coiled up on the tail-board; it was hanging down behind.

George Henry Jones, a lad in the employ of Mr. Barraball, said he saw the boy dragged with his feet entangled in the rope. Witness shouted several times to the driver to stop, telling him he was dragging the boy behind. The rope would trail about

three or four feet along the ground. Some soldiers picked the boy up.

Margaret Elliott, grandmother of the injured boy, gave evidence as to the expenses incurred during the boy's illness.

This concluded the evidence for the plaintiff.

For the defence, a Malay woman named Arlay deposed that before the boy ran after the cart the rope was lying coiled on the tail-board. The boy missed the tail-board, and caught hold of the rope.

Cross-examined: Witness was not a friend of the driver. Witness shouted three times before the driver stopped. She saw everything that happened. It was the little boy's own fault. Witness was sure the rope was not trailing on the ground.

Re-examined: The driver seemed to stop when he heard the shouts.

[Mr. Justice Jones: What do you say are the specific acts of negligence?]

Mr. Gardiner (for plaintiff): We allege two acts of negligence. In the first place I would argue that it was negligence to allow the rope to trail in a public street. If this were negligence, the defendant could not set up contributory negligence on the part of a boy of such tender years as a defence. I would also submit that there was negligence on the part of the driver in not pulling up more promptly after being summoned a number of times to stop, and after being told by Jones that he was dragging the boy behind.

Mr. Benjamin (for defendant) was not called upon.

In giving judgment, Mr. Justice Jones said that the plaintiff sued the defendant for damages for injuries which he alleged were caused by the misconduct of the defendant by negligent driving. The declaration stated that a driver employed by the defendant was driving a cab, the property of the defendant, in Simon's Town, and so negligently allowed a rope to hang from the back of the cab, that it trailed on the ground to the public danger, and that it became entangled in the legs of the plaintiff, who fell to the ground, and sustained certain injuries. Now, this small boy, on being put into the box, candidly said that the real cause was that he tried to get on the back of the cab. Then they had the evidence of the last witness, who was not interested in any way, and who said that she saw the rope fixed on to the cab, and that in trying to get on the back of the cab the boy pulled the rope down, and so became entangled. It could not be held, in

face of this, that there was negligence on the part of the defendant. In order to find for the plaintiff in this case, it would be necessary to find that there had been negligence on the part of the driver, and, however much he (the learned judge) might regret that the injury was caused to the boy, he could not find that it was caused by the negligence of the driver. Therefore, judgment must be given for defendant.

Mr. Gardiner said that the plaintiff was suing *in forma pauperis*, and the Court made no order as to costs.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

ATKINSON V. HAY. { 1901.
May 15th.

Sub-lease—Damage to goods of sub-lessee—Liability of original lessor—Privity of contract.

A lessor incurs no liability to a sub-lessee by reason of damage to such sub-lessee's goods arising from the defective state of the premises sub-let; provided that such sub-lease was contrary to the terms of the lease entered into by the original lessee with the original lessor.

This was an appeal from a judgment given by the Resident Magistrate of Cape Town, on January 29, 1901, in an action in which the plaintiff (now respondent) claimed the sum of £17 11s. 6d. as and for damages for breach of contract, and in which case the said Court gave judgment as prayed, with costs.

The plaintiff was a sub-lessee of an office in which he stored certain goods, which were damaged by rain coming through the roof of the building.

The Magistrate's reasons were as follows:

The office in question was let by Steer (acting for Atkinson) to one Savoury on a yearly lease, Savoury not having the right to sub-let without the consent of the lessor in writing.

It was urged that the conditions of the lease other than those as to the term would still continue, but even if that is so the defendant appears to have practically waived the condition in question. The evidence as to the conversation at the time of the hiring goes to show this, and also the fact that Steer, the agent, knew perfectly well that Hay was in occupation and that he took no steps to put a stop to such occupation. I am satisfied that had Savoury applied for permission it would have been readily granted, and I believed that Steer acquiesced in the tenancy of Hay. It is admitted that if Hay was in lawful occupation, as I think he was, he would have a right of action against defendant, the owner. The only expert evidence that plaintiff brings as to the cause of leakage is that of a builder, the witness Cran, who attributes it to the faulty state of the slates on the roof. His inspection, however, does not appear to have been a close one. The defendant's witnesses attribute the leakage not to the faulty state of the slates, but to the fact that there was a hailstorm on the night in question; that the perforated cap placed over the down pipe for the purpose of preventing a block of rubbish was blocked by the hail; that the overflow was not of sufficient capacity to carry off the hail and rain; that an accumulation of water was thereby caused in the gutter and the valley; that it rose to an unusual level, and so found its way upwards under the slates. I believe that these witnesses correctly describe the cause of the leakage.

These facts appear to me to constitute neglect on the part of the landlord of such a nature as to enable the plaintiff to recover from him in respect to the damage done to his goods by the water finding its way in this manner to the office. The hail and rain that night do not appear to have been excessive; and if the cap on the down pipe had not been blocked, and the overflow had been of sufficient capacity, there would have been no unusual accumulation of water and no leakage.

I am of opinion that it was the landlord's duty to supply sufficient means to carry off the water, and this he failed to do.

The evidence taken in the Court below having been read,

Mr. Searle, K.C., was heard for the appellant, and Sir H. Juta, K.C., for the respondent.

Buchanan, A.C.J. : In this case the office was originally leased under a written contract, which prohibited sub-letting, by Savoury, from the defendant without the con-

sent of the landlord. This contract had expired but the tenant continued to hold over. Without the consent of the landlord or his agent, Savoury put the plaintiff into occupation for a limited period, at a weekly rent. There was thus no privity of contract between the plaintiff and defendant. There is the further objection that it has not been shown that the injury complained of was done to the goods through any negligence on the part of the landlord. If the landlord is aware of any defect in a building and does not repair it he is liable for damage caused to a tenant thereby, but the damage, according to the finding of the Magistrate, arose from the unusual and extraordinary circumstance that a hailstorm choked the perforated cap of the box of the down pipe. The appeal must be allowed, and the Magistrate's judgment reversed, with costs in this Court and the Court below.

[Appellant's Attorney, A. W. Steer; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

LOUW V. DE KOLONIST PRINT. { 1901.
ING CO. { May 15th.

Libel—Newspaper—Justice of the Peace.

This action was brought in respect of an article which appeared in "De Kolonist" in January last, by which the plaintiff alleged that he was libelled. He claimed damages to the amount of £1,000. The article in question was written in a dialect of the Dutch language, which being translated read as follows: "(Contributed).—Martial law has come, the loyalists rejoice, the Bondmen weep . . . Our old quasi Bondman, Mr. J. Louw, people say, paid the local Commandant, some days ago, a visit to procure a permit, as he intended going to the Paarl. The Commandant looked at him from head to toes, and he did not like his appearance. After some cross-questioning, the Commandant informed him that he would not, under any circumstances, grant him a permit, but that he had to keep quiet on his farm; and if he did not do so, then he would take him under his own protection and place him in gaol. Right so, the mistaken politician, the thoughtless wanderer, had to go sneaking home, and still remains there; his wings have been clipped."

The defendant admitted the publication of the article, but put in a plea of justification, submitting that the words were true in sub-

stance and in fact, that the article was published for the public benefit, and was fair comment and criticism. Defendant denied that the article was wrongful, defamatory, and malicious, and maintained that it was political and not personal.

Mr. Searle, K.C., and Mr. Upington appeared for the plaintiff; Sir H. Juta, K.C., and Mr. Solomon for the defendant.

Jacobus Johannes Louw stated that he was a farmer, and resided at Bushmansfontein, in the district of Malmesbury. He was a J.P., and had been such for about 10 years. He was also a member of the Malmesbury Divisional Council. He was also chairman of the local branch of the Bond. Martial law was proclaimed in the district on January 7. On or about the 10th he went to the Commandant's office to obtain a pass for his wagons, himself, and family to proceed to the Paarl. He did not see Mr. Vos. He applied for a pass for his wagons for a month. The pass was granted. He then applied for a personal pass for a month. The Commandant stated that he could not give a pass for longer than one day. After discussion the Commandant agreed to give him a pass for two days. The Commandant then told him that there were no martial law notices issued yet. The Commandant warned him against any public meetings. The regulations were not printed until February. The Commandant told him to warn the people not to attend or promote any pro-Boer meetings. Since that time he had had many passes from the Commandant. He was never refused a pass. There was no friction between him and the Commandant. He had carried out the Commandant's instructions to warn his friends. His attention was drawn to the article in "De Kolonist" on the 15th January. It had occasioned him much annoyance. The Commandant was Lieutenant-Colonel Airey. The paper had a considerable circulation in the district. As a Justice of the Peace this article put him under a cloud. Nothing was ever said by the Commandant about putting him in gaol.

Cross-examined: He was chairman of the Malmesbury branch of the Bond. He never promoted any meetings of the Bond. He did not know that he was regarded in the district as a pro-Boer. He took exception to being called a quasi-Bondman. It affected his character. He had applied for a general pass for a month. He was warned not to attend pro-Boer meetings. The Commandant never warned him not to leave his farm. He absolutely denied having said that the Boers and rebels would soon be in Cape

Town. He never said this to Mr. Hubach. He never saw Mr. Hubach in the Commandant's office. The Commandant had never said that he would in no case give him (witness) a pass for more than two days. His friends were not all pro-Boer.

Re-examined by Mr. Searle: His main objection to the article was on the ground of his being a J.P. According to the article, he would be put in gaol if he moved off his farm. That statement affected his character as a J.P. The incident with Hubach occurred in about August of 1900. He and a friend had gone into a shop to buy a newspaper. Hubach was in the shop. His friend, Mr. De Kock, remarked that he wondered how long the war was still going to last. Witness answered that he thought about another year. Hubach then came up and offered to bet De Kock £5 that the war would be over in six months' time. He took De Kock by the arm and said, "Come away, I don't want to have anything to do with this man." Hubach then swore at him, and wanted to fight. De Kock said he was a younger man, and he would fight. He got De Kock away, and they left.

James Kennedy stated that he lived in Malmesbury. He was present when Mr. Louw came to the Commandant for a pass. He was there on business. He wanted a pass to Clanwilliam. People were not allowed to move from district to district without a pass. The Commandant gave Louw the pass without demur. The Commandant never said to plaintiff that if he did not keep quiet on his farm he would have him put in gaol.

Cross-examined by Sir H. Juta: Louw asked for a general pass, but could not get one.

Re-examined by Mr. Searle: If he had been refused a pass to the Paarl he would have considered it a reflection on his character.

William Jacobus Vos stated that he was a general dealer in Malmesbury. He was at the Commandant's office the day Mr. Louw was there for his pass.

Arnoldus Petrus W. Immelman stated that he was an auctioneer and a J.P. in Malmesbury. The "Kolonist" was sent to him gratis. He read the whole article. He considered it mischievous to a degree.

Cross-examined by Sir H. Juta: He attended public meetings. He was active at the time of Mr. Malan's candidature. He took exception to the whole article. He considered that the article in question would bring the plaintiff into contempt.

This closed the case for the plaintiff.

Sir H. Juta called Herbert Rouse, who stated that he was the editor of the "Kolonist." He did not know the plaintiff. It was not a personal question with him. He did not consider there was anything to apologise for. He did not answer the plaintiff's letter asking for an apology, because he maintained that the article was substantially correct.

Martinus Smuts stated that he was in the Commandant's office when he saw the article. He regarded it as political.

Cross-examined by Mr. Searle: He was present the whole time that Mr. Louw was there. He was not in the room. He had told the Colonel what were Mr. Louw's feelings. He had given the information for the article. He knew that the Commandant did not refuse plaintiff a pass. He told what happened to a number of people. The article was written from information supplied by him. He was an active politician. He was interested in "loyal" meetings.

William John Watney said that he was clerk to the C.C. and R.M. of Malmesbury. He was present when Louw applied for a pass. It was common talk in the village afterwards that Louw had got a slating from the Commandant.

Cross-examined by Mr. Searle: He was the Commandant's secretary. Passes were freely granted, except to Piquetberg and Clanwilliam.

This closed the case for the defence.

Mr. Searle, K.C. (with him Mr. Upington), for plaintiff: The point is what is imputed in these words? It is no doubt libellous to say that a J.P. is shut up on his farm. If the words were true, it would have been in the public interest to publish the statement. If false, they constitute a gross libel. Plaintiff had never had any conflict with the military authorities, and he had had a number of passes. The "Kolonist" reported the Commandant to have said, "If you hold a pro-Boer meeting you will be put in gaol." Twice plaintiff had asked for an apology, and defendant's reply was, "We shall be glad to meet you in the Supreme Court."

Sir H. Juta (with him Mr. Solomon), for defendant: This is a political action. A J.P. is of far less importance in this country than in England. The honour is far more common here. The evidence shows that what was said by the Commandant was worse than the newspaper report. There is no question of clearing a character. Plaintiff has not suffered in the eyes of his pro-Boer friends; and as to the other party, they would quite approve of the remarks in

"De Kolonist." The action is purely political. Then, again, is not the paragraph in substance correct? The matter was a *fama clamosa*. Everybody knew that plaintiff had applied for a pass, and that it had been refused.

[Jones, J.: If all this occurred in the public office of the Commandant, for whose benefit could it have been published?]

For that of members of the Bond. It was in the public interest that they should be told to keep quiet. The statement was true in substance, if not in detail.

Mr. Searle, K.C., was not heard in reply.

Buchanan, A.C.J.: This is an action for defamation brought by the plaintiff, who describes himself as a farmer, a Justice of the Peace, a member of the Divisional Council of Malmesbury, and chairman of the local branch of the Bond. The libel was published in the issue of "De Kolonist" of the 15th of January last. In his plea the defendant said the words complained of were true in substance and in fact, that they were published for the public benefit, and that the article was fair comment on the action of a man holding a public office. If the words were true in substance and fact, and were published in the public interest, considering the public office held by the plaintiff, the plea of fair comment would be thoroughly good. The question is whether the words are true at all. The article referred to plaintiff as "our old quasi-Bondman, Mr. Louw." These words taken alone are not libellous in themselves; and the same may also be said of other isolated statements. But taking the statements, not paragraph by paragraph, but as a whole, there was certainly a serious imputation on a man who held such an appointment as a Justice of the Peace. At that time, though martial law had been extended to the district, it had been shown that there was no difficulty whatever in obtaining permits from Malmesbury to the Paarl. This article said that this "quasi-Bondman" applied to the Commandant for a permit, as he intended to go to the Paarl, that the Commandant looked at him from head to toe, and did not like his appearance; that the Commandant, after cross-questioning him, said he would not under any circumstances grant a pass, and told him that he would have to keep to his farm, and that if he did not do so he would take him under his care and place him behind the bars. I think these words justified the innuendo attached to them in the declaration, which was that

this man was so deserving of suspicion, that he was not only refused a pass, but was not allowed to leave his farm. All these statements were altogether false. It was quite true that something was said by the Commandant to the plaintiff as to keeping quiet, but it had reference to a matter of a totally different nature. Martial law had just been proclaimed, and the Commandant, speaking to him as a well-known active politician of influence, warned him that it was not a time to hold political meetings, and also told him to warn other people that if they held meetings they would make themselves liable to imprisonment. That was totally different from the version given by the newspaper, which was not true in substance or in fact, nor justified under the circumstances. It cannot be said to be fair comment to publish an incorrect representation of what took place, showing up the plaintiff in a totally different light to that in which he was represented in the actual conversation. The article was not a comment on the plaintiff's political views. It implied that such a man was unworthy of the office he held as Justice of the Peace, and it was in this relation that the imputations had their sting. Plaintiff does not press for heavy damages. He simply wishes to justify his loyalty before the Court and his fellow-Colonists. The judgment of the Court will be for £10 damages and costs.

Mr. Justice Jones, in concurring, stated that the only justification the defendant could have pleaded would have been that the statements made were true and were made in the public interest. This he had absolutely failed to establish. A Justice of the Peace had to be a man of integrity and above suspicion, and to have it insinuated of such a man that he was disloyal and disaffected was holding him up to contempt. He entirely concurred with the Acting Chief Justice.

Mr. Justice Maasdorp, in concurring, stated that defendant must have known that the article was untrue; yet even after that knowledge came he failed to make amends to the plaintiff. The article implied that it would be unsafe to allow plaintiff to move about the district. This was a serious charge. The charge against the plaintiff was made against a J.P., and as such was a very serious one. Had the plaintiff not intimated that he did not wish to press for damages, his lordship would have been willing to grant substantial damages.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Faure and Zietsman.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1901.
May 17th.

Mr. Benjamin applied for the admission of Frederick van Zyl Kock as an attorney and notary.

The application was granted, Mr. Kock being duly sworn.

L'UBSER V. CRAIG.

Mr. Benjamin applied for provisional sentence for amounts due on two promissory notes, less the sum of £200 paid on account since issue of the summons, with interest.

Granted.

SCHRODER V. HANNUM.

Mr. Benjamin applied for provisional sentence on an acknowledgment of debt for £275 2s., with interest.

Granted.

LEWIN V. APPEL.

Mr. Gardiner moved for the final sequestration of the defendant's estate.

Granted.

CLARK V. WOOLF AND ANOTHER. { 1901.
May 17th.

Promissory note—*Pactum de non petendo*.

W. and his wife resided for some time at a certain hotel. In settlement of their account, W. tendered a promissory note payable on demand at the National Bank, Johannesburg. This note was endorsed by his wife. Defendant set up a verbal agreement that he should not be called upon to pay the note until he had returned to Johannesburg. The Court found as a fact that this agreement had been proved.

Held, that as it had not been shown that defendant was able to

return, or was taking no steps to do so, this agreement amounted to a pactum de non petendo and that provisional sentence could not be given against him.

This was an application for provisional sentence for £168, with costs of suit, due on a certain promissory note given by defendant to plaintiff, and endorsed by defendant's wife, in consideration of board and lodging for a certain period at plaintiff's hotel.

The affidavit of the defendant, Lewis John Woolf, stated: I am temporarily residing in this colony, having been compelled to leave my home in Johannesburg on account of the war. I stayed at plaintiff's hotel in Cape Town, and while there I paid him some hundreds of pounds. Plaintiff agreed to allow me credit, and to let my account remain in abeyance until my return to Johannesburg, and requested me to give him a promissory note at three months, which he undertook to renew from time to time until I could return home. I passed a note in his favour at three months, and on due date on attending at his attorney's office to renew the same it was agreed that as there was no prospect of my paying the note within three months, I should give a note payable on demand, with interest from date thereof, so that I should not be troubled about the matter until I returned home. That it is a breach of the condition on which I signed the note on plaintiff's part to sue me thereon.

The affidavit of the co-defendant, Sarah Woolf, stated.

I am in no way liable for the said amount, it being my husband's liability, and in terms of my ante-nuptial contract I am not liable for his debts. Moreover, as surety to the note, I except to being sued, as I renounce none of the legal exceptions necessary to be renounced, that I might be liable under the present proceedings. I endorsed the note on the distinct understanding that no demand for payment would be made until my husband's return to Johannesburg. I have received no notice of presentation of the note.

The affidavit of plaintiff's attorney stated that he had sent the note to Johannesburg for presentation, after warning defendants that he was about to do so.

The affidavit of plaintiff denied any agreement with defendants that payment was not to be demanded until defendant Lewis Woolf should have returned to Johannes-

burg, or that he had ever discussed the matter with Mrs. Woolf.

Mr. Gardiner moved.

Mr. Benjamin (for defendants): If defendant had wished to make the note really payable on demand he would have made it payable here and not in Johannesburg. The fact that it was only payable in Johannesburg bears out the defendant's statement that no demand was to be made upon him in respect of the note till his return thither. Mrs. Woolf has incurred no liability (1) because she is married out of community and is not answerable for her husband's debts; (2) because she has not renounced the benefit *authentica si qua mulier*.

Mr. Gardiner (for plaintiff): No *pactum de non petendo* has been proved save by the unsupported statements of defendants. The note is clearly a liquid document. Sentence can be given against Mrs. Woolf as surety, as she has received consideration for her suretyship, viz., board and lodging. *Oak v. Lumsden* (3 Juta, 144).

Buchanan, A.C.J.: In this case provisional sentence is claimed upon a promissory note payable on demand at the National Bank, Johannesburg. It is common cause that the defendants stayed at plaintiff's hotel. They were refugees from Johannesburg, and, as quaintly put by the defendant, unfortunately the war lasted longer than his funds. They informed plaintiff of their position, and he agreed to give them further credit, and to wait for payment till they returned to the Rand. A promissory note payable three months after date had first been given after an additional debt had been contracted. When this note matured the war was not over and another promissory note was given, payable on demand at the National Bank, Johannesburg. The defence is a *pactum de non petendo*, and, in my opinion, it has been clearly established. If it had been proved that the defendant was not returning, or that he was able to return, and failed to take steps to do so, there might be some ground for giving judgment against him. I think that as far as the principal defendant is concerned provisional sentence cannot now be given. As for the wife, it is clear that sentence cannot be given against her. In the first place, she simply wrote her name at the back of the note which was payable to plaintiff, and did not state she had done so as security. No liquid liability has been established between her and Clark. Provisional sentence against each defendant must be refused, with costs.

[Plaintiff's Attorney, C. Brady ; Defendants' Attorney, G. Friedlander.]

SEARLE AND SON V. BODELL.

Mr. Close applied for the final adjudication of defendant's estate.

Granted.

SHEA V. SHEA.

Mr. Solomon moved for provisional sentence on a promissory note for £60 18s.

Granted.

POTGIETER V. ESTATE OF GIBSON.

On the motion of Mr. De Villiers, provisional judgment was given on a mortgage bond for £125, less £3 paid, and interest certain property being declared executable.

COLONIAL GOVERNMENT V. WINTERBACH.

Mr. Howel Jones moved for provisional sentence on a certain acknowledgment of debt for a sum which defendant had failed to pay by instalments, as agreed, and interest.

Granted.

REHABILITATION.

Mr. Gardiner applied for the rehabilitation of Piet Jacobus Smit.

The application should have been made on the 13th inst., and the Court ordered that fresh notice should be given.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF HENDRIK JOHANNES KOEKEMOER.

Mr. De Villiers moved that a rule *nisi* granted under the Derelict Lands Act should be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF GERT MEYER AND OTHERS.

Mr. Upington moved that a rule *nisi* under the Derelict Lands Act be made absolute.

The application was granted.

NOCHAMSON V. VAN DER WESTHUYSEN,

On the motion of Mr. Searle, K.C., a rule *nisi* for the alteration of the christian name

of respondent from Matthew to Johannes Matthews was made absolute. Costs were ordered to be paid out of the estate.

IN THE ESTATE OF THE LATE PAUL JACOBUS ROUX.

Sir Henry Juta, K.C., moved for an order authorising the Registrar of Deeds to pass transfer of certain property to the executor.

The matter was referred to the Master for report, and notice was directed to be given to the children interested.

SUPREME COURT

DE JONG AND ANOTHER V. KAPLANSKY AND CO. 1901. May 17th.

Beneficial occupation—Landlord and Tenant—Act 8 of 1879.

Applicants had let a certain hotel on a monthly tenancy to respondents on condition inter alia that a month's notice of discontinuance of the tenancy should be given in writing. The hotel was closed by the authorities on March 4, in consequence of a case of plague. Applicants gave lessee notice to terminate his tenancy on April 4, and now claimed a month's rent. Respondents tendered rent for the four days of March during which he had had beneficial occupation.

Held, that by Act 8 of 1879, loss of beneficial occupation even by an act of the Executive does not exempt a tenant from payment of rent.

This was a motion to make absolute a rule *nisi* restraining respondent from removing certain furniture from the Masonic Hotel.

The circumstances, as shown by the petition and affidavits, were that the applicants, who are the owners of the Masonic Hotel, let it to the respondents on a monthly tenancy, on condition that a month's notice should be given in writing to discontinue the tenancy. The rent was £220 per

month. The hotel was closed by the authorities on March 4, in consequence of a case of plague being discovered on the premises. Plaintiffs gave a month's notice to terminate the tenancy on April 4, and the rule nisi was obtained pending an action being brought by applicants for the amount of rent alleged to be due. Plaintiffs said two months' rent was due—from March until the expiry of the notice on May 4. They, however, only claimed one month's rent—from March to April—in consideration of the circumstances. The defendants tendered £28 on April 4, this being the amount due as rent from March 1 to March 4, when the premises were closed.

Mr. Searle said that summons was not issued in the action, as he understood that the defendants agreed, if the point to be decided went against them on this motion, to pay the amount of rent claimed.

Mr. Searle, K.C. (with him Mr. McGregor), for plaintiffs: The whole matter is purely a question of law.

[Buchanan, A.C.J.: Is not the question rather whether rent is payable as the premises have been closed by order of the Colonial Secretary?]

See *United Mines of Bultfontein v. De Beers Consolidated Mines* (10 Sheil, 665), and *Logan v. Colonial Government* (11 Sheil, 84).

[Buchanan, A.C.J.: That was a lease of land. Do the authorities draw any distinction between land and houses?]

See section 7 of Act 8 of 1879. See also *Enochson v. Wood and Co.*, quoted in the *United Mines v. De Beers*. No distinction is drawn between houses and land.

[Jones, J.: Are the words of the Act "property leased"?]

Yes.

Our law has been assimilated to English law by Act 8 of 1879, and by the decision of the Court in the *United Mines* case. The Government here enforced regulations and closed this house. The case was parallel with that of the *United Mines*. See also *Pollock on Contracts*, p. 390.

Sir H. Juta, K.C. (for defendant): This is not a case of *vis major*, like an inundation or a war; here we have an Act of the Legislature.

[Jones, J.: Is this a case of unavoidable misfortune?]

No; the house is deservedly closed by an Act of the Legislature. Where the Legislature deliberately prevents the lease from being carried out, the lessee cannot be made to pay a cent. The cases quoted have nothing to do with this case. We say to the

landlord "Give us occupation." He says, "I cannot, I can't carry out the contract."

[Jones, J.: Could the landlord have avoided the plague?]

No.

[Jones, J.: Therefore it is unavoidable misfortune]

No; an act of the Legislature is not an unavoidable misfortune. It is an act of law, not an act of God. If the landlord is prevented from giving occupation by an act of the Legislature we cannot sue him for damages, and therefore he cannot sue us for rent, for he cannot fulfil his part of the contract by giving us occupation.

[Maasdorp, J.: What is the effect on a lease if Government expropriate the half of the farm leased?]

The lease is put an end to.

[Buchanan, A.C.J.: Because his title has gone.]

But the lease is there. His power to let has gone. Title is nothing more than power to let.

Mr. Searle was heard in reply.

In giving judgment, the Acting Chief Justice said that the applicants in this case were the landlords, and the respondents tenants of the Masonic Hotel, the premises being held by them under a lease, which provided that the rent should be paid a month in advance, on the 1st of each month. On March 4, the hotel was peremptorily closed, in consequence of a case of plague being discovered on the premises, under the regulations which were in force under an Act of Parliament—the Public Health Act. Under the lease, the contract could be terminated by a month's notice. A month's notice was given on April 4 to terminate the lease, but the landlords, in consideration of the circumstances of the case, only claimed rent for the month of March. The respondents admitted themselves liable for rent from the 1st to the 4th March, and tendered the amount of rent for this period. The landlords, however, required rent for the full month. The question was whether the full month's rent was due or not. Under the old Roman-Dutch Law of this country, certain exemptions were given to tenants who did not have the beneficial occupation of premises leased by them. The law of England made the tenant responsible whether he enjoyed beneficial occupation or not. The passing of the General Law Amendment Act of 1879 had, however, altered our common law, and had abolished the exemptions which the tenant previously enjoyed. Counsel had with considerable

ingenuity endeavoured to distinguish this case from the recent decisions in the cases of the *United Mines v. De Beers, Logan v. the Colonial Government*, and other cases, on the ground that this was not a *vis major* in the ordinary sense but a direct interposition by Act of Parliament. The Court, however, was unable to distinguish this case from other decisions of the Court. The rule nisi would be made absolute, with costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

Ex parte MACDONALD.

On the motion of Mr. Benjamin, the petitioner was granted leave to sue by edictal citation, the returning day being fixed for October 12, personal service to be effected; otherwise publication in the "Gazette" and the "Sydney Bulletin."

LEVY V. SOUTH AFRICAN COLD STORAGE CO.

This was a motion to fix a day for trial by jury.

Mr. Searle, K.C., was for the plaintiff, and Sir Henry Juta, K.C., for the respondent company.

The Court fixed Monday, June 10, for the trial.

Ex parte KEMPEN.

Sir Henry Juta, K.C., moved for an order allowing petitioner to omit the names "Marthinus Abraham" in all notarial deeds.

Petitioner is a notary and has to sign all notarial documents with his full name, which is Willem Hendrik Marthinus Abraham. He prayed that he might be allowed to drop the last two Christian names.

The application was granted.

Ex parte STEE-KAMP.

Mr. Percy Jones moved for leave to transfer certain property.

The Court ruled that an order of Court was not necessary.

Ex parte JOHN JOSHUA MINNAAR.

This was an application for an order compelling the military authorities to allow petitioner to travel to Tweefontein.

Mr. McGregor represented the applicant, and Mr. Searle, K.C., opposed.

Mr. Searle asked that the case should be postponed in order to allow the military to make an affidavit. He (Mr. Searle) had letters, but an affidavit would be more in form.

Mr. McGregor objected to the case being postponed, but the matter was ordered to stand over.

Ex parte EDWARD HUGHES AND CO.

Mr. Benjamin moved for the amendment of an order of Court. The order was in regard to certain property, and a mistake had been made in the dimensions thereof.

There was no objection, and the application was granted.

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF J. F. KEYTEL AND E. C. KEYTEL (BORN GRUTING).

Mr. Close moved for the appointment of a trustee in the place of J. E. P. Perold (deceased).

Granted.

IN THE ESTATE OF THE LATE RYKEL CATHARINA ARNOLDINA CLOETE (BORN VAN BEENEN).

Mr. De Villiers applied for an order authorising the Registrar of Deeds to pass transfer to the executor.

The application was granted, no order being made as to costs.

GARRETT AND CO. V. THE REGISTRAR OF DEEDS AND OTHERS.

Mr. Searle, K.C., moved for an order on respondent to register a certain trade-mark. Learned Counsel said that opposition was now withdrawn. Costs were asked for against Esser and Co., who had claimed to be entitled to the trade-mark in question.

The applications were granted, both in respect to the registration and costs.

Ex parte ELIZABETH ROSINA WILLIAMS.

Mr. De Villiers moved for a rule nisi calling upon the respondent (Frederick Williams) to show cause why petitioner should not sue *in forma pauperis*.

Granted.

REX V. PHILLIPS. { 1901.
{ May 17th.

Liquor—Proclamation 255 of 1900,
section 29—Contravention—
Sale by barman.

This was an appeal from a sentence passed upon the appellant by the Acting Resident Magistrate of Butterworth.

The appellant was charged with contravening section 29 of Proclamation 255 of 1890, in that he did on or about the 12th March, 1901, and at Butterworth, sell, give, supply, or deliver to a native, named John Tshivaza, a certain quantity of intoxicating liquor, to wit, sixpenny worth of brandy, the said Tshivaza not being the holder of a permit signed by the Resident Magistrate for the district of Butterworth, authorising him to obtain such intoxicating liquor.

The evidence for the prosecution was clear that the liquor was sold to Tshivaza by the appellant's barman, one August Butt, on the day in question.

The accused was found guilty, and sentenced to pay a fine of £25 or undergo two months' imprisonment, with hard labour.

From this sentence he now appealed.

Mr. Solomon was heard in support of the appeal.

Mr. Howel Jones for the Crown.

The Court dismissed the appeal.

In giving judgment, the Acting Chief Justice said that the whole question was whether liquor was sold. There was a great conflict of testimony, but the Magistrate believed the witnesses for the prosecution. It was not a case in which the Court could interfere, and the conviction would be confirmed.

[Appellant's Attorneys, Messrs. Innes and Hutton.]

REX V. FLENI.

1901.
{ May 17th.
Aug. 28th.

This was an appeal from a sentence of twelve months' imprisonment passed upon the appellants by the Assistant Resident Magistrate of Engcombo.

The prisoners were convicted of the crime of theft in contravention of section 198 of Act 24 of 1886:

The Court, after returning the record to the Magistrate for further evidence, duly considered the same, and quashed the conviction on the ground that the case was one of suspicion, but the evidence was not strong enough to convict.

Mr. Searle, K.C., for the appellant.

Mr. Howel Jones for the Crown.

[Appellant's Attorneys, Messrs. Fredgold McIntyre and Bisset.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

SLATE V. SLATE. { 1901.
May 20th.

This was an action for restitution of conjugal rights.

Mr. Benjamin appeared for the plaintiff; defendant was in default.

The parties were married at Portsea, England, in April, 1878. On March 9 this year, the husband, it was alleged, deserted his wife, who now applied for restitution of conjugal rights, failing which divorce. She also asked for the custody of the two minor children, and for £4 per month as maintenance for the younger child until he should attain the age of 16.

Defendant, who was a storekeeper at the Breakwater, had, so petitioner said, gone away with another woman.

Judgment was granted in terms of the prayer, the return day being May 31. Failing return, defendant was ordered to show cause, on June 19, why a decree of divorce should not be granted.

SAAYMAN AND ANOTHER V. { 1901.
FRIEDGOOD. { May 20th.

This was an action for damages.

The plaintiffs, who were restaurant-keepers, in July last entered into a contract to lease certain premises from the defendant. They were to have received possession on August 1, but defendant had neglected to give possession, and in consequence, plaintiffs had been deprived of the use and enjoyment of the premises. When the plaintiffs went to take the premises, they found another man (Kantor) in possession of three of the rooms. They intended to use these premises for the purpose of carrying on a restaurant, which defendant was aware of, but this man, who occupied three of the principal rooms, refused to quit, and remained a considerable time, and it was impossible for plaintiffs to carry on business. They wrote early to the defendant about this, but the man was allowed to stay. A lane, which was part of the premises leased by the plaintiffs, was occupied by a plumber, plaintiffs being thereby prevented from using it. The yard, which also formed

part of the premises leased, was used by the defendant for storing building material, and was obstructed in such manner that the plaintiffs could not use it. Plaintiffs claimed to be put in possession of the premises, and claimed £150 damages for being kept out of possession. The defendant set up a plea in abatement to the effect that on September 10 last, he ceased to be the owner. This plea affected the point of the plaintiffs being put in possession, but it did not touch the question of damages, as the plaintiffs sued for damages sustained up to the date when the defendant sold the property. Defendant further pleaded that he had given possession, that the lane was let with the plaintiffs' knowledge, that the plaintiffs were to receive the rent from the plumber, that the yard and the rooms let to Kantor were used with plaintiffs' consent, and that the premises were sub-let for an objectionable purpose, and without the written consent of the landlord being obtained, as provided in the agreement. The plaintiffs at first sought an interdict restraining the defendant from using premises in the vicinity for the purpose of a restaurant, but it had been found that the lease would not support this, and so this had been abandoned.

Sir H. Juta, K.C. (with him Mr. Alexander), for plaintiffs; Mr. Searle, K.C. (with him Mr. Upington), for defendant.

Charles Friedlander, attorney to the plaintiff, gave evidence as to the drawing up of the lease, and concerning the correspondence between the parties. He further deposed to having visited the premises in August, and to having seen the lane and yard obstructed. One Morris Kayser opened the negotiations for the landlord, and when the plaintiffs wished to sub-let part of the premises, Kayser gave his approval, and said he would arrange with defendant. A portion of the premises were thereupon sub-let to one Krawitz.

Ephraim Sayman, one of the plaintiffs, said that before he found Kantor in possession of the three rooms he had engaged servants, and had made every preparation for opening the premises as a restaurant. While Kantor remained this could not be done. Kantor, despite every effort made by witness, would not leave, saying he had engaged the rooms from Friedgood. He never paid witness any rent. On or about the 7th August a plumber took possession of the passage leading into the yard, and put a shop up there, blocking the passage at one end. Witness had never received rent from this man, and had never consented to his using the

lane. The yard was in a filthy condition, and witness could not use it. He did not give any permission to use the yard. In consequence of these things witness could not commence business. Friedgood and Kayser knew that witness wanted the place as a restaurant. The account produced showed the damage sustained.

Cross-examined: Witness did not know that Hertzowitch, witness's partner, went to the defendant and asked him for some iron for the plumber. Witness did not complain to Kayser that the plumber would not pay him (witness) the rent, because of some dispute. Kayser told witness to summon the plumber. Witness did not agree with defendant that the building material should remain in the yard until certain adjoining premises in course of building were completed. Witness sub-let part of the premises to a tailor and a carpenter. Kayser consented to rooms being let to Krawitz for use as a locksmith's shop. Witness afterwards found that women were in occupation.

Philip Kantor said he rented the rooms in the house from Kayser in July. When plaintiffs came to take possession witness demanded a month's notice. Witness tendered rent to Kayser, who said the plaintiffs should be paid. Witness did not receive a month's notice, but left in six weeks' time.

Cross-examined: Witness had to leave earlier than he considered he need have in consequence of the purpose for which part of the premises was used. Witness had told Sayman a dozen times or more about the use to which part of the premises were put. While witness was there building materials were stored in the yard, which was, however, not seriously obstructed thereby. Kayser told plaintiffs in witness's presence that if they troubled witness about going out he would not sign the lease.

Re-examined He had given a statement of his evidence to defendant's attorneys.

Harris Hertzowitch, partner to Sayman at the time, also gave evidence. He ceased to be Sayman's partner in December.

Sir H. Juta closed his case.

For the defence, Mr. Searle called

Morris Kayser, who said that he was the owner of the premises, and had never received rent from the plumber who occupied the lane. Sayman had complained to witness that the plumber would not pay him the rent. Witness consented to Krawitz going into the premises. He, however, found that the place was being used by women,

Before approaching witness about Krawitz becoming sub-tenant, Sayman had tried to get his consent to let rooms to some women, but this was refused. Krawitz never occupied the premises.

Cross-examined: Plaintiffs knew when the lease was drawn up that Kantor was in occupation. Witness did not reply to subsequent letters in which plaintiffs complained of Kantor being in the house. Witness was Friedgood's son-in-law. Witness had complained to the police about women using the house. Inspector Clark told him no complaint was made by plaintiffs.

At this point the Court intimated that they would like to hear Sir Henry Juta on the question of competition, but,

Sir Henry Juta, K.C. (with him Mr. Alexander), for plaintiffs, said that if the Court were satisfied with the evidence already given he thought it was waste of time to argue.

Mr. Searle, K.C. (with him Mr. Upington), for defendants, was not called upon.

In giving judgment, the Acting Chief Justice said that it was clear upon the evidence that plaintiffs knew Kantor was in possession of the rooms, and the condition of the yard and lane. On all points plaintiffs had failed in their action, and he did not see that the Court could do anything else than give judgment against them. He (the Acting Chief Justice) did not wish to make any comments as to the use of the property sublet by plaintiffs. One might make very strong comments, but as the defendant had ceased to become proprietor in December, it was immaterial to him how the premises were used. Judgment would be given for defendant, with costs.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP]

HENRY V. PERR LD. 1901.
May 21st.

This was an action instituted by plaintiff, a clothier, carrying on business in Cape Town, to recover the sum of £122 10s. The declaration alleged that on or about the 18th January last, plaintiff sold to the defendant 200 khaki suits at 12s. 3d. per suit. Defendant

afterwards said he did not require them, and asked plaintiff to sell them for him at the best possible price. Plaintiff sold to one Pearce, of Claremont, out of the goods bought by defendant, 120 pairs of trousers at 5s. 3d. each. He was unable to sell the remainder, and now claimed the purchase price from the defendant, to whom he tendered the suits, less the trousers sold. Defendant pleaded that it was as captain of No. 33b (Engineer) Company of the Town Guard, and not in his personal capacity, that he negotiated with plaintiff about the supply of 220 suits for the men of his own company, and of 33a Company. He denied that any contract was completed, and said that plaintiff had to wait for a written order before the purchase was completed. No written order was given, as the companies decided not to take the suits, and none were ever sold or delivered. The replication was to the effect that plaintiff was not aware of the fact that defendant was the captain of the company, or of what the company did.

Sir H. Juta, K.C. (with him Mr. Alexander), for plaintiff; Mr. Searle, K.C. (with him Mr. Close), for defendant.

Hugh Ross Sharp, tailor, Adderley-street, said that during January this year he did certain work for plaintiff, making tunics for him and other officers. On or about the 18th January defendant, accompanied by a Mr. Harcombe, called upon witness and asked him to make a number of suits for 22s. 6d. for his men. Witness said he could not do so. Afterwards witness saw a number of khaki suits at Henry's at 12s. 3d. per suit. Witness thought the value exceptional, and was well pleased with the suits. Witness thereupon went to see Harcombe, and told him of what he had seen at Henry's. Perrott, Harkham, and witness afterwards went to Henry's store. Perrott said he would require about 200 of the suits, and asked Henry if he wanted a written order. Mr. Henry said he did not think it was necessary. Witness understood the sale to be concluded, as defendant said he would have them for his men. The suits were to be taken to Captain Perrott's works, and it was arranged that in cases where the suits would not fit they should be changed. Witness heard nothing said about each man in the company having to buy his own uniform, or about plaintiff having to wait for a written order. Witness had no interest in this case.

Cross-examined: Witness could only speak as to what occurred on this one day. Defendant did not say that one-half of the

suits were for the men of his company, and the remainder for Captain Gearing's men. Witness heard all that was said. He distinctly understood that Captain Perrott was personally responsible.

Henry Henry, the plaintiff, said that after consulting Mr. Sharp, the defendant agreed to take the 200 suits, which he said were for the Town Guard. Witness asked him who were responsible for them, and Captain Perrott said he would pay for them, and would send him a written order. Witness said that was unnecessary, as he would take the captain's word. Witness agreed to let him have the suits on a thirty-days' bill. Two or three days later defendant came to witness's shop, and said his men would not have those suits, as they required serge. He asked witness to try and sell the suits for him, and witness said he would do his best. Next day Mr. Harcombe came, and said Captain Perrott had sold the suits. He took away a sample. Some days afterwards witness met Mr. Harcombe and a Mr. Pearce, of Claremont, and the former told him that the latter wished to buy some of Captain Perrott's goods. Mr. Harcombe said he would leave it to witness to arrange the sale, and witness promised to do the best he could. He sold Mr. Pearce 120 pairs of trousers for 5s. 3d. each. Witness advised defendant of the sale, and asked him to take the remaining goods, but received no reply. On the 18th February witness wrote to defendant again, and afterwards saw him personally. Captain Perrott then said he did not want the suits. Witness had sent accounts to him, but had not received replies.

Cross-examined: The goods were not delivered; they were in the store waiting for defendant to take delivery. It was not mentioned that the suits were for two companies. Witness did not send a boy for a written order, and this was not refused on account of the men being dissatisfied with the sample. Before defendant said the men were not satisfied witness did not send a sample. He did not know why the men said they did not like the suits when they had not seen a sample. He understood that the captain arranged for the men, and that what the captain liked the men would have to like. Defendant told witness that the men wanted serge; the suits witness supplied were drill.

Wm. Henry Draper Pearce, manager for his brother at Claremont, said he went to see Mr. Perrott about the latter supplying trousers. He saw Mr. Harcombe, who took him to Henry's in Waterkant-street and

Strand-street. Harcombe, whom witness took for Captain Perrott, left witness and Henry together, after telling the latter to do the best he could for him. Witness understood he was buying from Perrott, and left a letter for defendant with Henry. Witness two months afterwards addressed a memorandum to Mr. Perrott, enclosing a cheque in payment for the trousers. The cheque was returned, with a letter, in which it was stated that defendant had nothing to do with the transaction.

Sir Henry Juta closed his case.

Mr. Searle said that as no evidence had been called as to Harcombe's agency, the whole of the evidence concerning Harcombe must be struck out. He submitted that this evidence should not have been called if the plaintiff had not intended to prove Harcombe's agency, and that the Court would not have allowed that evidence unless they thought that Harcombe would be called or some evidence given connecting Harcombe with the transaction.

The Acting Chief Justice said he certainly thought the Court would not have admitted the evidence if they had understood there would be no attempt to prove agency.

Sir Henry Juta said that Harcombe had refused to give a statement.

Wm. Ingles Perrott said that he told Henry the suits were for his and Captain Gearing's Companies. He gave Henry a verbal order, conditional upon the men approving. Next day a boy came from plaintiff for a written order, and witness said he could not give it. Afterwards witness went to Henry's with Mr. Harcombe, and told Henry that he must countermand the order, as the men had gone back on their words. Witness told Henry that unless he heard from him in twenty-four hours he would consider the matter finished. The first witness knew about Pearce was on receipt of the cheque. There was no completed agreement on the 18th January, because the written order had to follow the verbal one, and the matter had to be submitted to the men. Witness could not complete the matter on the 18th January because he had not then obtained the consent of Captain Gearing.

Cross-examined: Harcombe was associated with him in this transaction. They went together. Witness did not act particularly through Harcombe. Witness gave the orders. The men at first agreed to take drill khaki, but afterwards would not, and the verbal order to Henry had therefore to

be countermanded. Harcombe was a lieutenant in the company.

Re-examined : Witness gave Harcombe no authority to sell any of the suits or trousers on his behalf.

By the Court: Witness would probably have had the suits if the men had not gone back.

[The Acting Chief Justice : Captain Perrott has been very candid, and has not attempted to hide anything, but I am afraid he has made himself responsible. He has acted perfectly *bona fide*, and has given the order because his men first said they would take the suits.]

Captain Gearing, of A Company, also gave evidence.

The Court asked Mr. Searle if he intended to go on with the case after the defendant's evidence.

Mr. Searle (with him Mr. Close), for defendant): At all events, we did not contract to buy the suits for Gearing's Company. It was a condition precedent to that purchase that we should get an order from Gearing for his men. Captain Perrott needed no written order as to his own company. The sale was only a provisional sale. Plaintiff is mistaken as to the form of his action. He should have sued for damages. He had no right to break up the suits if he had sold them to us. Plaintiff has sustained no damages. He claims the whole purchase price of the goods and tenders only a portion of them in return. If defendant would not take the goods plaintiff should have sold them and claimed damages. *Wood and Co. v. Bruce, Mavers and Co.* (7 Juta, 133). Even if defendant did make himself personally responsible he can be sued only for what he got out of the contract, less what he might have to pay. The true measure of damages in this case is the difference in price between what the defendant offered and what was offered to him on the Monday, since he knew on the Monday that we would not take them.

The Acting Chief Justice, in giving judgment, said that this action was founded on a contract entered into on the 18th January, when the plaintiff sold defendant 200 khaki suits at 12s. 3d. each. The plaintiff's manager had been called, and had given his version of the matter, and Mr. Sharp had also given evidence. He (the Acting Chief Justice) was, however, willing to decide the case on the defendant's own testimony, which was given in a most candid way, and which was most conclusive against himself. Two companies of the Town Guard had been

formed, defendant being captain of one and Mr. Gearing of the other. Defendant said his men agreed to go into khaki uniform, and also agreed to have drill khaki. He said he went to buy khaki for the men, but gave a verbal order, to be followed by a written order. The men, however, went back on their word, and defendant consequently went to plaintiffs and said he would have to countermand the order. He said that if he did not hear from plaintiff within twenty-four hours he would consider the matter closed. Had the men not gone back on their word the khaki suits would have been taken. Defendant's evidence fitted in with what was said by Mr. Sharp, who was an independent witness. The Court held that there was a contract, and judgment was given for plaintiff, with costs.

MERRINGTON AND OTHERS V. ES- (1901.
TATE MATHEW AND OTHERS. } May 21st.

Will—Construction - *Fidei-commisssa*.

Mrs. Mathews left the bulk of her property among her seven children, in equal shares. The share of William Francis, one of these children, was burdened with a fidei-commisum, in favour of his eldest five children. The share of Thomas John (another son) was burdened with a fidei-commisum in favour of his brothers and sisters, conditioned on his dying without lawful issue. He did so die, leaving him surviving five brothers and sisters; one sister (Eliza) having predeceased him. Plaintiffs contended: (1) That the estate of the deceased Eliza was not entitled to share in the property of Thomas John. (2) That the fidei-commisum imposed on William Francis did not apply to his share in the estate of Thomas John.

Held, (1) That as it could not be ascertained till the death of Thomas John whether his share of the inheritance was to be divided among his brothers and sisters or not: consequently in the interim, no interest had vested in these bro-

thers and sisters ; and that hence the estate of Eliza could not benefit. (2) That the fidei-commissum in favour of the five children of William Francis did not include the share of Thomas John's estate which fell to him on the death of the said Thomas John.

This was an action brought with a view to determine whether a fidei-commissum imposed by the will of the testator on one of his heirs applied to property which devolved on the said heir by accrual or not.

The plaintiffs were (1) Annie Harfield Merrington (born Mathew), (2) William Francis Mathew, (3) George Freeman Mathew, (4) Jessie Harriet Powrie (born Mathew) assisted by her husband, Charles Selwyn Powrie, and (5) John Alfred Mathew.

The defendants were (1) the Board of Executors and John Alfred Mathew, as executors testamentary of the estate of the late Ann Bondfield Mathew, (2) George Ernst Jeffreys, as executor dative of the estate of the late Eliza Mardin Jeffreys (born Mathew), and (3) Albert Yarnold Mathew and William Rose Mathew.

Plaintiffs' declaration was as follows :

1. The plaintiffs are the only brothers and sisters of one Thomas John Mathew, who died without lawful issue on the 13th day of October, 1900. The first plaintiff is a widow.

2. Besides the plaintiffs, the said Thomas John Mathew had a sister Eliza Mardin Jeffreys, in her lifetime married to George Yarnold Jeffreys ; the second defendant is executor dative of her estate, but she died before the said Thomas John Mathew.

3. The first defendants are the executors testamentary of the estate of the plaintiffs' mother the late Ann Bondfield Mathew, hereinafter called the testatrix, who died on the 22nd day of July, 1879, and of whose last will and testament a copy is hereunto annexed, marked A.

4. By her said will the testatrix appointed her children her heirs, but entailed and burdened with fidei-commissum the share of the inheritance of her son Thomas John Mathew in such wise as that in the event of his dying without lawful issue his said share of inheritance should go to and be equally divided between his brothers and sisters.

5. The plaintiffs claim to be alone entitled upon his death as aforesaid without lawful issue to his said share of inheritance in equal 1-5th portions, but the first defendants wrong-

fully and unlawfully refuse to recognise such claim, inasmuch as they have prepared an account wherein they propose to distribute the said share so as to award to the estate of the said late Eliza Mardin Jeffreys (born Mathew) a one-sixth portion of the said share of inheritance of Thomas John Mathew, to which her estate is not entitled.

6. The second plaintiff, William Francis Mathew, claims to be entitled to receive free of burden or condition his portion of the said share of the inheritance of Thomas John Mathew, but the first defendants wrongfully and unlawfully refuse to recognise such claim, inasmuch as in the aforesaid account they propose to award him a portion "in trust for his children," who are not entitled thereto under the will of the testatrix.

7. The children of the said William Francis Mathew are all of full age and the third defendants are the only two of them whom he can formally join in this suit, the whereabouts of the three others, if living, being to him unknown, but the plaintiffs submit that the first defendants sufficiently represent them in this suit.

8. The share of each plaintiff less succession duty should be £153 2s. 7d. and not £127 12s. 2d. as the first defendants wrongfully contend.

Wherefore the plaintiffs pray for :

(a) A declaration that they are each entitled to 1-5th portion of the share of inheritance of Thomas John Mathew under the said will, and that the second plaintiff is entitled to his portion free of burden or condition : and

(i) Judgment against the first defendants in favour of each plaintiff for the amount of his or her portion with interest *a tempore morae*, or that they may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit payable by the first defendants out of the estate of the testatrix.

A.

This is the last will and testament of me Ann Bondfield Mathew, widow of the late Thomas James Mathew of Claremont, being weak in body, but of sound and disposing mind, memory and understanding, and fully capable of doing any act that requires thought, judgment or reflection. I declare my intention to make and execute my last will and testament.

I give, devise and bequeath to my daughter Jessie Harriet Elliott as a prælegacy the following articles, to wit: One large horse-hair couch, one large bedstead and mattresses, one folding stretcher (iron) and mat-

tress, one large dining table, one small square table, four yellow cane-bottomed chairs, one rocking-chair. And as to the rest, residue and remainder of my estate and effects of what nature or kind soever, whether movable or immovable, and whether the same be in possession, reversion or expectancy, I give devise and bequeath the same to my children Annie Harfield Merrington, Thomas John Mathew, Eliza Mardin Jeffreys, William Francis Mathew, John Alfred Mathew, Jessie Harriet Elliott aforesaid, and Catherine Mathew, wife of my son George Freeman Mathew, in equal shares and proportions share and share alike.

I do hereby declare to entail and burden with fidei-commissum the inheritance forthcoming to my said son Thomas John Mathew in terms of this will, and I hereby authorise and direct my executors hereinafter named to pay to the said Thomas John Mathew the amount, interest and usufruct of this said inheritance for the support of himself and of any child or children he may beget being his lawful issue, and upon his decease then I will and direct that his share of inheritance shall go to and be equally divided between and amongst any child or children he may leave or in the event of his dying without lawful issue, then I will and direct that his said share of inheritance shall go to and be equally divided between his brothers and sisters. And I authorise and direct my said executors to pay over the share of inheritance of my said son William Francis Mathew, to him in trust for his five eldest children now living in order that he may invest the same for the support, maintenance and education of the said five children. It is my will and desire that in the event of the amount due by any one or more of my said children to the estate of myself and my said late husband exceeding the paternal portion of inheritance of my such child or children, then so much of any such amount as shall remain unsettled at my demise by reason of the same exceeding such paternal portion or portions of inheritance shall be treated as debts to my estate.

I hereby nominate, constitute and appoint the Board of Executors of Cape Town together with my son John Alfred Mathew to be the joint executors of this my will, administrators of my minor heirs, with all such powers and authorities as are required or allowed in law especially those of assumption, substitution and surrogation.

And hereby revoking all wills, codicils and other acts of a testamentary nature heretofore

made by me, I declare this to be my last will and testament desiring that it may have effect as such or as a codicil or otherwise as may be found to consist with law.

In witness whereof, I have hereunto set my hand at "Sea Point" this third day of April One Thousand Eight Hundred and Seventy-eight, in presence of the subscribing witnesses.

ANN BONDFIELD MATHEW.

As witnesses :

Jno. Steytler.

Ernest Trill.

The plea of the first defendants was as follows :

1. They admit the first four paragraphs of the declaration, save that they crave leave to refer to the will of the late Ann Bondfield Mathew for the precise terms and effect thereof. They say that the said Eliza Mardin Jeffreys survived the testatrix.

2. As to paragraph 5 they admit that they have prepared an account wherein they propose to allot the one-sixth share of the said inheritance of the late Thomas John Mathew and the estate of the late Eliza Mardin Jeffreys, but they deny that the said distribution is unlawful.

3. As to paragraph 6, they admit that in the said account they propose to award to the second plaintiff his portion of inheritance accruing to him by reason of the death of the late Thomas John Mathew "in trust for his children," but they deny that the said distribution is unlawful.

4. As to paragraph 7 they are unaware of the facts stated therein, but say that if the said children are all of lawful age they are prepared to pay over to the second plaintiff for and on behalf of such children as are entitled under the said will, the share of inheritance accruing out of the estate of the testatrix upon his exhibiting to them (the defendants) a power signed by such children authorising him to receive the said share on their behalf. They deny paragraph 8.

5. They say that the account which they have prepared showing the manner in which the estate in their hands should be distributed is a true and correct account according to the true meaning and effect of the said will.

The plaintiffs' replication was general.

Sir Henry Juta, K.C., for the plaintiffs.

Mr. Searle, K.C., for the defendants.

Buchanan, A.C.J. : The points raised in this case are manifestly clear and do not require time for consideration. The first is, as to the effect of the bequest in this will to

the children. The testatrix had, at the time she made the will, seven children, to whom she bequeathed her estate in equal shares. There is no difficulty in construing these words. She went on, in a later paragraph of the will, to say that she entailed and burdened with *fidei-commissum* the share of Thomas John, provision being made that he should be paid over the annual interest, and have the usufruct of the inheritance for the support of himself and of any children he might beget. He died without lawful issue, and the will directed that in this event his share should be equally divided amongst his brothers and sisters. If Thomas John had left issue his brothers and sisters would have taken nothing, and it was only at his death that it could be ascertained whether or not his share of the inheritance would be divided amongst them. The question is whether at the time the will took effect there could be said to be a vesting in the brothers and sisters. I am of opinion that in this case there was no intention to give a vested interest to them. It is not a case of only postponing the enjoyment of the gift. At most they had a *spes successionis*, a contingent interest, which might never become vested. When the will was made there were six brothers and sisters of Thomas John. When Thomas John died there were only five children, Eliza having predeceased him. If there was no vested right in the brothers and sisters till the death of Thomas John, there would consequently be no vested interest to go to Eliza's estate. The first prayer of the plaintiffs must therefore succeed. Then, as to the second point, the amount of William Francis's inheritance under the will was held by him in trust for his five children. It is contended on behalf of the defendants that this restriction also includes the windfall which came to him through the death of Thomas John. I am of opinion that the clause of the will put the inheritance only on trust, and did not burden the windfall which came to him on the death of Thomas John. The Court's decision on the first point is, that Eliza's estate did not take the sixth share of Thomas John's inheritance, and that each of the five plaintiffs was entitled to one-fifth of the inheritance of Thomas John. On the second point, the Court holds that the second plaintiff, William Francis, was entitled to his share out of the estate of Thomas John free of conditions of trust. The costs will come out of the estate.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendants' Attorneys, Messrs. Van Zyl and Buissinné.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

REX V. BRANDT. { 1901.
May 22nd.

Mr. Justice Jones said this case had come before him as judge of the week from the Assistant Resident Magistrate of Ladismith. The prisoner (William Brandt) had been charged with the theft of certain ostrich feathers, the property of J. P. de Villiers, a shopkeeper, in the district of Riversdale. He was convicted, and sentenced to three months' imprisonment with hard labour. All the evidence appeared to have been directed to the question as to whether the feathers were the property of De Villiers or not, and no trouble seemed to have been taken to prove that the prisoner had stolen them. The only evidence in this direction was to the effect that a trooper had gone to a Mrs. Botha, and was told by her that her husband had said he got the feathers from accused. The conviction must be quashed.

DAVIES V. DAVIES AND { 1901.
ANOTHER. { May 22nd.

Mr. Benjamin appeared for the plaintiff, and Mr. McGregor for the first respondent.

The action was one for divorce, the wife being the respondent, and one Roland Williams the co-respondent.

The parties were married in January, 1893, at Kimberley, and there were two children of the marriage. They lived together for some time, and defendant afterwards left Kimberley. It was alleged that during 1899 the wife committed adultery with Williams, with whom she at present cohabited. Petitioner claimed £100 as damages against Williams. He prayed for a decree of divorce, the custody of the two children, and forfeiture of benefits by respondent. The wife admitted the misconduct, but alleged cruelty on the part of the petitioner, who, she alleged, was of vicious habits, and was not fit to look after the children. She claimed the custody of the children. The co-respondent admitted the misconduct, but prayed that the claim for damages and costs should be dismissed.

Frank Augustus Davies, the petitioner, then gave evidence in support of the state-

ments in the declaration. He said that he had about three months yet to serve in the Colonial Defence Forces, and that when he married he was employed in the De Beers Mine at Kimberley. In October, 1899, respondent left him to go to Cape Town to open a dressmaker's shop. She came with witness's consent. Witness afterwards came down, and found his wife living in the suburbs with a Mrs. Mullaney. When witness went there he found Williams in her bedroom holding a banjo. Williams was a fellow-lodger of his wife, and respondent said she was paid by the landlady for making a cup of coffee every morning for Williams. He was then satisfied with her explanation, but afterwards taxed her with infidelity. She denied this. Witness afterwards went to England, and on returning, found his wife living with Williams at Woodstock. The allegation that he was cruel to his wife was untrue. He had struck his wife once for having used bad language about his mother. That was some years ago, and they had since lived together. Witness once kept a boarding-house, and had to complain of his wife's behaviour with the boarders.

Cross-examined: In 1896 there was a deed of separation between witness and his wife. Witness, however, went to his wife's place frequently after the execution of this deed. Since they had separated, respondent had entirely maintained the younger child. Witness had apprenticed the elder child to Mr. Humphries, of Tokai Convict-station, for five years. This child was seven years of age, and had received no education up to the present, nor was provision made in the articles for the education of the child. The child was treated by Mr. Humphries as one of his own children. Witness proposed, if the custody of the children were given him, to put the other child with Mr. Humphries, until he returned to Kimberley, after completing his term of military service. He would not object to the children being placed in a Church of England home, but he would prefer to let Mr. Humphries have them for the time being. Before the deed of separation was drawn up in 1896, he used to take too much liquor; since then, he had been a moderate drinker. Witness admitted having used indelicate expressions in letters he had written to his wife. Witness denied having struck the respondent with his fist, or knocked her head against the wall. He had not kicked her before the elder child was born. He did not, while she was at Wynberg, threaten her with a penknife.

Evidence was given as to the misconduct. Williams was said to be a music teacher, but no evidence was given as to his means.

Frances Davies, the respondent, gave evidence, alleging that her husband had ill-treated her, and was not a fit man to take charge of the children. If the Court would not give her the custody of the children, she would prefer that they should go into a home.

In cross-examination, witness said she did not leave her husband to come to Cape Town to open business as a dressmaker. She left in consequence of his behaviour. She admitted having written her husband letters in affectionate terms, and having addressed him as "her dear Dolly" since she left Kimberley. She had to do this to keep on the right side of him. She had kept the younger child, and had taken good care of her.

Evidence was called as to the respondent's care of the younger child.

The Acting Chief Justice, in giving judgment, said that the wife and the co-respondent were still living in adultery, and on that ground it was impossible for the Court to give her the custody of the children. Had she given up her course of life, the Court might be inclined to give her the custody of the younger child, but she persisted in her course, and it was impossible for the Court to do this. In granting a divorce, and giving plaintiff the custody of the children, the Court would order that the defendant should have access to them. Leave would be reserved to the defendant to move as to the future custody of the children if she found that plaintiff failed in his duty towards them. There was at present no evidence to justify the Court in saying plaintiff was not a fit person to have the children. Co-respondent was ordered to pay the costs, plaintiff being allowed his expenses as a witness.

Mr. McGregor asked that the Court should say something regarding the education of the children.

The Acting Chief Justice said that, of course, the children should be properly educated.

BISHOP V. GLYNN. } 1901.
May 22nd.

This action was for the restoration of certain property given to defendant to store, and for £20 damages for his neglecting to deliver them. Plaintiff (Mrs. Helena Bishop) undertook to pay defendant's charges, amounting to £20, by instalments

of £2 per month, defendant undertaking to deliver the goods, which included a piano. It was pleaded that all the goods were delivered with the exception of a piano. Defendant claimed in reconvention £20, being the amount plaintiff agreed to pay, £3 odd for services in connection with removing plaintiff's furniture, and £7 for storing the piano. Plaintiff said only part of the goods were delivered, and claimed delivery of other goods shown in a schedule.

Evidence having been led, Mr. Benjamin, for plaintiff, was heard in argument.

Mr. Uppington, for defendant, was not called upon.

In giving judgment, the Acting Chief Justice said that one could not help sympathising with the plaintiff, who seemed as a boarding-house keeper to have been unfortunate in business. In April last she was ejected from the house then occupied by her, judgment having previously been obtained against her. The messenger of the Magistrate's Court went to enforce the order and took with him one Piper and fourteen Coolies. The furniture was removed out of the house and put in the street. Some of these goods, it now appeared, could not be found. Plaintiff said that Piper undertook to remove the goods to his yard and take care of them. This he did. Then Glynn came in and again removed them, taking over Piper's charges and entering into an agreement with plaintiff. Plaintiff gave Piper an absolute discharge from any liability. It was said that a schedule was attached to the document signed by plaintiff, and held by Glynn, but this could not now be found, and plaintiff obtained nothing in the way of an acknowledgment from defendant that all these goods were in his possession. He (the Acting Chief Justice) quite believed that Mrs. Bishop owned all the goods claimed in the declaration, but the difficulty was to find that these ever came into the possession of the defendant. The goods were left in the street for some time, and it was quite reasonable to think that some of them may have been stolen or lost. Concerning the piano, which was one of the things that did come into his possession, there were some special circumstances. The piano was not put into the yard. It was taken to another house, from which it was removed by Glynn. Plaintiff said the piano belonged to one Beedle, and she told Beedle he could have it from Glynn. Mrs. Bishop undertook to pay Glynn his and Piper's charges, and agreed to pay £2 per month until the £20

was paid, beginning on the 1st August. Before now the whole of the amount had fallen due, independent of the condition that if one instalment was not paid the whole should become due and payable. On the date of this contract Glynn undertook to deliver the property he then held belonging to the plaintiff. Mrs. Bishop afterwards signed a document acknowledging receipt of the goods. Shortly afterwards, however, she began to miss certain articles, and sent in a claim for these. Had she proved them to have been in Glynn's possession, the Court would have called upon Glynn to deliver them, but she had not proved this. With reference to the piano, he thought the agreement for the amount of payment by plaintiff was wide enough to cover the piano. The Court could not allow the £7 claimed by defendant for storing the piano. The defendant also claimed £3 for certain other removal of plaintiff's goods, but the order for this was not given by Mrs. Bishop, but was a contract between Glynn and one Lynn. Judgment would be given for defendant for £20 and costs, on payment of which he would deliver the piano. His lordship remarked that Mrs. Bishop's misfortune seemed to have followed her even into court.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1901.
May 23rd,

Wm. Erskine Gill was, on the motion of Mr. Benjamin, admitted as a notary, the oath to be taken before the Resident Magistrate of Port Elizabeth.

PROVISIONAL CASES.

HOBKIRK V. CHRISTIAN HENRY VAN DER WALT.

Mr. Benjamin moved for provisional sentence for £700 on a certain mortgage bond, and for property hypothecated to be declared executable.

Granted.

VAN DER SPUY, IMMELMAN AND CO. V. CHRISTIAN LOEDOLFF AND HENRIETTA LOUISE LOEDOLFF.

Mr. De Villiers moved for provisional sentence on a mortgage bond for £550, and interest.

The application was granted, property specially hypothecated being declared executable.

ISRAELSON V. WILLIAM COWLING.

Mr. De Waal moved for provisional sentence for £2,350, purchase price of certain property, and interest.

Mr. Justice Jones pointed out that the papers only showed a contract of sale, and that there was no acknowledgment of debt. Possession was not shown to have been given.

The application was refused, the Acting Chief Justice saying that action should be taken under Rule 329.

ABT AND CO. V. CASPER HENDRIK JORDAAN.

Mr. Alexander moved for provisional sentence on a mortgage bond for £125, and for certain hypothecated property to be declared executable.

Granted.

ILLIQUID CASES.

DOYLE V. HENRY MCDONNELL

Mr. Gardiner moved for judgment under Rule 329d.

Granted.

ATTAS V. ROOS JACOBS.

Mr. Benjamin applied under Rule 329d for an order compelling defendant to give transfer of certain property, the purchase price for which had been paid.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHN CARL WINTERBACH.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

MITCHELL V. MITCHELL.

On the motion of Mr. Solomon, a rule *nisi* obtained in February last in connection with a motion for restitution of conjugal rights was made absolute.

IN THE MATTER OF THE PETITION OF SYDNEY RICHARDS.

This was an application for an order on the Attorney-General to deliver certain diamonds to petitioner.

Mr. Gardiner appeared for the applicant; Mr. Searle, K.C. (with him Mr. Howel Jones), for respondent.

The motion was ordered to stand over to allow applicant to file replying affidavits.

LOGAN V. COLONIAL GOVERNMENT.

Mr. Searle, K.C., moved for leave to defendants to appeal to His Majesty in his Privy Council.

Mr. Close appeared for the plaintiff (now respondent).

Mr. Searle said that the judgment for £200 in reference to the laying of water pipes was not appealed against.

Leave was given to appeal, the usual security to be given, and the judgment for the £200 to be executed.

IN THE MATTER OF THE PETITION OF MARIA DANIELS.

Mr. De Villiers moved for leave to purchase certain property for the benefit of petitioner's minor children.

The Master recommended the application, which the Court granted.

IN THE ESTATE OF THE LATE SUSANNA HELENA VAN DER VYVER (BORN COLYN).

Mr. Howel Jones moved for leave to sell certain property belonging to the estate, and to invest the proceeds for the benefit of the minors.

An order was granted in terms of the Master's report, which counsel said was favourable.

ARNOLD AND RAE V. CROSBIE.

Mr. Benjamin applied on behalf of the defendant for a postponement of the trial till the August term.

Mr. Searle, K.C., appeared for plaintiffs (now respondents).

The trial was postponed till the August term by consent, conditional upon Crosbie paying £879, which he admitted was due.

CORNISH V. CORNISH.

This was an action for divorce, Mr. Close representing the applicant (the wife).

The action was withdrawn, and leave given to sue by edictal citation, returnable on July 12.

SOLOMON V. THE REGISTRAR OF DEEDS. { 1901.
May 23rd.

Sale to executor—Transfer—Costs.

The Court upheld the action of the Registrar of Deeds in refusing to pass transfer without an order of Court to an executor who had purchased land from the estate for which he was acting; though the land was sold by public auction, and there was no allegation of mala fides.

This was a motion for an order directing the Registrar of Deeds to pass transfer of certain landed property purchased by an executor testamentary in the estate.

From the petition it appeared that the petitioner, Charles Edward Solomon, was a joint executor testamentary in the estate of his late father, Henry Solomon. The landed property of the deceased was sold by public auction, after being duly advertised, on January 25, 1901, and at the said sale, petitioner purchased (through an agent) a certain lot of the said ground. The Registrar of Deeds refused to pass transfer, on the ground that the duty receipt described the above transaction as a "private sale." The fact that this was an error and that the sale was public did not obviate the necessity for the sanction of the Court. *Nel v. Louw* (Buch., 1877, 133) and *Louw v. Hofmeyr* (Buch., 1869, 290). He did not question the *bona fides* of the transaction, but maintained that he had no discretion to pass the transfer without an order of Court.

Mr. Searle, K.C., moved for an order compelling respondent to pass transfer.

This the Court refused.

The Acting Chief Justice said: The Registrar was perfectly right in refusing to pass transfer, where there was a sale to an executor, without leave from the Court. The order compelling the Registrar to pass transfer will be refused. To grant the order, the Court would have to hold that the Registrar of Deeds was wrong in refusing the transfer. He was perfectly right, and I am only sorry that he has not appeared in court, so that we could have given him his costs.

Mr. Searle applied for an order authorising the Registrar to pass transfer.

In granting this, the Acting Chief Justice said that they wanted to show distinctly that the Registrar was not wrong in refusing to pass transfer.

IN THE MATTER OF THE PETITION OF DAVID GILL.

On the motion of Mr. Benjamin, an order was granted allowing transfer of certain property to be passed, subject to the consent of a certain interested major child being filed with the Registrar..

IN THE ESTATE OF THE LATE JOHN FLETCHER.

Mr. Benjamin moved that a rule *nisi* for the cancellation of a certain bond be made absolute.

It transpired that the rule was granted on the 10th instant, and only published two days ago.

The Court refused the application, but ordered that the rule should be extended until the 31st May, and published immediately. The Acting Chief Justice remarked that attorneys should not delay the publication.

IN THE INSOLVENT ESTATE OF MARIA ALIDA ERASMUS (BORN HAVINGA).

Mr. Benjamin moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

A rule *nisi* was granted in terms of the petition, returnable on the 12th July, to be published in English and Dutch in separate issues of the "Johannesburg Gazette" and in the "Government Gazette."

IN THE MATTER OF THE PETITION OF THE TABLE BAY HARBOUR BOARD.

Mr. Searle, K.C., moved to attach moneys in the Bank of Africa, being proceeds of the sale of goods from the vessel *America*, *ad fundandam jurisdictionem*. Counsel said the Harbour Board had a claim against the owners, Messrs. Wilson and Finlayson, Liverpool, for services rendered in connection with the fire on the *America*. Notice had been served on the agents of the ship, and it was necessary to attach something to found jurisdiction.

The application was granted.

Ex parte MINNAAR. { 1901.
May 23rd.

Martial law—Passes—Action of Supreme Court.

During the necessary existence of martial law, the Court will not

exercise any censorship over the acts of the military authorities in districts subject thereto.

This was an application on behalf of John Joshua Minnaar for an order on the military authorities to issue a pass to petitioner to allow him to proceed from Cape Town to Tweefontein.

The petition stated that in January, 1900, the applicant purchased a farm near Tweefontein Siding, in the district of Worcester. For the last nine years petitioner had resided and carried on business in Cape Town, and in consequence of having purchased the property at Worcester, he sold his business in Cape Town early this year, with the intention of proceeding to the farm. All the furniture had been removed to the farm. Martial law being in force at Worcester, petitioner had since February last made frequent applications to the military authorities at Cape Town for permission to proceed to the farm, and had made every effort to obtain a permit, but for some reason not disclosed to the petitioner the military authorities had refused, and still refused, to give permission, though petitioner had been informed and believed that the Military Commandant and the Resident Magistrate of Worcester had no objection. Petitioner asked for an order on the military to allow him to go up to Worcester with his wife. He would suffer irreparable damages if permission was withheld, and urged that it was important that he should be allowed to go to the farm immediately, as the ploughing season was approaching. He had always been a loyal subject, and was quite prepared to submit to any martial law regulations which might be in force in Worcester.

The affidavit of Major Braithewaite, Deputy Assistant Adjutant-General, acting for General Wynne, Commanding the Lines of Communication, was to the effect that the petitioner's application had been considered, but it was not considered advisable in the interests of order and good government to accede to it. It was necessary that great care and caution should be exercised in the district. The reasons for refusing the permit it was not advisable to name.

Mr. McGregor (for petitioner) : The military authorities can exercise their powers within certain limits. *Forsyth* (p. 189).

[Jones, J : To control the movements of people is a military operation. The Court might be called upon to interfere in any number of similar cases.]

It is quite immaterial how many cases there may be ; that, with much submission, has nothing to do with merits of this case.

[Jones, J. : The military say that the restriction is necessary in this case.

That is the very point the Court is asked to determine.

Mr. Searle, K.C., for the Crown, was not called upon.

Buchanan, A.C.J. : Speaking for myself, I would gladly welcome the happy time when the invasion of the Colony and the rebellion of its inhabitants are at an end, and the Court can exercise its proper jurisdiction throughout the length and breadth of the Colony without restriction of any kind. But that time is not yet. It is admitted that martial law exists and that the necessity for its existence still continues in the district of Worcester. Counsel, however, has asked the Court to interfere with one of the regulations which the military authorities in charge of the district have thought necessary in the district which they control. That regulation is one forbidding people to move about the said district without having first obtained a military pass. It is stated on affidavit that, after due inquiry, the military have found that it is not advisable in the interests of law and good order to grant the petitioner's application. It is also stated on affidavit that great care and caution are still required to be exercised in the district. I am glad that we have had facts placed upon affidavit so that we have not to depend upon matters of common knowledge, or to look to the newspapers to ascertain the state of the district. Even had there been no affidavit on the merits of this case the Court would show great caution before exercising any censorship over the acts of the military in places where martial law properly exists. When the time arrives in which the Court can exercise control fully, thoroughly and efficiently, it will not hesitate to do so. The application must be refused.

Their lordships concurred.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

EXECUTORS OF ESTATE VAN DER SPUY V. SMARTT, N.O. { 1901.
May 28th.
„ 31st.

Evidence — Parole — Documentary —
Railway — Notice of loss.

Where there was a conflict in the oral evidence, as to whether certain goods had been delivered to the Railway Department or not, the Court fell back upon the receipts wherein the department admitted having received the said goods. Notice of loss must be given to the department within a reasonable time that they may be held liable, but considering the then circumstances of the country, and of railway traffic, the Court refused to restrict such reasonable time to 14 days (as provided by Clause 145 of the railway regulations.)

This was an action brought by the executors of the estate of the late Daniel Gabriel van der Spuy against the Colonial Government, to recover the sum of £55 10s., being the value of certain wheat alleged to have been delivered to the Railway Department at Klipheuvcl Railway-station, for conveyance by rail to Stellenbosch. Between March 31 and April 19, 1900, plaintiffs, it was alleged, caused to be delivered to Klipheuvcl Station 400 bags of wheat, consigned to one Hunt, of Stellenbosch. A receipt was obtained for this number, but only 340 bags were delivered to Hunt. Plaintiffs claimed the value of the sixty bags undelivered. The defendant denied, in his plea, that more than 340 bags were delivered to the station, and alleged that two receipts were given in respect to one and the same consignment of sixty bags.

For an alternative plea defendant said that the wheat mentioned in the plaintiffs' declaration was received by the Railway Department upon the condition that the department should not be liable for loss of the

said goods unless the claim for such loss was made within fourteen days of the approximate date of delivery, as provided by clause 145 of the Railway Regulations, and that in this case no notice was given until long after the expiration of the fourteen days.

The evidence for the plaintiff showed that the executors had sold 450 bags of wheat more or less to one Hunt of Stellenbosch, at 18s. 6d. per bag, and that Hunt had only received 340 bags. Four hundred bags were delivered at Klipheuvcl Station. Plaintiffs produced receipts from the Railway Department for 400 bags, and the stationmaster at Klipheuvcl stated that he always satisfied himself that the goods were on the truck before giving a receipt. On the other hand, the consignment notes could not be found for more than 340 bags. The last receipt (for 60 bags) was not given until some days after the wheat had left Klipheuvcl Station. The stationmaster represented that this was a duplicate receipt, although he admitted that he had never given a duplicate receipt to anybody else. There was a direct conflict of evidence as to who brought the wheat to the station and signed the consignment notes.

The facts appear from the judgment.

Mr. Searle, K.C. (with him Mr. Upington), for the plaintiffs.

Mr. Howel Jones (with him Mr. Benjamin), for the defendant.

Mr. H. Jones : No consignment note for the loss of 60 bags can be found, and the department is not responsible for anything not on a consignment note.

[Buchanan, A.C.J. : Is it not the presumption that the receipt you gave was correct ?]

We can rebut that presumption, one receipt was a duplicate.

[Buchanan, A.C.J. : You speak about two consignment notes being signed, but you say nothing about two receipts.]

[Jones, J. : After making inquiry, the department did not set up the present defence.]

Inquiries by letter are always difficult. There is nothing to show that the stationmaster ever inspected the receipts before signing.

[Buchanan, A.C.J. : If Root is correct, Kloos van der Spuy must have committed deliberate perjury.]

He is plaintiffs' brother. It is most extraordinary that 60 bags of wheat should have been loaded without a consignment note. J. S. van der Spuy's recollection was very hazy. There is no evidence to show that there were 400 bags on the farm. Hunt wanted 450. There is evidence that 400 bags

were sent, but no evidence that the 60 bags were not still on the farm. As to the alternative plea, viz.: that the claim should have been made within 14 days. This had not been done. The 5th clause of the "conditions," of the department said three days. (See 145th Rule, 10th clause.) It was not till June 14 that plaintiffs asked the stationmaster to look into the matter. These conditions as to notice of loss had been held reasonable in England. (*Macnamara's Law of Carriers* (p. 159).

[Jones, J.: A person cannot be bound by a condition unless he has notice.]

[Maasdorp, J.: Have you not waived your conditions?]

No, a waiver must be explicit. If the Court finds defendant has not proved that he delivered the goods to us we must get absolution from the instance.

Mr. Searle, K.C. (for plaintiffs): We base our case on the documents. The receipts are in order and the stationmaster said that he always counts goods before giving receipts. He says that on this occasion J. D. van der Spuy came to him and said that a receipt had been given for 70 bags whereas 130 had been delivered. He thereupon made out a receipt for the extra 60 bags and predated it. He made no reference to it in his books.

The Acting Chief Justice, in giving judgment, said: In this case the plaintiffs are the executors in the estate of the late D. G. van der Spuy, and they sold 400 bags of wheat to Mr. Hunt, of Stellenbosch. The wheat, according to the receipts, was forwarded on March 30, April 18 and 19, but only 340 bags were delivered to Hunt. It was now contended that the railway receipt for the 60 bags on May 19 was only a duplicate receipt, which had been given by the stationmaster to Jacobus van der Spuy. If Van der Spuy, knowing that he only delivered 340 bags, went to the stationmaster and obtained another receipt for 60 bags, that would amount to deliberate fraud. But nowhere throughout the correspondence, until the plea was filed, was there any intimation of a duplicate receipt having been given by the stationmaster, or that two receipts had been given for one consignment. And it also seems an extraordinary thing that if the department knew that two receipts had been given they would have made an offer of payment. With regard to the plea that the claim should have been made within fourteen days of the approximate date of delivery, it is admitted that there was an abnormal condition of affairs at that

time, and the Court cannot fix with anything like definiteness what would be a reasonable time within which to give the department notice of the non-delivery of the goods under the existing circumstances of the country. Under all the circumstances and considering the conflicting evidence, the Court is bound to fall back upon the receipts, and consequently judgment must be given for plaintiffs with costs.

Jones and Maasdorp, J.J., concurred.

[Plaintiffs' Attorneys, Messrs. Berrange and Son; Defendant's Attorneys, Messrs. J. and H. Reid and Nephew.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

WERNER V. STRACHAN. { 1901.
May 29th.
" 30th.

Libel.

In an action for libel, judgment of £10 and costs was given against S., who at a public meeting used the following language of and concerning W. "He is a rebel and one of Le Fleur's lot."

A plea of justification was not established.

This was an action for £1,000 damages for libel brought by plaintiff against the defendant Strachan.

The declaration alleged that the defendant did at a meeting on April 14, in Kokstad, state that plaintiff was "a rebel, and connected with Le Fleur's lot." The innuendo drawn from these words was that plaintiff was accused of being a rebel and disloyal to His Majesty's Government.

Defendant in his plea admitted using the words, but pleaded justification, on the ground that the words were true and spoken in the public interest and without malice.

Mr. Searle, K.C., and Mr. Uppington appeared for the plaintiff.

Sir H. Juta, K.C., and Mr. Gardiner for the defendant.

Frederick Werner said he lived at Kokstad, where he had an erf. He was a registered voter. He came into Griqualand with Adam Kok. He was at one time a member of Adam Kok's Raad, before the British took over the country. He remembered a meeting held in Kokstad in April, 1900. They had assembled to discuss the question of the annexation of Griqualand East to Natal. Mr. King accepted the chair at the meeting. Mr. Strachan and other gentlemen had places on the platform next to the chairman. Mr. Strachan also addressed the meeting. Witness then asked if he could also say a few words. They told him to come up to the platform. He did so, and commenced to speak in Dutch. Strachan told him to get an interpreter. He asked Strachan to do so, but Strachan refused, saying that he was a rebel, and connected with Le Fleur's lot. The people then grabbed hold of him and dragged him out of the place. He bled copiously from a blow on the head. After that he went straight home. He was 63 years of age. There was not a word of truth in the statement that he was a rebel and a supporter of Le Fleur. This statement of Strachan at the meeting appeared in several papers. Strachan was a man of influence in the district, and his statement would carry great weight. Witness was a man of position amongst his people. He had often worked with Mr. Zietsman, and had several times been appointed executor in estates. Some years ago witness went into Pondoland at the head of a number of Griquas. He held the position of a kind of magistrate. This was in 1887, and they went with the consent of the Government. They remained there until 1889, when they were driven out by the Pondos. Sigcau was then Chief of the Pondos, and gave them the right to elect their own headman. William Kok accompanied the trek into Pondoland as the head. Le Fleur on two occasions created disturbances in the years 1897 and 1898. Mr. Stanford, the Magistrate, went down to make an inquiry. Witness assisted to raise a guard of 25 men to accompany Mr. Stanford. They had a political association at Kokstad. De Bruin was the president, and witness was one of its members. Mr. Zietsman started this political association. This was in 1890. Le Fleur joined the association about 1893. He (Le Fleur) remained in the association until about 1894, when he (Le Fleur) started an association called the Volks' Committee, of which he took the chairmanship. Le Fleur never rejoined the Political Association.

Cross-examined : He came into East Griqualand with Adam Kok. He was one of the men who started the Rifle Association. They called themselves the Circuit Court. Witness did not know that the members of this rifle association were called the "Forty Thieves." He never threatened Adam Kok. He remembered a Land Commission coming into the country to inspect titles. Mr. Strachan was one of the Court. He and the party of Griquas did not move into Pondoland because they were intensely dissatisfied with the decisions of the Court. When he went into Pondoland he took Adam Kok's widow with him. He had an interview with Sigcau when they entered Pondoland. Sigcau gave them certain ground in Gippo's Land. There were some Basutos there, too. It was because of them that the row came, and they were driven out. The C.M.R. werewaiting for him and his party as they made their exit from Pondoland. The Government knew and approved of their move into Pondoland. He retained his property in Griqualand. Le Fleur was the only man who agitated about his land. All the others negotiated about their land peaceably. They got their land afterwards. Witness had no grievance against the Government. In 1894 Le Fleur came to Cape Town. He was then friendly with Le Fleur. It was before Le Fleur left their political association. Witness did not know what Le Fleur was coming to Cape Town for. He gave Le Fleur a letter about certain land belonging to his brother. Subscriptions were raised. Witness had nothing to do with the raising of the subscriptions. The letter he gave Le Fleur was sent to him by his brother to hand to Le Fleur. When Le Fleur returned he did not attend several meetings. He remembered when Sir Gordon Sprigg came to Kokstad. He was one of the deputation who went to see Sir Gordon. Their political party had a meeting in De Bruin's house before the deputation went to see Sir Gordon. They did not bring two headmen from Mount Frere district to see Sir Gordon. Le Fleur was not present at the meeting. Lodewyk was the chairman at Le Fleur's meeting. He went to Le Fleur's meeting and said to the natives, "Do you come again as concealed assegais, as in the time of Captain Blythe?" Le Fleur objected to this, and dismissed the meeting. He could see Le Fleur was dealing with the Kafirs. He and Le Fleur did not march at the head of a procession down the street. Their meeting was not hostile to the Government. Mr.

Murray never said that if he (witness) was a soldier he would not say he was taking too much drink, but as a civilian he did drink too much. What Murray did say was that he (witness) did not drink like a soldier, but like a respectable civilian. Witness never sent a message to Sigcau in 1896. He remembered when Le Fleur was arrested in 1897. Le Fleur was acquitted. He did not attempt to induce Le Fleur to raise a rebellion. Mr. Strachan knew them all well. Witness was present at Le Fleur's last trial. Witness had one drink on the night of the meeting, when Strachan libelled him. He was not intoxicated. He knew a woman Margaret Baker. She was insane. He was not the cause of her insanity.

Re-examined : The Rifle Association was formed when Adam Kok first came into the country. Witness was an officer in that association. They acted as a kind of body-guard to the Chief. He severed his connection with this association some years before Kok's death. After that he became a member of the Volksraad. The meeting at which he made the remark about "concealed assegais" was held in the schoolroom about a month before Sir Gordon came to Kokstad. He was not invited to attend the meeting by Le Fleur. He was never very friendly with Le Fleur. He never had anything to do with Pondoland after his return to Griqualand.

By the Court : He was not at Le Fleur's trial at Umtata. He was at Kokstad. He was not one of the crowd who went out to welcome Le Fleur after his acquittal.

Walter Ernest Mortimer Stanford stated that he was Secretary for Native Affairs. He left Kokstad in June, 1897. He was the Chief Magistrate there from July, 1895. He had known plaintiff for many years. He knew nothing against Werner's loyalty. He had a great deal to do with the Griquas. They had many grievances against the Government about their land. Witness had a favourable opinion of Werner's character as a loyalist. De Bruin and Le Fleur were the strongest men in the Political Association. They afterwards drifted apart when Le Fleur became the head of the seditious faction, and De Bruin of the loyal faction. Witness did not consider the trek of Werner and his party into Pondoland as inimical to the Government. Plaintiff on several occasions rendered witness valuable services. Werner attached himself to De Bruin's party. He did not regard him as a very powerful man in the country.

Cross-examined : Le Fleur once supplied him with an escort to Flagstaff. There was

great dissatisfaction in the country about land rights.

William Gordon Cummings stated that he was chief clerk in the Native Affairs Department. He was Chief Magistrate in Kokstad from June, 1894, till November, 1900. He knew De Bruin and Le Fleur. De Bruin was head of the loyal and Le Fleur of the seditious party. Werner belonged to De Bruin's party. Witness did not know that Werner ever assisted Le Fleur. He looked upon Werner as a decent, respectable Griqua.

Cross-examined : Witness was Assistant Chief Magistrate when there was to be a great meeting in January, 1897. The meeting was stopped. Umhlangao was Prime Minister to Sigcau. He was a dangerous, intriguing man.

This closed the case for the plaintiff.

Sir Henry Juta then called Andrew Abraham Stockenstrom Le Fleur, who stated that he was serving on the Breakwater for rebellion in Griqualand. He was sentenced to 14 years' penal servitude. There was a great deal of dissatisfaction in Griqualand in 1893 on the land question. In 1894 witness severed his connection with the Political Association. He was at that time friendly with Werner. Witness had held many meetings prior to Sir Gordon's visit. Werner was present at these meetings. The meeting at which Werner spoke of concealed assegais was in August, 1896. Werner brought two native chiefs to the meeting. Werner said they were to assist them (the Griquas) to recover their land from the Government. They were men Werner knew in Pondoland. They discussed the question of guns and ammunition at the meeting. The meeting was not friendly to the Government. Werner said : "You must come as concealed assegais as you did in Captain Blythe's time." Witness then broke up the meeting. When Sir Gordon came to Kokstad, Werner and several others came to the house of witness, and discussed the question of bringing the land question to Sir Gordon's notice. They met Sir Gordon at about 4 p.m.. Another meeting was held after they had seen Sir Gordon. At this second meeting witness explained to the people what had happened at the meeting with Sir Gordon Sprigg. There was cheering from the time they left Sir Gordon Sprigg until the meeting was held in his house. There were more meetings after Sir Gordon's departure. Mr. Cumming, in 1896, came to them with a proposition to go to Rhodesia. Werner, De Bruin, and several others said they would rather fight to the death in Griqualand than to go into such a

howling wilderness as Rhodesia. At that time the question of rebellion was freely discussed throughout the country. After witness had been tried and acquitted at Umtata there were great rejoicings throughout the country. Werner came to congratulate him too. The people were anxious to rebel.

Cross-examined : At the preliminary examination before his first trial he did not mention Werner's name. Witness considered Werner, De Bruin, and all the committee members equally guilty with him in the charge of rebellion. Minutes were kept of all the meetings held by the two political associations. Witness did not consider the Volks' Committee, in which he was a prime mover, a seditious organisation. This association later on became amalgamated with the other association. De Bruin attended rebellious meetings. Witness severed his connection with the Political Association in 1894. None of the members of the Volks' Committee were tried. Only those captured in the field were tried. Witness admitted being the ringleader in the attempted rebellion. He tried his best to get all possible support. He told the people after his acquittal at Umtata that Judge Barry had said that the Griquas had no rights. Plaintiff and De Bruin for many years worked together.

By the Court : Plaintiff did not go out into the field with witness.

Roedolph van Wyk said that he was taken in connection with Le Fleur's rising in Griqualand. In 1896 Werner and Le Fleur had a conversation, in which Werner stated that it was time they shot the English. Le Fleur told him that he spoke like a child. Witness joined Le Fleur's agitation in 1894. He took part in the agitation. Werner went with both parties.

Cross-examined by Mr. Searle : He saw Werner at three meetings just prior to the rising. The first meeting was just after Le Fleur's return from Cape Town. Nothing particular happened at that meeting. The second meeting was in the church. That meeting was to discuss Mr. Stanford's proposal about the allotments. The people were not willing to accept Mr. Stanford's proposal. Nothing seditious was spoken at that meeting. The third meeting was just before Sir Gordon Sprigg's arrival. Witness did not attend that meeting. Nothing of a political or insurrectionary character took place at the two meetings at which witness was present.

Sir Henry Juta with this closed his case. Mr. Upington then read the evidence of several witnesses taken on commission for the

plaintiff. Mr. Gardiner did the same for the defendant.

Mr. Searle, K.C. (with him Mr. Upington), for plaintiff : The issue in this case is, has the plea of justification been established, that is to say : (1) Are the words true? (2) were they spoken in the public interest? To call a man a rebel is libellous. *Michau v. Argus Co.* (10 Sheil, 722). It is not sufficient defence to show that the words are true. It must be further shown that they were spoken or written in the public interest, and the onus is on the defendant to show that such words are in the public interest. *Botha v. Brink* (Buch., 1878, 118, 128). There was no duty cast on defendant to show that plaintiff was a rebel.. The object of the meeting at Kokstad on April 14 was not to point out rebels, but to express views as to the annexation of Griqualand East to Natal. Defendant was not justified in calling plaintiff a rebel as a reason for refusing to interpret for him. He might have excused himself in other ways. The affair of Le Fleur was years old and was not before the meeting. As to the truth of the libel, it is for defendant to prove that, and this he has not done. As to damages, plaintiff came, as he had a right to do, to speak at a public meeting. He was hustled out of the hall, and injured in consequence of what defendant said. *Mayne on Damages* (p. 426, 3rd edition) cites a very similar case—*Lynch v. Knight* (9 H., p. 577). in which a man was ducked because he had been called a "welsher." All Government officials had given plaintiff a good character. Then justification had been pleaded. If not established that is an aggravation of the offence. *Odgers* (1st edition, p. 178).

Sir H. Juta, K.C. (with him Mr. Gardiner), for defendant : The main point is, has defendant proved the truth of his words? If so, it was in the public interest that they should be said. Le Fleur's rebellion was fresh in people's minds. The matter to be discussed at the meeting of April 14 was a very serious one, and it was in the public interest that people who had given trouble should not sway the councils of the people. Werner had spoken rebellion when he was in drink. If the defence can prove that plaintiff instigated the taking up of arms the words are justified. Then the words "He is a rebel and connected with Le Fleur's lot" must be taken as a whole. Plaintiff had been connected with Le Fleur. He might never have done anything against the Government, but defendant, who had been commissioned to hold an investigation into this rebellion of Le Fleur's, knew

that he had not done anything to aid it. If a man has useful information and does not communicate it he is a rebel.

[Maasdorp, J. : Do you mean information as to treason? Of course, misprison of treason is a substantive crime.]

It is difficult to say when a man is a criminal unless there has been an actual outbreak. If a man sits quiet, knowing that agitation is going on, he cannot be called loyal. Plaintiff was sitting on a fence.

[Jones, J. : That is no crime. Can you show that he had information which he knew would facilitate treason and concealed it?]

Counsel proceeded to trace the history of the Griqua rising at some length, with a view of showing plaintiff's relation with Le Fleur and with Umhlangaso.

As to damages, there is no similarity between this case and that of Mr. Michau. Mr. Michau is an attorney of this Honourable Court, while plaintiff was not a man of the very highest standing, either morally or socially. If the evidence against him would not be strong enough to convict a prisoner it is sufficient to carry conviction to every honest mind. In any case no damages save nominal should be awarded. If plaintiff only wished to vindicate his character he could have gone to the Magistrate in the Transkei, who has unlimited jurisdiction as to damages. The case looks very much as if somebody or other was backing up plaintiff.

The Court requested Mr. Searle to address himself to the question of damages.

Mr. Searle (in reply) : No shadow of justification has been proved. Plaintiff was very ignominiously treated in consequence of what defendant said. He had been charged with a capital crime. As a registered voter he had a perfect right to go to the meeting and to speak at it. This is quite a proper action to bring in this Court, and one can quite understand why he should prefer to come here rather than go before the Magistrate. He was entitled to substantial damages.

Buchanan, A.C.J. : This is an action in which plaintiff sues defendant for damages for defamation, in that at a public meeting held at Kokstad he falsely and maliciously spoke of and concerning plaintiff the words : "He is a rebel and connected with Le Fleur's lot." The innuendo drawn from these words alleged in the declaration was that the plaintiff had come into rebellion against the Crown, together with the said Le Fleur. The defendant had pleaded justification of these words. He has alleged that they were true and spoken in the public in-

terest, without malice and upon reasonable occasion. Whenever justification is pleaded, the onus is on the person who pleads it to prove his allegation. Now, I look upon the accusation of being a rebel, especially under the present circumstance of the country, as one of the most serious charges that any man can bring against a fellow-colonist. It is no light charge, it is one of the most serious crimes in the calendar, and no person is justified in calling another a rebel unless he has good grounds for so doing, and can justify his allegations. The second part of the libel, which charged plaintiff with being connected with Le Fleur's lot, would not, if taken alone, under the circumstances proved, have entitled the plaintiff to judgment. I am satisfied that plaintiff was connected with Le Fleur in such a way as to justify that statement, if that had been all that was said of plaintiff. But the evidence is not sufficient to justify the Court in saying that plaintiff is a rebel. Most of the evidence has been taken on commission, and deals with many matters of historical interest, but neither that evidence nor the evidence produced before the Court is such as would justify any jury in convicting plaintiff of the crime of rebellion. I do not lay down the hard and fast rule that such evidence is necessary to justify a libel as is necessary to prove a crime before a jury; but it must be so clear and distinct as to leave no doubt upon the minds of the Court that the charge is true. The utmost the evidence in this case went to was that it raised great suspicions against the plaintiff; but that does not amount to proof of rebellion, and consequently the Court must hold that the justification pleaded has not been substantiated. As to damages, there are such circumstances in the case as ought to induce the Court not to give heavy damages. In the first place plaintiff has always been, from the very first time of his residence in Griqualand, a turbulent man. It has been shown that he obstructed and was not altogether loyal to his former chief, Adam Kok. A good deal of ill-feeling amongst the Griquas was caused by the land question, but the evidence has shown that while plaintiff had no cause of complaint on this account, he took part in the agitation against the conduct of the Government. Rebellion occurred as far back as 1878 in connection with the land question, and from then up to 1895 plaintiff continued his agitation. Le Fleur, who became the ringleader and who was tried and convicted and is now undergoing sentence, has given very important evidence in

this case, but the evidence of such a man, unless supported, is necessarily tainted. The Court does not say that his evidence should be disregarded altogether, but it requires some corroboration to satisfy us that it is true. Before 1894 Le Fleur did not seem to have had any actual intention of rebellion, but after then he was urged on, and seemed to have been willing to be urged on, and that led him into overt acts. In 1896, Le Fleur was first tried and acquitted, and he said that after that acquittal plaintiff came to his house with Umhlangaso, the then counsellor of the Pondo Chief, who was hostile to the Government, and that they discussed the action to be taken. He (Le Fleur) said he told them what happened at the trial and that they arranged for a native rising on the Pondo border and for an emissary being sent to the asutos. Le Fleur had not then broken out into rebellion, and told them to come again. He said they did so, and that plans were arranged. Le Fleur's evidence showed that he expected (on what grounds it was not clear) that Werner would help. It was said that the remark was made to Werner that he had only one arm, and that he replied that he would shoot with a revolver. I think that plaintiff's conduct was so suspicious that he was not entitled to be regarded as an undoubtedly loyal man. The evidence shows, at any rate, that he sympathised with the rebellion. He induced the leader of the rebellion to believe that he would support him, but when it came to action he remained quiet. Under these circumstances plaintiff is not a man who can come into court and claim substantial damages, and moreover there are other respects in which it has been shown that he is not a man of such character as to induce the Court to give him a large sum. The damages in this case will sufficiently show that a person cannot be called a rebel without sufficient justification and at the same time that plaintiff's character is suspicious, and not such as to entitle him to heavy damages. Judgment will be given for £10 damages and costs.

Jones and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendant's Attorneys, Messrs. Faure and Zietsman.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1901.
May 30th

Charles W. Newmark was, on the motion of Mr. Benjamin, admitted, and took the necessary oaths as an attorney, notary, and conveyancer.

There was a motion on the list for the admission of Joseph Patrick Murphy as a conveyancer, but no counsel appeared to move.

PROVISIONAL CASE.

ESTATE OF HAMILTON V. GAMIE AND OTHERS

Mr. Benjamin moved for provisional sentence on certain conditions of sale for £850, and for the property to be declared executable.

The application was granted, the Court intimating that plaintiff would have to tender transfer.

ILLIQUID ROLL.

LEHMAN V. STONIER.

Mr. De Waal moved under Rule 329d for judgment in respect to a sum of £69, balance of rent, with interest and costs of suit.

Granted.

DE BRUYN V. HOLT AND HOLT.

Mr. Searle moved in this case for judgment in terms of a consent paper filed by defendant.

Granted.

DAY V. FINK.

Mr. Benjamin applied for judgment under Rule 329d for £29 14s. 3d., balance of money lent.

Granted.

WESSELS V. FAIRFIELD BRICK AND LAND COMPANY (LIMITED).

Mr. Benjamin moved under Rule 319 for judgment for the sum of £635 11s. 10d., for goods sold and delivered.

Granted.

ESTATE OF RIEVE V. SCOTT.

Mr. Close moved for judgment under Rule 319 in respect to an amount of £465, being the sum due on the purchase price of certain property, plaintiff tendering transfer.

Granted.

FITCHET V. GEDYE. } 1901.
 { May 30th.

This was an application by Mrs. Fitchet to compel the respondent Gedye to render an account of administration in his capacity of receiver, appointed under an order of the Eastern Districts Court, in the matter of *Fitchet v. Fitchet*. The Eastern Districts Court made an order for judicial separation of Fitchet and his wife (who had been married in community of property), and for the division of the common property. Respondent had been appointed receiver under this order. Counsel for petitioner stated that the aforesaid order as to the distribution of the property had not been obeyed, as the receiver had failed to render his account of administration.

Mr. Benjamin (for petitioner): The respondent practically has no defence, and only wants time. I submit that it would be incurring unnecessary costs and delay to send the case to the Eastern Districts Court.

The Acting Chief Justice: The plaintiff has shown no good reason for bringing this before the Supreme Court, when so far the matter has been dealt with by the Eastern Districts Court. The application will be refused, costs to be costs in the cause.

GENERAL MOTIONS.

OHLSSON'S BREWERIES V. THOMSON. } 1901.
 { May 30th.

Mr. Searle, K.C., moved, on behalf of the defendant, for removal of bar and for leave to plead.

Sir Henry Juta, K.C., appeared for Ohlsson's Breweries.

An order as prayed for was given by consent, applicant to pay the costs of the application, the plea to be filed forthwith, and the parties to be ready to go on with the case on the 24th June.

On the question of the costs of opposing the application, Sir Henry Juta asked that applicant should be ordered to pay these, contending that his clients should not be mulcted for coming there in connection with the application.

The question of the opposition costs in the application was ordered to stand over until the trial, the Acting Chief Justice saying it could be better determined then when the facts were before the Court.

Ex parte DE VILLIERS. } 1901.
 { May 30th.

Registrar of Deeds—Mortgage bond and deeds of transfer.

A certain mortgage bond and two deeds of transfer had been lost or mislaid while in the custody of the Registrar of Deeds. The Court ordered the Registrar to issue certified copies of the said mortgage bond and deeds of transfer.

This was an application for an order authorising the Registrar of Deeds to issue certified copies of a certain mortgage bond and of two deeds of transfer.

The petition of applicant was as follows:

1. Your petitioner is an attorney, notary, and conveyancer.

2. On November 27, 1900, your petitioner, as conveyancer, lodged in the office of the Registrar of Deeds a first mortgage bond for £3,500 by Jaberdien Hendricks in favour of Johan Frederik Wicht, hypothecating certain pieces of land in Cape Town.

3. On December 1, 1900, petitioner appeared before the Registrar of Deeds, acknowledged his signature to the said bond, and the same was duly passed.

4. A portion of this property, viz., that mentioned in paragraph 1 of the said bond, was transferred to the said Jaberdien Hendricks simultaneously with the passing of the said bond.

5. That the properties hypothecated under the second and third paragraphs of the aforesaid bond were transferred to the said Jaberdien Hendricks by two deeds of transfer, both bearing date December 21, 1897.

6. These deeds were lodged in the Deeds Office, together with the bonds.

7. By a clerical error Jaberdien Hendricks had been described in the deeds of transfer as Jabodien Hendricks, and the deeds were detained in the Deeds Office, in order to amend the same, instead of being placed in petitioner's box in the ordinary course.

8. The aforesaid amendment has been made in the Deeds Office copies of the said

two deeds of transfer, but the bond, together with the two deeds aforesaid, have never been delivered to petitioner.

9. The said two deeds of transfer and the mortgage bond aforesaid have not been found in the Deeds Office, but have been there lost or mislaid.

10. The missing deeds have not been delivered to the conveyancer who passed the same.

11. The aforesaid bond and the two deeds of transfer were never delivered to petitioner.

Wherefore he prays that the Court will be pleased to grant an order authorising the Registrar of Deeds to issue certified copies of the mortgage bond for £3,500, passed by Jaberdien Hendricks in favour of Johan F. Wicht, and of the said two deeds of transfer in favour of Jaberdien Hendricks.

The Registrar of Deeds reported that the aforesaid mortgage bond and the two deeds of transfer had been duly delivered to him; that the duplicate originals had been found in his office, but that the copies of the aforesaid documents had presumably been irretrievably lost, and he therefore recommended the application for favourable consideration.

The Court granted the order as prayed.

[Applicant's Attorney, P. de Villiers.]

IN THE ESTATE OF THE LATE GEORGIA SMERDON.

Mr. De Villiers moved for an order allowing the executor to pass transfer to himself of certain property in the said estate.

The Master reported as follows: I am not favourably impressed with the transaction, and I think that the petitioner should pay into the Guardians' Fund the full share of the minor—that is, one-fourth of £556 16s. 6d., in addition to £31 11s. 4d.—before he is allowed to take over the property.

The Court granted an order in terms of the Master's report.

Ex parte LE SUEUR. { 1901.
May 30th.

Will - *Fidei-commissum*—Failure of gift-over—Payment of corpus.

This was an application for an order on the executors of petitioner's parents to pay out certain money to her from their estate.

The petition of Anna le Sueur showed:

1. That she was a daughter of the late Johannes Adriaan le Sueur and of his wife, the late Anna Elizabeth le Sueur (née Cloete).

2. That petitioner's parents had burdened the inheritance of their children with *fidei-commissum*, directing that their children should receive the usufruct, and that the capital should devolve unconditionally on their children's children. No provision was made by the will as to what should become of the capital of any child dying without leaving a child or children.

3. That petitioner's father died on June 21, 1876, and petitioner's mother on July 9, 1893.

4. Under the liquidation account the capital share of each child is £1,715 8s.

5. The estate is under the administration of the S.A. Association.

6. Petitioner will be fifty-five years of age on the 25th September next, was never married, and (as shown by affidavit filed herewith) is beyond the age of child-bearing.

7. She therefore submits:

(a) That she has a right to dispose by will of her share of the capital in the estate.

(b) That no one else, born or unborn, has now any right to that capital.

(c) That as she is not married, and is now beyond the age of child-bearing, the capital is now at her disposal *inter vivos*.

Wherefore the petitioner prayed that the Court will be pleased to authorise the executors of her parents' estates to pay to her the said capital standing to her credit in the said estate.

Sir H. Juta, K.C., moved.

The Court granted the order as prayed. Costs to be paid out of the fund.

The Acting Chief Justice said: The executors acted quite rightly in waiting for an order of Court. There has been a failure of the gift-over, and there is ample evidence that the petitioner has passed the age of child-bearing. The application will be granted, costs to come out of the fund.

[Petitioner's Attorneys, Messrs. Van Zyl and Buissinné.]

Ex parte SCHWEIZER. } 1901.
Re ESTATE HARMAN } May 30th.
(BORN BUNDY).

Executor—Removal.

The Court ordered the removal of an executor testamentary who had failed to render his accounts, and was at the date of the application residing in Belgium and had himself consented to and requested to be relieved of his trust. The

application was granted at the special instance and request of one of the sureties of the executor testamentary aforesaid.

This was an application by one Constantine Alexander Schweizer, of Burghersdorp, for the removal of one Abraham Fischer, of Bloemfontein, from his post as sole executor in the estate of the late Susan Harman (born Bundy), and for the appointment of another executor in his stead.

The petition of applicant set forth:

1. That on August 24, 1899, Susan Harman (born Bundy) died at Kroonstad, in the then Orange Free State, having by her last will and testament appointed Abraham Fischer, of Bloemfontein, as her sole executor.

2. The estate of the late deceased consists of certain property in the Orange River Colony, and of certain property, both movable and immovable, in this colony.

3. The said Abraham Fischer, having duly obtained letters of administration as executor testamentary in the then Orange Free State, on August 25, 1899, applied for and obtained from the Master of the Supreme Court letters of administration as executor testamentary in this colony, bearing date the 24th October, 1899.

4. The said Abraham Fischer having been called upon by the Master of the Supreme Court to give security for the due administration, liquidation, and settlement of the estate in this colony of the said Susan Harman (born Bundy), your petitioner, at the request of the said Abraham Fischer, agreed to bind, and did bind, himself as surety accordingly, and your petitioner still is, and remains, bound as such surety to the Master of the Supreme Court of this colony.

5. The said Abraham Fischer departed from Bloemfontein in or about the month of March, 1900, and proceeded to Europe. For some time he was, to the best of your petitioner's knowledge and belief, residing at the Hague, Holland; but subsequently resided, and, to the best of your petitioner's knowledge and belief, still resides in the city of Brussels, and has no known agent or representative in this colony.

6. The said Abraham Fischer having failed to render his account as executor, in compliance with section 33 of Ordinance 104, he was called upon by the Master of the Supreme Court on October 9, 1900, for a full and true account of the whole admin-

istration and distribution of the said estate, and failing compliance therewith by the 15th November, 1900, proceedings would be instituted against him in this Honourable Court.

7. Your petitioner's representative, Mr. Dan Victor Kannemeyer, having become aware of the aforesaid notice to the said Abraham Fischer, did on the 14th December, 1900 (while your petitioner was absent), write to the said Abraham Fischer, enclosing a power of attorney for his signature, authorising him (the said Dan Victor Kannemeyer) to liquidate the Colonial estate, and to file an account with the Master of the Supreme Court. (A copy of the said letter is hereunto annexed, marked A.)

8. No reply has ever been received from the said Abraham Fischer to the said letter, but he wrote to one O'Connor, of Bloemfontein, on January 13 last, from Brussels, in which he acknowledges having received the letter and power of attorney mentioned in paragraph 7. (A certified extract from the said letter, duly authenticated, as required by law, is hereto annexed, marked B, and your petitioner prays that the same may be regarded as inserted herein.)

9. From the said extract it further appears that the said Abraham Fischer is desirous that steps should be taken to have him removed from the office of executor, and that some other person should be appointed as such.

10. Up to the present no steps have been taken by the said Abraham Fischer regarding the liquidation and distribution of the said estate, and your petitioner fears that proceedings will soon be instituted by the Master of the Supreme Court against the said Abraham Fischer, as well as against your petitioner, as surety for him.

11. Your petitioner verily believes that the said Abraham Fischer has no immediate intention of returning to the Orange River Colony, and that his absence will be a long one, and it is therefore in the interests of all concerned that the said Abraham Fischer be removed and another person appointed as executor.

12. Your petitioner is willing to undertake the office of executor, and to provide security to the satisfaction of the Master of the Supreme Court if the Court should decide upon appointing your petitioner as executor.

Wherefore your petitioner prays that your lordships may be pleased to grant an order removing the said Abraham Fischer from

his office of executor testamentary of the estate of the late Susan Harman (born Bundy), and to appoint your petitioner as executor in the place of the said Abraham Fischer; or otherwise, that your lordships may be pleased to make such other further order in the premises as to your lordships shall seem meet.

And your petitioner, as in duty bound, etc.

(Sgd.) C. A. SCHWEIZER.

Burghersdorp, May 11, 1901.

A.

Abraham Fischer, Esq.,

c/o Transvaal Legation, Brussels.

Burghersdorp, December 14, 1900.

Re Estate Mrs. Harman.

Dear Sir,—The Master of the Supreme Court has called upon you for an account in Mrs. Harman's Colonial estate, threatening to sue for same. As Kannemeyer and I are sureties under your bond to the Master, I must ask you to please sign the enclosed power of attorney to enable us to act in the matter, else we will be sued. So far I have only sold one of the erven for £75 by auction, and the purchase price was long ago tendered, but I could not give transfer. To enable me to do this, I enclose for your signature power of attorney to transfer erf. I will then be able to receive the purchase price, and file a first account with the Master.

Kindly get your signature attested by the British Consul.

(Sgd.) p.p. C. A. SCHWEIZER.
D. V. KANNEMEYER.

B.

Brussels, January 13, 1901.

Dear O'Connor,—

Re Estate Harman (born Bundy).

I have just received a letter, dated 14th December, from Mr. D. V. Kannemeyer for Mr. C. A. Schweizer, Burghersdorp, enclosing a power of attorney, which he requests me to sign to enable him to file an account in the above estate, in which I am the executor under the will of deceased.

Anyway, I cannot advise or act from here, but would like steps to be taken by one or other creditor in his own interest to have me formally removed from the execu-

torship, so that a new executor can be appointed to protect the interests of the creditors.

Yours very truly,

(Sgd.) A. FISCHER.

Having heard Mr. P. Jones (for applicant), the Court granted an order as prayed. (Costs to come out of the Estate.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

IN THE ESTATE OF THE LATE ALEXANDER SPIERS.

Mr. De Villiers moved for the cancellation of a mortgage bond.

A rule *nisi* was granted, to be published once in the "Government Gazette," the rule being made returnable on July 12.

IN THE MATTER OF THE PETITION OF SIPANGO DABALA.

Mr. Benjamin applied for an order authorising the transfer of certain property.

A rule *nisi* was granted, to be made absolute with the consent of the Government. The rule was made returnable on the 12th July, and was ordered to be published in the "Government Gazette," and in the "Queen's Town Free Press."

BARRY AND OTHERS V ROBERTSON LICENSING COURT. (1901. May 31st.)

Conditions of licence—*Ultra vires*—Costs.

The restrictions "no liquor to be sold to any coloured person, except in quantities to be consumed on the premises" and "no liquor to be sold to any coloured person after the closing hours of the canteen are ultra vires and illegal. The members of the Licensing Board had not, however, shown gross misconduct in inserting these conditions, and hence an application against them, for costs de bonis propriis, was refused.

The Liquor Licensing Court for the division of Robertson, held at Robertson on March 6, 1901, inserted in certain retail licences the following conditions:

1. "That no liquor be sold to any coloured person, except in quantities to be consumed on the premises."

2. "That no liquor be sold to any coloured person after the closing hours of the canteens."

This was an application on the part of certain holders of licences for the sale of intoxicating liquors, calling upon the president and other members to the said Court to show cause why the above conditions should not be expunged from the licences on which they were endorsed, and the members of the said Court should not be condemned to pay the costs of the present application *de bonis propriis*.

Sir H. Juta, K.C. (for applicants): There is no statute under which these conditions can be imposed, and therefore we say that they are *ultra vires*, and illegal. We ask to have them expunged, and we also ask for costs against respondents *de bonis propriis*.

Mr. Joubert (for respondents): We cannot uphold the conditions as lawful. *Queen v. Robertson* (9 Juta, 299), *Queen v. Heydenrych* (2 E.D.C., 248), and *Queen v. Smith* (3 E.D.C., 409). The last two cases were decided under Ordinance 9 of 1851. The policy of the law has been to multiply restrictions since then. The error of the Licensing Court was not an unnatural one; they ought not therefore be made to pay costs. We complain that we have been rushed into court. The Attorney-General had the matter under consideration, with a view to proceeding under section 96 of Act 28, 1883. If the Governor had granted the order contemplated by that section, he would have further considered the advisability of prosecuting.

Sir H. Juta, K.C. (in reply): The Attorney-General has no right to upset a Licensing Court. The only remedy for applicants was to come to this Court.

[Jones, J.: The difficulty is that you ask for costs *de bonis propriis*.]

The greater includes the less. If we ask for costs *de bonis propriis*, the Court can give us costs out of public funds.

Buchanan, A.C.J.: The restrictions are illegal, and must be struck out. The only class which the law allows restrictions to be placed upon are natives, and the Act of Parliament defines who should be considered as natives. As to the costs, it has been repeatedly stated by the Court that costs will not be given *de bonis propriis* against a person acting in a public capacity, unless some gross misconduct is shown. It has not been

shown in this case, and no order will be made as to costs.

[Applicants' Attorneys, Messrs. Findlay and Tait.]

PROVISIONAL CASES.

VAN DER BYL AND CO. V. { 1901.
MOLLETT. { May 31st.

Mr. De Villiers moved for provisional sentence on a promissory note for £675 10s. 7d. Granted.

NATIONAL BANK V. H. AND M. LEON.

Mr. Benjamin appeared for the plaintiff. Counsel said this was the extended return day of an interdict, and of a provisional order for the sequestration of the defendants' estate. The matter stood over from time to time to allow of a settlement being arrived at. There had been a settlement subject to certain terms and conditions. These had been complied with with the exception of one condition, providing for the handing over of certain moneys amounting to £1,200 deposited in London. Counsel applied that the order for sequestration and interdict might be cancelled subject to a certificate being produced to the Registrar that all the conditions had been complied with, or that the matter should stand over until it could be ascertained whether defendants had fulfilled the conditions.

The matter was ordered to stand over until the 1st August.

BOTHA V. CHAPMAN.

Mr. Gardiner asked that this case should be withdrawn, as it had been settled.

Granted.

ESTATE OF RIX V. ODENDAAL.

Mr. Gardiner applied for provisional sentence for the sum of £200 due on a mortgage bond, with interest and costs of suit, and for specially hypothecated property to be declared executable.

Granted.

ILLIQUID ROLL.

ZEEDEBERG AND OTHERS V. KRAFCHIK.

Mr. De Villiers applied, under Rule 329d, for judgment and costs.

Granted.

VAN DER BYL AND CO V. ROBERTS.

Mr. Gardiner moved for judgment under Rule 329d for the sum of £137 17s., for goods sold and delivered, with interest and costs of suit.

Granted.

MOWBRAY MUNICIPALITY V. HAYWARD.

Mr. Benjamin applied for judgment under Rule 329d, for £40, being landlord's rates, and costs.

Granted.

HIGGINS V. FLETCHER.

On the motion of Mr. De Waal, judgment was given in terms of a consent paper filed by defendant.

REID AND CO. V. WOOD. { 1901.
May 31st.

Mr. Searle, K.C., appeared for the plaintiff, and Sir Henry Juta, K.C., was for the defendant.

The application was for judgment in terms of referee's report. The referee awarded the plaintiff the sum of £310 9s. 3d., and judgment was entered for this amount by consent, with interest at 5 per cent. from the 6th December, 1900.

The question of costs was in dispute.

After hearing argument, the Court gave judgment for plaintiff for the amount of the award with costs.

In giving judgment, the Acting Chief Justice said that in the action plaintiff sued for £450 15s. 3d., as the balance of amount due for restoring certain buildings destroyed by fire. Of this defendant tendered payment of £78 18s. 3d., after showing certain deductions. It was pre-eminently a case which should be referred to an expert—an architect. This was done, and the referee had submitted his report, and no exception was taken thereto. The case now stood thus: Plaintiff claimed £450 15s. 3d., defendant tendered £78 18s. 3d., and the referee awarded £310 9s. 3d. There seemed to be no reason in this case to depart from the rule that the successful party should be awarded costs. The tender was wholly insufficient, and the rule must be followed, and the plaintiff, as the successful party, must have his costs. Judgment would be given for plaintiff for the amount awarded, with interest from the date of summons, and costs of suit. The costs would, of course, include costs of reference.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JOHN FLETCHER.

Mr. Benjamin moved that a rule *nisi* for the cancellation of a certain bond should be made absolute.

Granted.

IN THE ESTATE OF THE LATE LODEWICUS LEONARDUS CASTELYN.

Mr. Benjamin moved for a rule *nisi* for the removal of an executor to be made absolute.

Granted.

TARRY V. BROOK, SPOONER AND CO.

Mr. Solomon moved to have judgment signed against plaintiff for not proceeding.

Granted.

IN THE MATTER OF THE PETITION OF THE SEVENTH DAY ADVENTISTS' MEDICAL, MISSIONARY, AND BENEVOLENT ASSOCIATION OF AMERICA.

This was an application for a rule *nisi* authorising a certain transfer to be made absolute.

Mr. Searle, K.C., appeared for applicants, and Sir Henry Juta, K.C., opposed.

On the application of Sir Henry Juta, the case was ordered to stand over until the 12th June, Mr. Searle offering no objection.

IN THE ESTATE OF THE LATE JOHN HOSKING.

Mr. Percy Jones moved for leave to raise money on mortgage.

Granted, subject to the consent of the major being filed with the Registrar.

IN THE MATTER OF THE PETITION OF HARRY HURRELL SCOWEN.

Mr. Benjamin moved for the amendment of deeds of transfer.

Granted.

WILLIAMS V. WILLIAMS.

Mr. De Villiers moved in this case for the extension of the return day until the 12th June.

Granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

RATTRAY V. STELLENBOSCH { 1901.
MUNICIPALITY. { June 3rd.
 " 4th.
 " 5th.

This was an action in which the plaintiff sought a declaration of rights, and claimed £100 damages. The circumstances of the action were briefly these: In 1846 the Government sold certain Crown land at Stellenbosch by public auction. Plaintiff last year became the owner of one of the lots into which the property was subdivided. A road or avenue, to which access was gained by a road from plaintiff's property, ran at the south of the ground, and plaintiff claimed a declaration that he was entitled to use the road for vehicular traffic. He had been summoned by the Municipality, and convicted for contravening a Municipal regulation forbidding the use of the avenue for vehicular traffic. The Municipality pleaded that the avenue had from time immemorial been in the possession and under the control of the local authority, and had been always preserved from the traffic of vehicles, mules, horses, and asses. It was further pleaded that the grant to the original proprietor, one Mader, in 1846, gave no right to the use of the avenue for vehicular traffic.

Henry Edward Tindall, Government surveyor practising at Stellenbosch, deposed to having in 1898 made a survey and subdivided a portion of certain lots for J. D. Beyers, who sold the property to the plaintiff. Mader surveyed in 1895, and Beyers had a private road reserved.

Frank Molteno, Deeds Register Surveyor, produced the outlying diagram of lot 3.

James Rattray, the plaintiff, said that in March, 1900, he purchased the property in question. There were then no houses there. Witness let the top portion on a lease, which would expire at the end of the present month. He had built on the lower part, and had obtained his material through a private road, which went across the avenue. In July this way was obstructed by the Municipality, preventing the crossing of the avenue by vehicular traffic, and witness took out some posts, and used another part of the avenue. He was summoned by the

Municipality, and stopped from doing this. He afterwards deposited the material on the side of the avenue, and had it carried across. He subsequently constructed a bridge over the watercourse opposite his road, and drove across, and then the Municipality applied for an interdict. Witness ceased to use the avenue for carts, having completed the buildings. Witness was very considerably hampered in the building operations by the action of the Municipality in refusing to allow him to cross the avenue. Witness had been in Stellenbosch for about six years, during which time the crossing to his property had been in use for vehicular traffic. (Considerable correspondence between the parties was put in at this point.) Witness (continuing) said that if he were allowed to use a crossing in the avenue, he would give up any claim he might have to drive in the avenue.

Cross-examined: Witness did not know he was the only person in the whole history of Stellenbosch who had claimed the right to drive over the avenue. When witness came to Stellenbosch there was a board marked "No thoroughfare" at the crossing now broken up by the Municipality, but witness made inquiries, and found that the board was put up by J. M. Beyers to prevent people from using his private road. Witness would have possession of the top portion of the property after this month, and he would then be able, though not without great cost, to get access to the top road, which, however, was not so conveniently situated as the way across the avenue.

Re-examined: During the time the notice board was up, the crossing was still used for vehicular traffic, and it was not until witness received the resolution from the Municipality informing him that in fourteen days the crossing would be closed that he thought this would be done.

Jacob Weber, a former member of the Stellenbosch Council, said that for 18½ years there had been a crossing at the place now closed by the Council. Witness had seen it used, and had never heard any complaint by the Municipality of persons driving over it.

Johannes David Beyers, a former owner of the property, and present proprietor of adjoining land, said that up to last year the crossing in question was freely used.

Cross-examined: He had driven across, but not through, the avenue. He supposed that was prohibited by the regulations. Witness was one of the persons who, in October last, signed a petition asking the

Council to grant a right of way across the avenue.

Re-examined: It was after he had received the Municipal notice that the crossing would be closed that witness signed the petition.

Johannes Frederick Groenewald said he was 64 years of age, and lived at Stellenbosch. He had seen the crossing used for many years, and had often seen people driving up and down the avenue.

Cross-examined: The crossing was made when Mr. Beyers first built. It was long before the crossing was made that witness last saw people driving up and down the avenue. Witness did not know that many people had been fined for doing so. Witness had known since he was a child that people were forbidden to ride in the avenue.

By the Court: Witness had never seen a regulation prohibiting persons from driving in the avenue; but he thought it belonged to the Municipality, and that they could do as they liked.

Hector Gideon, 83, a coloured man, said he had often driven up and down the avenue in his fish-cart, both before and after Mr. Beyers had the property. He had never been told that he could not do so. He had seen other people driving through the avenue.

Postea (June 5).

Mr. Searle (with him Mr. Upington), for plaintiff, stated that a settlement had been arrived at. An arrangement had been made in the following terms, which had been roughly drawn out by Sir Henry Juta, who (with Mr. Benjamin) appeared for defendant, and himself: By consent, plaintiff and his successors in title to have a crossing for vehicular traffic over the avenue opposite the present 24-foot road leading to plaintiff's property, plaintiff to have £15 damages and costs, including costs of interdict, and to give up the claim to ride or drive in the avenue except as above set forth.

The Acting Chief Justice, in giving judgment in these terms, said he thought it was a very reasonable settlement. He would have been very sorry indeed to have seen the beautiful avenue destroyed. The settlement was one which he thought would be a most convenient one for all parties.

[Plaintiff's Attorney, Gus Trollip; Defendants' Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

OHLSSON V. PARSONS. { 1901.
{ June 7th

Hotel lease—Conditions of forfeiture.

One Kuhr had rented certain hotel premises on a monthly tenancy from plaintiff. In November, he sold the goodwill, stock and furniture to defendant for £3,000. At the time of the sale plaintiff consented to give a seven years' lease on defendant paying him £250 and £80 a month as rent. One of the conditions of the said lease was that if defendant "should be convicted of any contravention of the laws relating to the sale of intoxicating liquors, the landlord, or his agent might, without any notice whatever, re-enter and take possession of the premises and expel the tenant; and that upon such re-entry the tenancy should absolutely terminate." Early in March, defendant was convicted of having permitted drunkenness on his premises. He was not personally present when the offence was committed.

Held (1) that defendant had forfeited his lease.

(2) That the measure of damages was the amount due as rent during the period defendant had illegally retained possession of the premises.

Plaintiff's declaration set forth that he was the owner of a certain hotel known as His Lordship's Larder, situated on the corner of Loop-street and Shortmarket-street. On the 16th January, 1901, plaintiff let the premises to defendant for a term of seven years, commencing on the 1st January, 1901, at a rental of £720 per annum, payable in

monthly instalments. The lease stipulated that the defendant should quietly and peaceably deliver up the premises on any breach of the conditions made therein. One of the conditions was that if the defendant was convicted of any contravention of the law relating to the sale of liquor, the landlord might re-enter and take possession of the premises, and that immediately upon such re-entry the tenancy should terminate. On the 4th March, 1901, defendant was convicted of a contravention of the Liquor Law, in that he permitted drunkenness on his premises, and was fined £5. By reason of such conviction, the plaintiff became entitled by the seventh clause of the lease to re-enter the premises, and expel defendant, and any persons there with his authority. On or about the 6th March plaintiff gave notice to the defendant that he must leave the premises on the 31st March, and defendant undertook to deliver up the premises peaceably and quietly. He failed to do this, and remained, and still remains in possession. He had further neglected to pay rent, amounting to £120, for which sum plaintiff had obtained judgment. Plaintiff alleged that he had sustained damages to the extent of £500 by reason of defendant having failed to give possession. He asked for an order for ejectment, compelling defendant to forthwith deliver up the premises, and £500 damages, or other relief, and costs. In his plea, defendant referred the Court to the terms of the lease. He pleaded that at the date of the conviction alluded to, he was not the licensed holder of His Lordship's Larder, the licence being held by one Kuhr, from whom the plaintiff had undertaken to give him (defendant) transfer. He also said that the conviction was illegal, and bad in law, and was not such a contravention as was contemplated by the lease. He admitted that judgment had been obtained against him in the Magistrate's Court for £120, but said that at the time he had a counter claim for a sum exceeding that amount in respect to the accumulated discounts on purchases, which claim, however, was outside the Magistrate's jurisdiction. He denied that plaintiff had sustained any damages for which he (defendant) was liable. Defendant, in reconvention, claimed damages to the amount of £5,000. In support of this claim he said that he bought the goodwill from one Kuhr. Plaintiff had agreed to get a licence for the premises in defendant's name, but no licence was secured

in his name, and he had thereby lost the goodwill, and suffered damages in consequence. In replication plaintiff admitted that Kuhr was the licensed holder, but said that defendant was the tenant in terms of the lease. Plaintiff repudiated the statement that he owed defendant money in respect of the discount alleged to be due on beer purchased, saying that if any discount was due, it was due, not by plaintiff, but by Ohlsson's Cape Breweries. He also denied that he was any party to the transaction between Kuhr and defendant, save that he consented to the defendant becoming tenant, and received £250 in consideration of giving a seven years' lease. In respect to the claim in reconvention, plaintiff (defendant in reconvention) said that he was unable to give transfer of the licence to defendant before the sitting of the Licensing Court, as it was a practice of the Court not to sanction a second transfer of a licence in one year, and already one temporary transfer from a former tenant to Kuhr had been obtained. Plaintiff admitted that he agreed to transfer the licence to defendant, but he could not do that at once, for the reason given. He, however, took steps to enable defendant to become the tenant, and gave him all the benefits under the lease. Before the time arrived at which he (plaintiff) was able to obtain transfer to defendant, Parsons had been convicted, and so had, it was alleged, forfeited all right to transfer and tenancy.

Mr. Gardiner and Mr. De Villiers for the plaintiff; Sir H. Juta, K.C., and Mr. Benjamin, for the defendant.

Evidence was given by G. Blackstone Williams, Acting Resident Magistrate of Cape Town. He deposed to the granting of the licence to Jackson and the transfer to Kuhr, and to having given authority to defendant to act as manager from January until March. He further stated that it was the practice not to grant two temporary transfers of the same licence in one year. A temporary transfer of the licence of His Lordship's Larder was granted to Kuhr from Jackson, in September last.

Alexander Clark, Chief Inspector of Police at Cape Town, was also called. He said he had at first recommended the renewal of the licence, but he would have opposed a transfer to defendant after his conviction.

Anders Ohlsson, the plaintiff, said he had nothing to do with the terms of the sale between Kuhr and Parsons, and received nothing out of the £3,000 said to have been

paid. He received £250 for signing the seven years' lease, but the cheque for this amount was dishonoured. The house was now closed, and Parsons refused to go. He did all he could to get the licence transferred to Parsons, and had there been no conviction he would have carried out the lease.

Cross-examined: Witness did not agree that Parsons should sell the goodwill. Parsons had written giving him the names of two persons who would take the hotel, but witness replied that he had obtained a tenant. This tenant was Mr. Halgate. Witness did not arrange for Mr. Halgate to pay any goodwill. He doubted whether he could get any goodwill for the place after it had been closed so long. When Parsons agreed to leave, witness offered to see that the next tenant should take over the stock and furniture at a valuation.

Archibald Bultitude, manager of Ohlsson's Cape Breweries, also gave evidence, saying it was doubtful whether they would be able to obtain £60 for the goodwill now, after the place had been shut up.

Cross-examined: Witness thought £3,000 a fair amount for Parsons to pay to Kuhr for the goodwill of the house. It was not agreed that Parsons should have the goodwill of the house when he expressed willingness to transfer. They (Ohlsson's) were to have the goodwill. The usual object of a retiring tenant, in submitting names of possible tenants for approval, was to get goodwill.

John Halgate said he had been in negotiation with the plaintiff with the object of becoming tenant of His Lordship's Larder. The arrangement was that he should take it on a monthly tenancy at a rental of £60 per month. He was not prepared to give that now. The business had to be worked up again. In his estimation it was worth £40 a month until this was done.

Cross-examined: It was not arranged that witness should pay any goodwill on entering the premises.

Gerald M. Parsons, the defendant, was then called. He said he bought the premises in December, 1900, from Kuhr, as shown by the broker's note. He gave £3,000 for goodwill, fittings, etc. The goodwill was the chief item. Mr. Bultitude and Mr. Ohlsson were cognisant of the transaction. Witness went in on the 22nd January, and was doing a very good business. When the alleged contravention of the Liquor Act took place witness was not pre-

sent in the hotel. It was arranged between Mr. Ohlsson and witness that he (witness) would leave the house, and that he would get a tenant to purchase it. The object of the conversation was that witness could get a purchaser to be approved by Mr. Ohlsson. Witness tried to get a purchaser, and afterwards wrote submitting names to the plaintiff, who, however, replied that he had secured another tenant. Witness then went to see plaintiff, who would not meet him, though he (defendant) tried to persuade Mr. Ohlsson to be lenient. Witness refused to go out of the house, as the goodwill was his only asset, and he had creditors. Witness had no licence, and had to close down.

Mr. Justice Jones: Why didn't you go out?

Witness: I wanted to get paid, my lord.

Witness valued the goodwill at £3,000. He had worked up a good business.

Cross-examined: Witness had always considered he was entitled to the amount for which the goodwill would be sold. He did not ask permission to sell from Mr. Ohlsson as an indulgence. When witness read the clause in the lease referring to the conviction he objected to it, but he was told that Mr. Ohlsson never took advantage of that clause. Asked why he had not appealed against the conviction, if, as alleged in the plea, it was illegal and bad in law, witness said it was too late. It was a good house, and the old customers would soon come back.

Re-examined: He went to Mr. Ohlsson in order to get his consent to a tenant. He could not, he knew, sub-let or re-assign without the consent of the landlord.

Mr. Justice Jones: You knew there could be no assignment of this lease unless you got the landlord's consent in writing?

Witness: Yes, my lord.

Mr. Justice Jones: Well, if you knew that you also knew this, that you would have to assign if he wished to have a new tenant, and if there was a forfeiture?

Witness: I knew they retained the right to approve of any tenant, of course.

Mr. Justice Jones: Yes, but you would have to assign without getting anything. And you also knew you would have to assign the licence, too, if you got one?

Witness: Yes, my lord.

Mr. Gardiner, for plaintiff: There has been a clear conviction under the liquor laws, and plaintiff may take advantage of the forfeiture clause in the lease. The conviction was for a serious offence, viz., per-

mitting drunkenness on the premises. Under section 11 of Act 44 of 1885 defendant was liable as tenant. It is immaterial that the licence was not in his name. Defendant's contention is that, although plaintiff had by such conviction a right of re-entry, he had no right of forfeiture. Then we have been kept out of our hotel for three months. The trade has been spoilt. Houghton was prepared to pay £60 a month, now he will give only £40. With regard to the claim in reconvention, plaintiff contends that defendant was bound to transfer the licence. He had had the full benefit of the licence until the end of March. Plaintiff had performed all duties under the lease. The Licensing Court would not grant a second temporary transfer until after the first had been confirmed. In March we applied for a licence in Kuhr's name. We could not do anything else. A transfer cannot be made to a new holder, and if we are entitled to evict defendant, he cannot claim the licence from us. The terms of the lease show that plaintiff cannot claim the goodwill from us.

[Maasdorp, J.: If you can now make money out of the goodwill, you have no claim for damages.]

I took it that my learned friend meant that this was an element in his damages.

[Jones, J.: If you get an open house, you get something for goodwill?]

Not after the place has been closed so long. Just now we have lost even our rent, and the property has been depreciated by the fact of the place having been kept closed.

Sir H. Juta, K.C.: The principal point with which the Court has to deal is the construction of the lease. On March 4 the value of the goodwill was about £3,000, and the Court is asked to hold that for a contravention of the liquor laws, which did not jeopardise the licence, plaintiffs could take away £3,000 of defendant's property.

[Jones, J.: You are bound by your contract, and the licence is liable to forfeiture.]

The Licensing Court must exercise a judicial discretion. They cannot deprive a man of a licence merely because he has been three months without a manager. Sub-section 5 of section 76 of Act 28 of 1883 provides many reasons for the refusal of a licence, *inter alia*, "want of accommodation." No Cape Town hotel has ever been attacked on the ground of want of accommodation. The contract must be interpreted reasonably. *Woller v. Knott* (1 Exch. D., 124). In that case not even a conviction was necessary. Here it was required. Yet in that case it was held that the landlord

could not evict the tenant, though she had committed two offences in one day against the Licensing Acts.

[Jones, J.: In this case the defendant was convicted. How do you get over that?]

I cannot believe that one party intended to rob the other. The case of *Fleetwood v. Hull and Another* (23 Q.B.D., 35) was much stronger than the present.

[Jones, J.: In that and similar cases it was provided that the tenancy could be determined only if something prejudicial to the licence had happened.]

The clause in this lease could never have referred to a mere technical conviction. The wording of the leases in the English cases was very much wider. This conviction did not jeopardise the licence. No doubt the holder of a licence is responsible for the acts of his manager, but surely a mere tenant who does not hold the licence cannot be held responsible for the acts of everybody in his hotel.

[Maasdorp, J.: Is it not the fact that in England premises and not individuals are licensed? Hence a conviction of a tenant is not always endorsed on a licence.]

It is absurd for plaintiff to ask for damages. He has had his rent (£250) for a lease, and now he gets £3,000 worth of goodwill. Again, the landlord has allowed his tenant to get another tenant to take the place off his hands, so clearly he did not consider that the lease was forfeited.

Mr. Gardiner (in reply) was not called on.

In giving judgment, the Acting Chief Justice said: The defendant entered into possession of His Lordship's Larder in January last. Before January a licence had been obtained for the purpose of selling intoxicating liquors in these premises in the name of one Jackson. This licence ran forward from April, 1900, to March 31, 1901. During the currency of this licence it was transferred by Jackson to one Kuhr on September 15. At that time these premises were held by Kuhr on a monthly tenancy, liable to be terminated on one month's notice. In November, Kuhr sold what he called the goodwill, stock, and furniture of the premises, to the defendant for the sum of £3,000, which seems to me to be an extraordinary amount to be obtained by Kuhr for the sale of the goodwill of premises of which he only held the monthly tenancy. At the time of the sale negotiations with the proprietor took place, whereby he consented to a lease for seven years on payment of a

consideration to him of £250, the rental being £60 per month. The plaintiff had nothing to do with the £3,000; that was a matter purely between the tenants themselves. When defendant entered into the lease with plaintiff he agreed to one condition, upon which this action was founded. This was the seventh paragraph of the lease, in which it was stipulated that if the defendant should be convicted of any contravention of the laws relating to the sale of intoxicating liquors, then in such case the landlord or his agent may, without any notice whatever, re-enter and take possession of the premises, and expel the defendant; and that upon such re-entering the tenancy shall absolutely terminate. The fourth section of the lease provided that upon the termination or expiration of the tenancy the defendant shall deliver up the premises quietly and peaceably. The issue raised was whether defendant had been convicted so as to entitle plaintiff to terminate this lease. It was beyond dispute that at the beginning of March he was convicted of a contravention of the Licensing Act. This still stood against him; he had never appealed against it, and it has now become final. Sir Henry Juta, for the defendant, contended that a mere technical offence was committed, and that the Court should consider whether it was such an offence as would jeopardise the licence. There is no doubt that between the parties the one great object of the seventh clause was to protect the licence. The parties in this case had not, however, contracted that the conviction should be such as to jeopardise the licence. They had made the fact of conviction the test to be applied. There were two answers to the question raised as to its being a technical offence. One was that there was no stipulation in the contract that it should be an offence that would jeopardise the licence, and the other was that, looking at the offence and the licensing laws, the offence must be considered one which would jeopardise the renewal of this licence. The conviction was for permitting drunkenness. [His lordship quoted the 76th section of the Licensing Act, and said that in his opinion the Court would be bound to hold that this conviction did jeopardise the licence. But what he most strongly relied upon was that it was expressly contracted that on conviction there should be right of a re-entry.] It is common cause that this conviction stands, and the defendant sets up no other defence against the ejectment than that this conviction was illegal

and bad in law. It was not proved that it was so. No attempt to set it aside has been made, and this being the only defence set up on the pleadings, the Court are bound to give judgment for plaintiff. As to the question of damages, the defendant must pay something for having deprived plaintiff of the rent he would have received from these premises. The Court are inclined to limit the amount of damages strictly to what the amount of the rent would be for the period during which defendant had been in unlawful possession, namely, £150. True, plaintiff has lost possession of the place, and as licensed premises they could not be quite so valuable now as they were when they were last open. Still, the advantage of getting possession was so great that the Court are not inclined to give more than the amount of the rent. This disposes of the claim of reconvention, because that claim depends upon the continuance or otherwise of the lease. If the lease had not been forfeited then defendant no doubt might have had a good claim to have the renewed licence ceded to him, and to have remained in possession. Judgment must be given for plaintiff for ejectment, and £150 damages, and on the claim in reconvention also for the plaintiff in the action (defendant in reconvention), with costs.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDOEP.]

MCKENZIE V. JOHNSON. { 1901.
June 10th.

This was a motion by the defendant for postponement of trial until the August term.

Mr. Searle, K.C. (with him Mr. Close), for defendant: The application is made on the ground that Captain John Alexander Johnson's evidence cannot be obtained by Friday next, which is the day upon which the case has been set down for hearing. This action is to recover certain charges, alleged to be due to the plaintiff by defendant for taking cargo from the hold to the ship's rails. The vessel has been attached to found jurisdiction, but was released on security being given. The plea is

that the agreement was made between the Admiralty, who were the charterers of the vessel, and McKenzie. Defendant denied that he was in any way liable for payment.

Sir Henry Juta: The costs of this application should be paid by applicant. He assented to the case being put down for Friday.

The Court ordered that the parties should go to trial on August 16, applicant to pay the costs of the motion.

On the application of Sir Henry Juta, the Court ordered a commission *de bene esse* to issue to take the evidence of a witness named Alfred John Williams, who is shortly leaving for Europe. Mr. Upington was appointed commissioner.

Mr. Searle applied for a commission to take the evidence of Captain Johnson.

The whereabouts of the witness's ship was not known, and the application stood over until the information could be obtained.

YULE V. BLACK. { 1901.
Junellth.

This was an action brought by plaintiffs, who were landing and shipping agents, against the defendant, who is a merchant, for a sum of £110 5s. 11d., being the balance of an account due by defendant to plaintiffs for the clearing and forwarding of certain goods. The defendant denied liability for the whole amount, and disputed certain items on the account. He admitted liability to the amount of £81 18s. 2d., and agreed to pay that sum, plus costs. In reconvention, he claimed delivery of certain goods or damages for their value.

William Potter Partridge stated that he was a shipping clerk with the plaintiffs. He had charge of the matters referred to in plea. If goods are not cleared in 24 hours of the vessel commencing to discharge, consignee is liable to a fine of 6d. per ton per day. If goods are not cleared from the quays the goods are removed by the Harbour Board to the dumping store. The Harbour Board charges for removal.

Cross-examined: He has been in the employ of the plaintiff since June, 1900.

Arthur Henry Bruins stated that he had been in Yule's employ until lately. He was employed at the Docks for Yule.

Edward D. Orpen stated that he was employed at the Customs in the Docks. He knew of a certain cask of leather consigned to Black being detained at the Customs Office, because the leather was not properly described in the clearance order.

This closed the case for the plaintiffs.

Harry Bird Black, the defendant, stated that he had had dealings with plaintiff's firm for some time. He employed them as landing and delivering agents. When fines were due to the negligence of the clearing agents, they (the agents) had to pay such fines. The fines in this case ought to have been paid by plaintiffs.

Bertha Ginsberg deposed as to the delivery of certain goods by the plaintiffs.

After further evidence had been called, Mr. Upington closed his case.

Mr. Benjamin, for plaintiffs: I submit we have made out our claim to the first thirteen items. On November 13 £65 10s. 4d. was admitted, and on December 20 a promissory note was given for £95 13s. 4d. That account was settled. Black says he received only certain accounts, but the witness Partridge says he rendered general accounts. The charge of 2s. 6d. per ton for cartage to Kloof-road was reasonable. The 1s. 3d. for a dumping-store warrant had been paid. The question is: was it plaintiff's fault or defendant's that the goods were taken to the dumping store. There is nothing to show that plaintiff was in fault. Sundry other small items fall under "out-of-pocket" expenses or cartage charges. Various fines had been objected to, and also an item of £3 3s. in the account of £161 5s. 11d. had been queried. The fines were paid in the usual course, and as they did not become chargeable owing to our default, defendant was liable.

Mr. Upington, for defendant: The most important items are those which relate to the goods ex S.S. Urbania and ex Worcester Hall. It was plaintiff's duty to pay out these charges, and then come upon us. He said he was short of cash, and asked us for £15. He did not get it, but on January 20 he nevertheless cleared the goods.

[Buchanan, A.C.J.: He meant, "You owe me so much that I cannot advance more."]

If he meant that, he should have said so. Defendant's financial position was good, and on the 26th January plaintiffs gave us credit for £15, and did what they ought to have done on the 17th.

[Maasdorp, J.: He gave you notice that he would not clear?]

No, he said he was short of money. He said he could not advance the money, not that he would not. The other important item is the fine of £17. In relation to this there are the notices of January 15 and January 30. This latter notice was signed by Kitchen. He has not been called by the

other side, nor has his absence been satisfactorily explained. Then again the fine was imposed, not because the goods had not been delivered, but because they had not been cleared. Nothing was said about this claim in the letter of January 17. That letter could not vary an ordinary contract as between consignor and landing agent. With regard to the claim for extra cartage, plaintiff is quite out of court. Three shillings per ton is the charge for delivery anywhere within the Municipal radius. Even if these regulations did not strictly apply, they afford the Court a scale when making any allowance for charges for delivery. These are maximum charges. The clerks' only guide as to charges are the books, and these have not been produced.

[Mr. Benjamin: We gave you notice of avail.]

We could be estopped from disputing items only by a final settlement of account. I need not go into the items *seriatim*; the onus is on plaintiffs to show that the fines were incurred owing to our negligence. As to the oil clothing claimed in reconvention, it was landed, came into the possession of McKenzie and Co., was taken over by Yule and Co., and then delivered at Ginsberg's store. We cannot be estopped by McKenzie's receipt. That was not a clean receipt. Then there was Mrs. Ginsberg's receipt to the driver of the wagon, but it would be going very far to hold that we are estopped from going behind that receipt. As to the piano, delivery was charged for it, but there was delay in inspecting the piano.

[Buchanan, A.C.J.: Who was answerable for the delay?]

I cannot show that they are, but then they have not tendered delivery. As to the leather, there is considerable conflict of evidence. No doubt there was a mistake somewhere, but as plaintiffs' agent had a sample for Customs purposes, there ought to have been no difficulty in clearing it. Partridge's evidence on this point is not reliable. The white lead is only a small matter, but here again there is a conflict of evidence. Clearly Partridge and defendant were thinking of two different occasions. Defendant has made out a very strong case as to the oil clothing, and it is not to be expected that in such a small matter we should produce the man who packed it in England.

Mr. Benjamin (in reply) was not called upon.

In giving judgment, the Acting Chief Justice said the items in dispute had never been objected to, or called into question, until the action was brought. The Court was not prepared to say that the price charged for cartage was unreasonable. As to the other items, they consisted of fines charged by the Harbour Board, and his lordship did not see how they could be charged to the agents. Upon the claim in convention, therefore, the Court gave judgment for plaintiff, with costs. As for the claim in reconvention, no default or neglect on the part of Yule had been shown, and the claim must be dismissed.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

REX V. DE WEE.

{ 1901.
June 11th.

Illegal arrest—Police Act 27 of 1882.

Mr. Justice Maasdorp: A case has come before me on review from the Court of the Special Justice of the Peace for the district of Beaufort West, in which Dewas de Wee and Koos de Wee, the former a coloured farm labourer, and the latter a coloured shepherd, were charged with a contravention of section 10 of Act 27 of 1882, by using threatening language to the look-up keeper of Van der Byl's Kraal, thereby tending to create a breach of the peace. They were convicted and sentenced to a fine of £2, or one month's hard labour each. Dewas, it seemed, had been in the service of the policeman, who charged him with having deserted his service. The policeman was instructed by the Special Justice of the Peace to arrest Dewas, and he tried to arrest him without a warrant. He did not arrest him on this charge, but on meeting Dewas, in company with the other accused, he asked them if they had a pass, and finding that one of them had not, arrested him for not having one. Thereupon the alleged contravention took place. It did not appear that the men were bound to have passes, and therefore the action of the policeman was illegal. Under the circumstances it was an assault on the

part of the policeman to try to arrest the man, and consequently the conviction must be quashed.

Mr. Justice Jones added that it was perfectly clear that the policeman had no right to arrest the man.

MCKENZIE V. JOHNSON.

Mr. Searle, K.C., mentioned this case, and said that on the previous day Mr. Upington was appointed by the Court to take certain evidence on commission. It now appeared that Mr. Upington had been retained in the case, and he (Mr. Searle) therefore asked that Mr. Solomon should be appointed instead.

The Court appointed Mr. Solomon as commissioner.

SAUERLANDER V. SCOTT. } 1901. June 11th.

Promissory notes — Surety — Liability.

This was an action brought by Ewald Sauerlander and Herman Paul Carl Kruger, carrying on business as merchants at Cape Town, under the style of Sauerlander and Kruger, against James Scott, broker, of Cape Town, for the payment of a certain sum of money, amounting to £62 8s., being half the amount of three promissory notes which had been paid by plaintiffs as sureties for one Kuhr.

This action arose out of a matter which had been before the Court on several occasions in connection with the licensed house known as His Lordship's Larder. In the declaration plaintiffs claimed the amount above stated, and also an order declaring that the defendant was equally liable with the plaintiffs in regard to the remainder of the notes which had not yet become due for all amounts which they as endorsers must pay from time to time to retire the said notes. The notes were given in respect of part of the purchase price of the goodwill and furniture of the hotel. There were twenty-five promissory notes given, the aggregate amount thereof being £1,000. These were payable from month to month, commencing on the 1st October, 1900. The hotel was sold through Scott, and the plaintiffs alleged that it was specially agreed between them and defendant that he, jointly with plaintiffs, should endorse the bills which were made by Kuhr, the purchaser of the hotel, and become

equally liable in respect thereto. In February Kuhr was in difficulties, and absconded, his estate being sequestrated. Plaintiffs, who had endorsed the bills, had paid those which became due in February, March, and April, and they said that Scott, who it was alleged had agreed to endorse the bills but had neglected to do so, was equally liable with them. Fifty pounds was paid by Kuhr for this endorsement, to be equally divided between the plaintiffs and defendant as endorsers. Plaintiffs said that defendant, though repeatedly asked to endorse the bills, had failed to do so, though he had received his share of the £50 paid by Kuhr in consideration of the endorsements. Two bills had become due since issue of the summons in April, viz., on May 1 and June 1, 1901. The defendant pleaded that there was no agreement that he should endorse the bills. The £25 paid to him, which was half the amount of the sum spoken of in the declaration, was given to him for arranging for the endorsements of the bills by plaintiffs, and for arranging with Jackson to accept the bills. Defendant said that he had agreed to endorse the bills if the seller (Jackson) required his endorsements as well as the plaintiffs. He also alleged that, in addition to the £25, plaintiffs had received valuable consideration for the endorsement. Defendant alleged that it was only after Kuhr had absconded and some of the notes endorsed by plaintiffs became due by them that plaintiffs advanced their claim. He (defendant) repudiated liability for half the amount of the promissory notes.

Ewald Sauerlander, one of the plaintiffs, was the first witness called. He said that in August Kuhr came to see him, and he (witness) sent him to Scott. Kuhr and Scott afterwards came to him, and it was agreed that witness should sign the promissory notes on the condition that Kuhr would have all foreign liquors for His Lordship's Larder from witness's firm. It was agreed that Scott should also endorse the notes as security, and should receive £25 of the £50 to be given for endorsing by Kuhr. Mr. Kruger was present. Witness, on September 21, wrote to Scott, asking him if he had endorsed the bills, as arranged. No reply was received, and witness afterwards saw Scott, who said he would sign the bills if they were brought to him. On the 3rd November, witness again wrote to Scott expressing surprise at hearing that the bills were not endorsed by him according to agreement, and insisting that he should make the endorsements, or, otherwise, that the

firm should be paid the whole of the £50 paid for endorsing. There was no reply to that, but Scott said he would sign the bills on their being brought to him. Defendant wrote, on November 27, stating that he was prepared to sign the promissory notes at any time requested so to do. The first time that Scott repudiated the agreement was after the hotel was sold to Parsons in about January. Witness would not have endorsed the bills unless Scott had agreed to do so also.

Cross-examined: Scott did not say that it was such a good place that if Jackson, the seller, was not satisfied with the endorsement of Sauerlander and Kruger, he (Scott) would sign also. He wanted Scott to sign, so that he would be interested in the same manner as his (witness's) firm, and would therefore look after the matter. The firm and Scott had signed a bill jointly some time previous in respect of another transaction. Witness did not answer the defendant's letter of November 27. He thought there was no necessity to do so, as he regarded the letter as an acknowledgment of joint responsibility for the bills.

In reply to Mr. Justice Jones, Mr. Close said that defendant contended that the meaning of this letter was that Scott would sign if requested by Jackson, the seller, to do so. He had agreed to sign at the outset if Jackson required him.

Herman Paul Carl Kruger, the other plaintiff, gave corroborative evidence, and said that when he asked Scott to sign the promissory notes the defendant said he was very busy, and would endorse them during the day. The bills were left there for signature, but Scott never endorsed them. Scott never repudiated his liability. Witness spoke to Scott several times about his endorsing the notes, but he always made excuses.

Cross-examined: Scott never disputed his liability until Kuhr absconded.

For the defence, James Scott, the defendant, was called. He said that Sauerlander and Kruger first agreed to endorse bills for £600. Kuhr, however, wanted bills to the amount of £1,000. Kuhr promised to pay £50 if witness could persuade Jackson to accept £1,000 in bills instead of £600. This £50 witness agreed to divide with plaintiffs if they would endorse bills for the larger amount. Witness said he also would sign the bills if Jackson was not satisfied with plaintiff's endorsement only. The question of witness becoming joint surety was never raised. Kruger had never asked witness to sign the notes. When plaintiffs raised the

question of joint liability witness immediately denied such liability.

Cross-examined: Kuhr promised to pay £50 if Jackson would accept £1,000 in bills. Witness had his brokerage, and had the sum of £25, being half the £50 paid by Kuhr. He regarded this £25 as payment for having persuaded Jackson to accept bills for £1,000.

Mr. Searle: But you had to persuade Jackson to do this to get the sale through, and get your commission.

This was all the evidence, and counsel were then heard in argument.

Mr. Searle, K.C. (with him Mr. Benjamin) for plaintiffs: Plaintiffs sue in respect of certain promissory notes, which defendant had promised to endorse, as he had previously done in Daker's case. Scott is a hotel broker and would take care to make matters right and find a new tenant should there be any difficulty as to Kuhr. In the case of these monthly tenancies there is a great deal of risk. The documentary evidence is wholly in plaintiffs' favour. There is the letter of September 21. Kuhr was then solvent, and was doing a good business. Scott did not at that time repudiate the agreement that he should endorse the notes. Plaintiffs wrote to Scott again in November, expressing surprise that he had not endorsed the notes. On November 19 plaintiffs wrote to him asking for their half-share of the brokerage, and on November 27 defendant sent a cheque for £25, and said he was ready to endorse the notes when required to do so. He thus acknowledged his liability. He could not have written in these terms if he thought that he was bound to endorse only if required to do so by the creditor. Then, again, why did he get the £25? He says as consideration for inducing Jackson to accept plaintiffs' name for bills to the amount of £1,000. He never, in fact, denied his liability until after Kuhr had absconded, and he did not deny it in writing till he filed his plea. Kuhr has been excused. He is insolvent, and that is sufficient excussion. There are still twenty-one bills in circulation. We are suing only on three of these, but if a declaration is given as to the bills not yet due it will help to obviate a multiplicity of actions.

[Jones, J.: You cannot pray for a declaration of rights on a negotiable instrument.]

That will not affect prayer (b). If defendant is equally liable, the Court can say so.

Mr. Close (for defendant): This is a mere question of conflict of evidence. The probabilities are in favour of defendant. The monopoly of supplying "His Lordship's

Larder" with foreign wines, given to plaintiffs under the agreement, was valuable consideration. When that agreement was entered into nobody entertained any doubt as to the soundness of Kuhr's financial position. Such being the case, plaintiffs did not require any additional security.

[Jones, J.: Your difficulty is that in every bargain there must be two parties. A person on whose behalf security is given cannot release his surety.]

Plaintiffs had a great interest in getting the transaction through, for it would have meant to them a commission of 2½ per cent. on £5,000. They had far more interest than defendant had in getting the transaction through. Defendant wanted his brokerage, but he was not going to saddle himself with a responsibility indefinitely.

[Jones, J.: Where do you find that agreement?]

It is implied in the agreement of August 8. Plaintiffs asked the Court to believe that they were mere lay figures, and had been "bluffed" by defendant. It is unreasonable to suppose that business people would act in this way.

[Maasdorp, J.: Defendant was to get £25 for his endorsement.]

No, he was only to get Jackson to accept. The transaction was strictly between Kuhr and Jackson.

[Jones, J.: It is an astonishing proposition that two men can bind themselves as joint sureties and then one of them may slip out of it.]

The agreement was conditional, and the broker's note does not negative the condition.

Mr. Searle (in reply) cited *Walmerhausen v. Garlick* (Ch. D., 1893, Part II., p. 514).

[Jones, J.: I do not see how we can make a prospective order, directing that if plaintiffs should pay more than their share they can recover.]

[Maasdorp, J.: How are you to get it back?]

If we have an order we can sue provisionally. Otherwise we cannot. The tendency of recent decisions is to extend the scope of provisional sentence. If the Court merely expresses an opinion we shall have to enter an action, instead of suing on a judgment. In England such an order would be given.

In giving judgment, Mr. Justice Jones said that fortunately in this case the Court had not to trust very much to their judging of the credibility of the testimony of the witnesses. The documents were before the Court, and he (the learned judge) might say

that they seemed to him to be so strong that, without dealing with any question as to the credibility of evidence, the Court could arrive at a decision with ease. The first document said that the purchaser agreed to pay £50, this to be divided between Sauerlander and Kruger and James Scott in consideration for the endorsements of the bills. What did that mean? On the very face of it, if one interpreted it in the ordinary way, it meant that plaintiffs and defendant were to be joint sureties. That was the document of the 8th August. Then there was the letter of the 21st September, addressed by plaintiffs to the defendant in the following terms: "Kindly let us know if the bills of Mr. Kuhr have been endorsed by you as arranged." There was no answer contradicting that statement at all. This was followed in November by another letter, in which the plaintiffs said they were surprised to hear that the bills had not been endorsed by defendant as agreed. They went on to say that they must insist that this should be done at once; otherwise they would claim the full amount (£50) which Mr. Kuhr had paid for their and his (Scott's) endorsements. Again, there was no contradiction from the defendant. Afterwards there came a letter from James Scott himself, in which he enclosed the cheque for £25—the half share of the £50—and said: I am quite prepared to sign the promissory notes at any time when requested so to do. Now, could anyone, reading that letter, come to any conclusion but that the arrangement alleged by Sauerlander and Kruger was other than the arrangement actually made? In the face of these documents it seemed to him absolutely absurd to contend that anyone could get behind them. There were the documents, and any explanation that James Scott might now have advanced in respect to these letters had, as far as his lordship was concerned, no effect whatever. For himself, he (the learned judge) was satisfied to rest his judgment on the correspondence as it appeared between the parties themselves. Judgment would be given for the plaintiffs for the £62 8s. claimed in the declaration, with costs. As to the prayer that defendant should be declared liable for the half of the promissory notes as they became due in the future, it seemed to him (Mr. Justice Jones) that as far as the previous practise of the Court was concerned, they had not, except under very exceptional circumstances, ever given a judgment which was prospective, where it was dependent upon a fact which was not

within the knowledge of the Court. It would be a dangerous practice to introduce, and he would hesitate to give such a judgment, except in a very exceptional case. Judgment would be refused on this—the second—prayer.

[Maasdorp, J., concurred.]

[Plaintiffs' Attorneys, Messrs. Scanlen and Syfret; Defendant's Attorneys, Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice JONES.]

ADMISSION { 1901.
June 12th.

On motion of Mr. Searle, K.C., Arthur Upington was admitted, and took the oath as an advocate.

PROVISIONAL CASES.

STARKE V. REYNEKE.

Mr. De Villiers moved for judgment on two mortgage bonds for £300 and £150 respectively, with interest and costs, and for specially hypothecated property to be declared executable.

Granted.

HOPKIRK V. VAN DER WALT AND ANOTHER.

Mr. De Villiers applied for provisional sentence on two mortgage bonds for £163 13s and £302 7s. respectively, and for specially hypothecated property to be declared executable.

Granted.

BEYLEVELD V. VAN ZYL.

Mr. Benjamin moved for provisional sentence on a judgment of the Magistrate of Steynsburg for the sum of £14 11s. 3d., together with interest and costs of suit. There was also a prayer for leave to execute against any surplus funds in the hands of the Sheriff from the proceeds of the sale of property attached by another creditor.

Granted, and plaintiff was allowed to take execution against any surplus funds in the hands of the Sheriff.

HERTZOG V. THE GORDON COMPANY.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £3,000, and also asked that certain hypothecated property be declared executable.

Granted.

MARAIS V. GROENEWALD.

Mr. De Waal moved for provisional sentence for £16 17s. 3d., balance due on a promissory note.

Judgment was given for principal and interest

PURCELL, YALLOP AND ANOTHER V. PITT.

Mr. Upington appeared for applicant, and Mr. Searle, K.C., for respondent.

The case was ordered to stand over until June 14, in order to enable applicant to prepare a replying affidavit.

BOSMAN V. FALCONER. { 1901.
June 12th.

Insolvency—Assignment—Failure to comply with conditions.

Mr. De Waal moved for a final order of sequestration. The estate had been provisionally sequestrated.

Mr. Searle, K.C., opposed, and said that the defence was that plaintiff had agreed to and had accepted an assignment, and had also agreed, with other creditors, to stay all proceedings against the defendant. In consequence of these proceedings, defendant alleged he had sustained £100 damages, which amount he claimed. The deed of assignment was signed subject to the costs of sequestration incurred by plaintiff being preferent. Plaintiff said he signed the deed of assignment on condition that the costs in the matter of a previous application by him be paid by defendant according to a certain agreement, which he alleged defendant had not carried out. It would be, plaintiff further stated, for the benefit of the creditors to sequester the estate.

Mr. Searle argued that there was no condition that defendant should pay the costs to plaintiff privately. He submitted that the only condition was that when there

were assets, plaintiff would be entitled to take the amount of the costs. He might have the right to sue defendant on the document, by which defendant agreed to pay him the costs in certain instalments, but he (Mr. Searle) contended that this document could not be held to annul the agreement in respect of the assignment.

Buchanan, A.C.J.: In this case the plaintiff held a promissory note given by the defendant, which note had been dishonoured, and upon which the plaintiff had obtained judgment. On execution being taken out a return of *nulla bona* was made, and thus the defendant has committed an act of insolvency, upon which the plaintiff obtained a provisional order for the sequestration of defendant's estate. On the return day of that order the defendant proposed an assignment of his estate, which the plaintiff signed, on the express condition that defendant should pay him by a specified date the costs which had been incurred. The plaintiff attached the condition to his signature that his costs should be preferent. It is clear that the creditors knew the condition upon which plaintiff attached his signature, but neither debtor, creditors, nor assignees, though repeatedly called upon, have performed the condition, and consequently plaintiff is entitled to pursue the proceedings. The question as to whether the assignment was beneficial does not deprive him of the right given to him under the Insolvent Ordinance, and a final order must be given for sequestration.

ILLIQUID ROLL.

PURCELL, YALLOP AND ANOTHER V. LOUNDER.

Mr. Solomon applied for judgment under Rule 329d, for the sum of £53 10s. 11d., less £5 paid since issue of the summons, for goods delivered and wagon-hire, with interest and costs of suit.

Judgment as prayed.

BUGDOLL V. GAFFOOR.

Mr. Solomon applied for judgment under Rule 329d on a summons in terms of a broker's note.

Judgment as prayed.

FOOTE AND CO. V. PAUL.

Mr. Close applied under the same rule for judgment for £27 6s. 9d., for goods sold and delivered, with interest and costs of suit.

Judgment as prayed.

WILL V. JONKER.

On the motion of Mr. Solomon, judgment in terms of consent was given under Rule 329d for the sum of £126 17s. 3d., due for building materials supplied, with interest and costs.

ARDERNE V. SAAYMAN AND ANOTHER.

Mr. Upington moved for judgment in terms of a consent paper.

Granted.

REHABILITATION.

Mr. De Villiers moved for the rehabilitation of Joseph Eugene Lefevre.

Ordered as prayed.

Mr. Benjamin applied for the rehabilitation of Hendrik Jacobus Calitz.

Ordered.

On the motion of Mr. De Villiers, William Shepherd Henwood was rehabilitated.

Mr. Benjamin moved for the rehabilitation of William Stableford.

Ordered.

GENERAL MOTIONS.

BURNARD V. WARD.

Mr. Benjamin moved to have judgment signed against plaintiff for not proceeding. Counsel said that the original application by the plaintiff was for provisional sentence, in respect to which defendant appeared to oppose. The application stood over until that day, and plaintiff had not proceeded.

The Acting Chief Justice: Then all the Court will have to do will be to refuse provisional sentence, with costs.

Mr. Benjamin agreed, and an order was made accordingly.

WILLIAMS V. WILLIAMS.

Mr. De Villiers applied that a rule *nisi*, calling on defendant to show cause why leave should not be given to sue *in forma pauperis*, should be made absolute.

The application was granted, Mr. De Villiers being appointed counsel, and Messrs. Van Zyl and Buissine, attorneys.

GRUEWALD V. GRAND JUNCTION RAILWAYS.

Mr. Gardiner applied for the award to be made a rule of Court.
Granted.

WILMER V. GRAND JUNCTION RAILWAYS.

Mr. Gardiner moved for the award to be made a rule of Court.
Granted.

**IN THE MATTER OF THE PETITION OF
BLANCHE MARION DAVIDSON.**

Mr. De Villiers moved for leave to sue by citation. Counsel said the petitioner sought leave to sue her husband by edictal citation for restitution of conjugal rights, or, failing that, divorce. The parties were married in England in 1898, and afterwards came out together to South Africa. They passed through Cape Town, and proceeded to Natal, and went thence to Johannesburg, where the husband left his wife, and went to England. She had only received one letter from him since, and did not know his whereabouts. Mr. De Villiers said he understood the petitioner was now residing in the Colony.

The Acting Chief Justice said it had not been shown that the Court had jurisdiction. The parties married in England, passed through Cape Town on their way to Natal, and went to Johannesburg. On the information before them the Court could make no order.

MILLS V ESTATE OF MILLS.

Sir Henry Juta, K.C. (with whom was Mr. Benjamin), moved for leave to appeal to His Majesty in his Privy Council.

Mr. Searle, K.C. (with him Mr. Close), appeared for the executors of the estate.
Leave was granted on the usual terms.

IN THE MATTER OF THE MINOR WESSELS.

On the motion of Mr. Benjamin, an order was granted authorising the sub-division of certain property.

IN THE MATTER OF THE PETITION OF HENDRIK A. MENZIES.

Mr. Solomon moved for leave to attach certain money.

The Court made an order declaring money in the hands of the Civil Commissioner of Barkly East to be executable.

**IN THE ESTATE OF THE LATE CHARLES
ROBERT LANGE.**

Mr. Searle, K.C., made application in this matter, in which it appeared that transfer had been passed only in respect to half of a property sold by the Sheriff.

The Court ordered that the matter should stand over in order to see if the whole of the property had been sold. The Acting Chief Justice said that if it had been the Sheriff was bound to transfer, and if he would not, applicants could get an order on him to do so.

SLATE V. SLATE.

Mr. Benjamin moved for a decree of divorce, plaintiff to have the custody of the children, and defendant to pay £4 a month in respect to the maintenance of the younger child until it became sixteen years of age. This was the return day of a rule nisi issued on the wife's application.

The Court made the rule absolute as prayed.

**IN THE ESTATE OF THE LATE PAUL JACOBUS
ROUX**

This was a motion for leave to transfer certain property.

Sir Henry Juta, K.C., who appeared for applicant, said that, as directed by the Court, the major heir's consent had been obtained, and the Master had been asked to report as to whether the minors should be separately represented. The Master's report was submitted.

The Court made an order appointing the Hon. Mr. Neethling, Stellenbosch, curator of the minor heirs, and also ordered that notice should be served on him.

VOS V. VOS.

Mr. De Waal moved for leave to sue by edictal citation. The husband was alleged to have deserted applicant, and to have had three children by another woman in Natal. The wife sought leave to sue by edictal citation for a divorce by reason of defendant's desertion and adultery, and for the custody of the children of the marriage.

Leave was granted as prayed, the order, which was made returnable on the 1st August, to be published in the "Natal Mercury" and the "Gazette."

IN THE MATTER OF THE PETITION OF
THEUNIS JACOBUS BOTHA.

Mr. De Villiers applied for the release on bail of petitioner, who was awaiting trial on a charge of treason.

Mr. Howel Jones, for the Crown, consented to the application on the following terms: Accused to become surety for his appearance at the trial in the sum of £2,000, and to find two sureties for the sums of £500 each; and on condition that the applicant resided on his own farm, in the Wodehouse district.

Mr. De Villiers agreed to these terms, and an order was made accordingly.

IN THE MATTER OF THE PETITION OF THE
SEVENTH DAY ADVENTIST MISSIONARY
ASSOCIATION.

This was an application for the rule *nisi* for passing of transfer to be made absolute.

Mr. Searle, K.C., appeared for the applicants, and Sir Henry Juta, K.C., for the respondents.

The motion was postponed, by consent, until the 15th August, costs to be costs in the cause.

DU TOIT'S CURATOR V. REINEKE. { 1902.
June 11th.

This was an application on notice made on behalf of Robert Walter Watson, in his capacity of curator to Peter Cornelius du Toit and of Elsie Magdalene Crafford, calling upon respondent to show cause:

(a) Why a certain lease entered into between him (the said respondent) and Peter Cornelius du Toit on the 20th September, 1900, should not be declared null and void, on the ground that it was at variance with the terms of the last will of the late Peter Cornelius du Toit and his wife Elsie Magdalena du Toit, dated November 12, 1897, and that it was of no binding effect in law.

(b) Why respondent should not be ordered to quit and give up possession of the properties referred to in the said lease.

(c) Why he should not be ordered to pay the costs of this application.

Mr. Upington (for applicant): The terms of this lease are inconsistent with those of the will. By the second condition of the will the condition *ne exeat extra familiam* is imposed, this forbids lease as well as sale to a stranger, and there is nothing to show that the lease was granted to other beneficiaries under the will.

Mr. C. W. de Villiers (for respondent): The proper proceeding in this case is by action. We deny that any lease has been executed and say that there was only an agreement.

[Jones, J.: What is the difference? You are in possession by consent of P. C. du Toit.]

Reinecke is there as the servant of Du Toit.

[Jones, J.: What is Du Toit to get? As far as I can see he gets nothing.]

He gets half the profits of the farm.

[Jones, J.: If your agreement is really a lease the Court will treat it as one, whatever you call it. *Treasurer-General v. Lippert* (1 Juta, 291.)]

The present applicants are not the proper persons to apply. Mrs. Crafford's capacity is not stated, and one of the heirs has not been joined in the application. Du Toit had made this agreement before the Court had declared him to be of unsound mind.

[Buchanan, A.C.J.: Could Du Toit have validly leased even then?]

Yes. We do not know whether Mrs. Crafford appears as heir or as executrix. In the case of *Goodison v. Tate* (10 Sheil, 399) the Court refused to cancel a sale on motion.

[Buchanan, A.C.J.: Facts were in dispute. What is in dispute here?]

The nature of the document.

[Buchanan, A.C.J.: Mrs. Crafford's capacity should be more clearly stated. We will allow time for further affidavits. If no facts are in dispute we will decide the case on the affidavits. If facts are in dispute we will allow time for answering affidavits to be filed.]

[Applicant's Attorney, Mr. Gus. Trollop.]

Ex parte RICHARDS. { 1901.
June 12th.

Diamonds—Act 14 of 1885—Illegal possession—Registration.

Richards had been acquitted at the April Criminal Sessions of a charge brought under sections 1 and 7 of Act 14 of 1885. Certain diamonds, the corpus delicti, had been seized for the purposes of the trial by the police, and petitioner now asked to have them returned to him. This application was opposed on behalf of the Crown on the ground that they were re-

quired as "exhibits" for the purposes of further proceedings under section 27 of the aforesaid Act.

Held, that under the proviso to the seventh section petitioner was entitled to have the said diamonds returned to him.

As a reasonable time had elapsed, during which the Crown, if so advised, might have instituted further criminal proceedings, a bare statement of intention to institute such proceedings did not justify them in the further detention of applicant's property.

Semble: The 27th section of the Act has reference to the registration of diamonds when moved from one district of this colony to another district.

This was an application brought by one Sydney Richards for an order compelling the Attorney-General to deliver up certain 47 rough and uncut diamonds, the property of the said Sydney Richards. The petition of the applicant was as follows:

1. Your petitioner left Johannesburg for Delagoa Bay on or about 28th September, 1899.

2. Whilst in Delagoa Bay, awaiting the arrival of a steamer to proceed to Natal, your petitioner met one Louis, from whom he purchased certain 48 diamonds for the sum of £200.

3. On or about 1st October, 1899, your petitioner left Delagoa Bay and arrived at Durban on the 3rd. Your petitioner then left Durban for Kimberley on the 9th October, having previously handed the diamonds to his wife, Ada Richards, who remained in Durban after his departure, and who was then staying in Durban.

4. Your petitioner remained in Kimberley during the whole of the siege, and during that period your petitioner's said wife left Durban for Cape Town, where she remained until March 7, when she left to join your petitioner at Kimberley.

5. Before her departure, viz., on March 5, 1900, she handed 47 of the said diamonds to the Standard Bank in Cape Town for safe keeping, where they remained until September 3, 1900.

6. After the relief of Kimberley and the disbandment of the Town Guard, to which your petitioner had been appointed, he left

Kimberley on April 3, 1900, together with his said wife for Cape Town. Thereafter your petitioner resided at Fish Hoek near Kalk Bay.

7. On November 7, 1900, your petitioner wrote three letters to England, one to a certain Mr. Brook enclosing six diamonds, one to a Mrs. Scott enclosing two diamonds, and one to Messrs. Mappin and Webb enclosing five diamonds. Your petitioner posted these letters on the same day.

8. On the 15th November last, at Fish Hoek, your petitioner was arrested on a warrant charging him with having contravened section 1, Act 14 of 1885.

9. On the next day, November 16, your petitioner was re-arrested at Simon's Town on a warrant charging him with having contravened section 7 of Act 14 of 1885.

10. Your petitioner was committed for trial, and thereafter was tried at the Criminal Sessions held at Cape Town on April 17 last, on an indictment charging him with having contravened sections 1 and 7 of Act 14 of 1885, and was found not guilty and discharged.

11. Your petitioner was able to procure at considerable expense the evidence of witnesses from Delagoa Bay, Kimberley, and Johannesburg. Your petitioner craves leave to refer to the evidence given on his behalf at the trial. The principal witness, one Leo Falk, has returned to Delagoa Bay—as your petitioner believes—and it would not be possible to procure any affidavit from him for a considerable time.

12. In the month of March, 1900, your petitioner's said wife before leaving for Kimberley gave one diamond to a Mrs. Pollock, now Mrs. Wells. On account of the ill-health of Mrs. Wells your petitioner was unable to procure the attendance of the said Mrs. Wells, but he obtained two affidavits which he was unable to use at the said trial but which he now files in support hereof.

13. In two of the aforesaid letters of the 7th November, 1900, your petitioner stated that he had obtained the said diamonds at Kimberley during the siege. These statements your petitioner regrets to say were invented by him for the purpose of endeavouring to enhance the value of the diamonds. None of the said diamonds were obtained by your petitioner at Kimberley, and he refers to the evidence given by Harris, a director of De Beers Consolidated Mines, at the trial, who was in Kimberley during the siege, to the effect that it was not possible to purchase diamonds at that time.

14. Your petitioner has now been summoned to return to Johannesburg to resume work with the companies by whom he is employed, and desires the restoration of the said diamonds, his property.

15. Your petitioner has, through his attorneys, made application to the Attorney-General for the diamonds belonging to him, amounting in all to 47, but has been informed that the Government will not return these diamonds until an order has been obtained from this Honourable Court on the subject.

Wherefore your petitioner humbly prays that your lordships will be pleased to grant an order directing the Attorney-General to make delivery of the 47 diamonds now in possession of the Resident Magistrate for Cape Town, to your petitioner.

The affidavit of William George Fairbridge (one of the petitioner's attorneys) stated :

1. That before the above petition was drawn he had had an interview with the Secretary of the Law Department, who then and there informed him that the Crown would not give up the diamonds without an order of Court, inasmuch as certain statements had been made with regard to the same by the petitioner in certain letters put in at the Criminal proceedings.

2. That the Crown did not wish to take any technical objections, if the Court were satisfied that the diamonds ought to be returned to the petitioner, and that the Crown would not take the objection that the diamonds had not hitherto been registered in the name of the petitioner.

The latter part of paragraph 2 was denied in the answering affidavit of the Secretary to the Law Department, who said that he had not intended to convey that the Crown would waive any substantial objection which it was found necessary to submit to the Court in connexion with the matter. That he had not consented to any course which would suspend the provisions of the law as regarded the said diamonds, but that, on the contrary, he had told Mr. Fairbridge that he did not think Mr. Richards ought to have the diamonds.

Mr. Searle, K.C. (with him Mr. Howel Jones), for the Crown : The Attorney-General is going to prosecute under section 27 of Act 14 of 1885. Applicant had previously been prosecuted under sections 1 and 7.

[Jones, J. : Even if the diamonds are not registered there is no forfeiture; the ownership remains in the seller unless you get a conviction.]

Yes ; but it does not follow that the Court will order the diamonds to be given up. *Kemp v. Roper* (2 Ap. C., 141).

Sir H. Juta, K.C. (with him Mr. Gardiner), for petitioner: The Crown had ample time to frame any number of indictments between November last, when petitioner was first arrested, and the last Criminal Sessions, when he was brought up to trial. The whole gist of section 7 of the Act is that diamonds must be registered. Petitioner has been tried (1) for not being able to account for the possession of the diamonds ; (2) under section 7 for not having registered the diamonds, and he was acquitted on both counts.

[Buchanan, A.C.J. : Section 7 refers to the Magistrate's register.]

The greater includes the less, section 6 falls under section 7. If a man is prosecuted for not registering at all, he cannot be again prosecuted for not registering in Simon's Town. Schedule I. to Act 14 of 1885 shows that section 27 was intended to deal with diamonds brought from one district of the Colony to another. Under sections 6 and 7 the registration is not confined to any particular district. The Attorney-General has not in any case a right to retain these diamonds. In *Robinson v. Roper* (2 Ap. C., 89) certain diamonds had been seized *in transitu*. The High Court held that the seizure was justified, but the Appeal Court reversed this decision. This is a far stronger case. In that case the seizure was illegal because there had been no conviction. Here there had been a trial and an acquittal. Our Colonial Act is stronger than that of Griqualand West, since it orders the diamonds to be restored to any person who can show a *bona-fide* claim to them. This petitioner had done by securing an acquittal on a charge of unlawful possession.

Mr. Searle (in reply) : My learned friend raises two points : (1) Applicant has been prosecuted already for this offence. He was charged under section 7. This section refers to section 2 for penalties, among which penalties confiscation is included. Section 27 describes an offence of an entirely different character, viz., having diamonds in one's possession without a certificate. The prescribed penalties also are different. It is admitted that petitioner had no certificate from the Magistrate of Simon's Town. If indicted under the 27th section he could not plead *autrefois acquit*. If section 27 were covered by section 6, section 27 would be unnecessary, and in construing a statute

effect must be given (if possible) to every section. As to my learned friend's second point, viz., the right of the Crown to retain the diamonds, that right was referred to in *Robinson v. Roper* (2 Ap. C., foot of p. 96) De Villiers, C.J., said they could not be retained because the department had not shown any intention of prosecuting.

[Jones, J. : Here you had every opportunity to prosecute, and failed in the only prosecution you undertook.]

Applicant could not be found ; our delay was not unreasonable.

[Jones, J. : Will you undertake to prosecute ?]

Certainly ; as to the unreasonable delay, *Pentz v. Colonial Government* (8 Juta, 34), but there the defendant had decided not to prosecute. Applicant left about five weeks after his acquittal ; we were not bound to prosecute within five weeks. In *Kemp v. Roper* (2 Ap. C., 141) the Court held that plaintiff could not recover diamonds from the department although the Court held that he could not have been convicted if prosecuted.

[Sir H. Juta : Because he was not the owner of the diamonds.]

If a man does not do certain things and is found in possession of diamonds his *bona fides* is open to suspicion. But section 27 has nothing to do with *bona fides*.

Sir H. Juta was not called upon in reply.

Buchanan, A.C.J. : The applicant in this case was in possession of certain rough and uncut diamonds so far back as November, 1900. He then attempted to send them through the post to England. They were stopped under the 7th section of Act No. 14, 1885. Applicant was thereupon arrested and a preparatory examination held, which resulted in his being committed for trial. He was indicted for the January Sessions, but the trial was postponed till April, when he was acquitted. On reference to the indictment it will be seen that the charges brought against applicant were the contravention of the 1st and 7th sections of the Act. Under the first section, he was tried for being in possession of uncut diamonds and the onus of proof as to lawful possession was cast upon him. On his trial he satisfactorily accounted for the possession of these diamonds within the Cape district. The seventh section, which authorised the stopping of the diamonds passing through the post, makes the ground of proceeding, the suspicion that the diamonds have not been registered as required by the 6th and

the 25th sections of the Act. The 6th section requires the registration of diamonds imported into the Colony, and the 25th section requires an entry of all dealings by authorised persons to be made in the register to be kept by such persons. The proviso to the 7th section entitles the person, if able to prove a *bona-fide* right to the possession of the diamonds, to have the diamonds restored to him, or, if previously sold, to be paid their value. This may be done without a trial, but in this case there has been a trial, and this right has been established by an acquittal. Under these circumstances, Richards is, under the 7th section, entitled to have the diamonds returned to him. But the Crown now says "We will not restore these diamonds, because we intend to prosecute him under another section." A reasonable time has long since elapsed within which the Crown might have proceeded. All the facts were known to the Crown as far back as November last year, and another prosecution might have been instituted, yet nothing was done. It must be remembered that this offence is not a crime in itself, but is an offence created by Act of Parliament. There is a great deal in Sir Henry Juta's argument, that the applicant cannot again be prosecuted for being in possession of diamonds in one part of the Colony after he had been acquitted of having them unlawfully in possession in the Colony itself. The 27th section, under which it is said the Crown now intends to move, has reference to the registration of diamonds when moved from one district to another ; as will appear on reference to the schedule referred to in the section. The applicant has not removed these diamonds from the district into which he originally brought them on importing them into the Colony, and he has established his innocence in regard to such importation. However, the decision will not be based on the construction of that section but on the fact that there has already been a prosecution under the 1st and 7th sections of the Act, and an acquittal obtained, and under the proviso to the 7th section, as to further intention to prosecute ; since more than reasonable time has elapsed the Crown cannot retain the diamonds any longer, but must restore them to the owner. Judgment must therefore be given for plaintiff.

Sir H. Juta : We ask for costs. This is a civil proceeding, and they were granted against the Government in *Robinson v. Roper*.

Mr. Searle : Though this is a civil proceeding in a certain sense, it arises out of a criminal prosecution. Costs in such a case should not be granted against the Government.

Buchanan, A.C.J. : In a case like this the Court must grant costs.

Jones and Maasdorp, J.J., concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton ; Respondent's Attorneys, Messrs. Reid and Nephew.]

KOCH V. HENDRICKS. (1901.
(June 12th.

Water Rights—Plea in abatement—
Joinder.

In an action between K. and H., two lower proprietors of certain lands in which action plaintiff claimed that defendant should be interdicted from discharging water on to his (plaintiff's) land, defendant pleaded in abatement that certain upper proprietors whose water flowed across his land on to plaintiff's should be joined as co-defendants.

Held : (1) That as the dispute was simply between plaintiff and defendant, and could be settled without prejudice to the rights of third parties, it was not necessary that they should be joined in the action. (2) That such upper proprietor might be allowed to intervene if advised that his rights might be prejudiced by the decision in such action.

This was an argument on a plea in abatement.

Plaintiff's declaration was as follows :

1. Plaintiff is the registered owner of certain lands, situated at Retreat, in the Cape Division, being the remainder of the farm "Rape Kraal," now called "Frogmoor."

2. Defendant is the registered owner of a sub-divided portion of the said farm, adjoining the said lands of the plaintiff.

3. In or about 1897 defendant wrongfully and unlawfully, and for his own use and benefit, led, and still leads, a certain stream of water over and across his said property into

a certain furrow, situated upon the said lands of the plaintiff. Portion of the said water rises upon defendant's said property, but by far the greater portion is water which defendant allows to flow on to his property from a farm adjoining his, on the opposite side to that of plaintiff's land, and called "Pollsmoor."

4. By reason of the premises large quantities of water were caused and permitted to flow, and did flow, off the said property of defendant and other lands into and upon the said lands of the plaintiff, and the volume of such water has increased recently, and is a serious nuisance to the plaintiff, and threatens to flood the said lands of the plaintiff, and render them valueless.

5. Defendant contends that the plaintiff is bound to receive the said water thus discharged from defendant's property, including the "Pollsmoor" water.

6. Defendant on or about the 26th day of April, 1901, and on divers occasions before and since, wrongfully, unlawfully, and negligently caused or permitted manure and other filth to accumulate in certain furrows along which the surface water is drained from the lands of the defendant into certain furrows upon the lands of the plaintiff.

7. By reason of the matter in the last preceding paragraph set forth, a nuisance dangerous to health has been caused to the plaintiff, plaintiff's drinking water has become foul, noxious, and unfit for use, and plaintiff has sustained great loss and damage, and put to serious inconvenience.

8. Plaintiff has frequently requested defendant to divert the said stream of water, so that it shall not flow into plaintiff's said furrow, and to refrain from the wrongful and unlawful acts in paragraph 6 set forth, but defendant wrongfully and unlawfully refuses to do so.

9. By reason of the foregoing plaintiff has suffered great loss and damage in his farming operations and otherwise, and has in all sustained damage in the sum of £500.

Wherefore plaintiff claims :

(a) A declaration, as between plaintiff and defendant, the plaintiff, as owner of the farm "Rape Kraal," now "Frogmoor," is not bound to receive water other than the surface overflow from defendant's lands.

(b) A perpetual interdict restraining defendant from discharging water other than such surface overflow, arising or collected on defendant's land on to plaintiff's land, and especially from discharging the "Pollsmoor" water on to plaintiff's land.

c) £500 damages.

(d) Alternative relief.

(e) Costs of suit.

The defendant pleaded in abatement that the owner of "Pollsmoor" claims the legal right to send down the water complained of on to the defendant's property, and thence downwards, and that therefore the prayer of the declaration cannot be granted without the said owner of "Pollsmoor" being made a party to this action, and defendant further says that the framers of the declaration are inconsistent and embarrassing. Wherefore defendant prays, etc.

Sir H. Juta, K.C. (for defendant and exceptor): We contend that the owner of "Pollsmoor" should be joined as a co-defendant in this case. Plaintiff wishes to sue defendant to show that he (defendant) has no right to send down water on to his (plaintiff's) property, and then to leave defendant to sue "Pollsmoor." It is impossible to decide the case unless the owner of "Pollsmoor" is before the Court. If defendant is bound to receive the "Pollsmoor" water, where can it go, save on plaintiff's property?

[Buchanan, A.C.J.: Why should it be necessary to join the upper proprietor if your plea of prescription is proved?]

We must have him to prove what his rights are.

[Jones, J.: Then it comes to this, that in every action between two lower proprietors you must always join all the upper proprietors?]

Not if you are suing *in tort*. If it were a question of a declaration of rights, you might have to do so. "Pollsmoor" is really doing the wrong by sending down his water.

[Jones, J.: You can plead that it is "Pollsmoor" water without any plea in abatement.]

It is better not to try a case piecemeal, but that the Court should have all the parties before it.

[Jones, J.: Defendant can defend himself without joining "Pollsmoor." Defendant has no right to say, "You must sue somebody else." Such an answer amounts to "I have no defence."]

Co-owners are often joined in an action *in tort*, because Courts will not have piecemeal litigation. Plaintiffs are practically asking the Court to say that no water from "Pollsmoor" shall come on the land, and how can the Court grant that order unless "Pollsmoor" is joined?

[Jones, J.: You have only to say, "It is not our water; it is 'Pollsmoor' water."]

We cannot say that, for "Pollsmoor"

claims a legal right to send water down. We say that we do not allow "Pollsmoor" water to flow on to plaintiff's land, but "Pollsmoor" claims a right to put it there.

Mr. Searle, K.C. (with him Mr. Upington), for plaintiff (respondent in the motion), was not called upon.

Buchanan, A.C.J.: The foundation of the plea in abatement is that there are third persons interested in the dispute between the parties, and that the dispute cannot be settled without prejudice to the rights of these third persons, and that therefore they ought to be joined in the action. The dispute in this case is simply one between defendant and plaintiff. It may be that defendant is bound to receive the water running across his land to plaintiff's. If he is so bound, it is part of the defence to show that he has done no wrong. I do not think it necessary to join this third person with defendant in the action. If he desired the upper proprietor might be allowed to intervene, but the plaintiff cannot be compelled to force a person to litigation against whom he claimed no right, and who would not be affected by the judgment. The plea in abatement cannot be sustained. The costs will be costs in the action.

[Plaintiff's Attorney, Mr. D. Tennant, jun.; Defendant's Attorneys, Messrs. W. E. Moore and Son.]

JOSEPH AND OTHERS V. ESTATE (1901.
MULDER.) June 13th.

Land — *Fidei-commisum*—Contract of sale.

Held, that a stipulation in a contract of sale of land, that "the said ground shall never be sold or disposed of to a stranger, but shall continue to remain among the legal heirs," imposed a trust upon the purchaser to dispose of the property within the class specified; and was not equivalent in itself to a bequest to the class, and did not confer a vested interest on the legal heirs.

This was an action for a declaration of rights. The plaintiffs were Chiam Moses Josef and Morris Josef, carrying on business as M. Josef and Co., of Oudtshoorn; Philipus Ludovicus Olivier, married in community of property to Anna Maria Mulder; and

Christian Michael Lind, in his capacity as trustee of the insolvent estate of Mattheus Mulder.

The defendants were Maria Susanna Mulder (born Van der Westhuizen, in her capacity as executrix testamentary in the estate of the late Willem Gerhardus Mulder; Andries Hermanus Mulder; Hendrik Frederick Breytenbach, married in community of property to Anna Catharina Hester Mulder, and James Alexander Foster.

The plaintiffs' declaration was as follows:

1. The plaintiffs are (1) Chiam Josef, of Oudtshoorn; (2) Moses Josef and Morris Josef, carrying on business at Gamka, in the division of Oudtshoorn, under the style or firm of M. Josef and Co.; (3) Philippus Ludovicus Olivier, married in community of property to Anna Maria Mulder; (4) Mattheus Mulder.

2. The defendants are: (1) Maria Susanna Mulder (born Van der Westhuizen), widow of the late Willem Gerhardus Mulder, of Armoed, in the division of Oudtshoorn, who is sued in her capacity as executrix testamentary in the said W. G. Mulder's estate; (2) Andries Hermanus Mulder, of Armoed; (3) Hendrik Frederick Breytenbach, of Armoed, married in community of property to Anna Catharina Hester Mulder; (4) James Alexander Foster, of Oudtshoorn.

3. The late Willem Gerhardus Mulder was married to the first defendant in community of property, and died on July 8, 1899, leaving seven children him surviving, amongst whom are the wife of the third plaintiff and the fourth plaintiff.

4. The parents of the said late W. G. Mulder were named Johannes Jacobus Mulder, sen., and Jacoba Hendrina Mulder (born Olivier), and were married in community of property, and on or about September 24, 1881, they executed a document (a translation whereof is hereunto annexed, marked A), whereunder they made over certain landed property belonging to them, and then registered in the name of the said J. J. Mulder, to the said W. G. Mulder, for the sum of £300, upon the condition therein stated, that the said ground should never be sold or parted with to a stranger; but should continue to remain for his lawful heirs, and it was further provided in the said document that it should be registered with the transfer deed of the said property.

5. Thereafter the said J. J. Mulder, sen., died, and on or about July 5, 1890, the said W. G. Mulder and Robert Alfred McIntyre, in their capacity as executors in the

said J. J. Mulder's estate, transferred to the said W. G. Mulder portion of the landed property made over as aforesaid, subject to the conditions contained in the aforesaid document A, which was annexed to the title deed.

6. The true effect of the said document annexed as aforesaid was to confer upon the said W. G. Mulder merely a life interest in the said property, the children of the said W. G. Mulder succeeding jointly to the full ownership in the said property upon their father's death; thereafter on August 4, 1894, the said W. G. Mulder passed a mortgage bond upon the said property transferred to him as aforesaid, in favour of one Richard Gavin, for £500, and the said Gavin ceded the said bond to the second defendant; the said W. G. Mulder further mortgaged the property on August 15, 1896, to the said A. C. H. Mulder, now married to the third defendant; and on April 26, 1897, he mortgaged the said property to the fourth defendant for £305; the said mortgagees took their respective mortgages, with notice of the document A, registered with the title deed.

7. The first plaintiff purchased on March 15, 1900, at public auction, in the insolvent estate of one Johannes Jacobus Mulder, a son of the late W. G. Mulder, who became insolvent on or about 12th January, 1900, all the rights of the said insolvent in and to the said property.

8. Mattheus Mulder, the fourth plaintiff, prior to July 23, 1900, became indebted to second plaintiffs for certain moneys advanced to him, and on July 23, 1900, he passed a notarial bond in their favour, pledging, amongst other rights, all his right, title, and interest in and to his share of the said property. Since action brought the estate of the said Mattheus Mulder was placed under sequestration as insolvent, and thereafter the trustee of the said estate sold and the first plaintiff purchased, subject to the said deed, the right, title, and interest of the said Mattheus Mulder in and to his share of the said property.

9. The plaintiffs contend that the first plaintiff is entitled to two-sevenths shares and the third plaintiff is entitled to a one-seventh share of the property mentioned in the said document A, free and unencumbered, and that it be declared that the said mortgage bonds are null and void, and that it be declared that the first and third plaintiffs are respectively entitled to receive from the first defendant transfer of their said shares.

The plaintiffs claim;

(a) A declaration of their rights in and to the said landed property.

(b) An order declaring the said mortgage bonds to be null and void, and directing that they be cancelled.

(c) An order on the first defendant to pass transfer to the first plaintiff of two-sevenths shares and to the third plaintiff of one-seventh share in the said property.

(d) Alternate relief.

(e) Costs of suit.

Annexure A.

On the 24 th September, 1881, we, the undersigned, declare to have bequeathed to our son, Willem Gerhardus Mulder (Joh. son), one-sixth ($\frac{1}{6}$) share in Lot No. 53 of the farm Armoed. The said one-sixth share shall contain and comprise 78 morgen and 30 square roods, including the corn lands, as surveyed, Lots B and C on diagram, and the remaining morgen of pasture land. The said W. G. Mulder shall not be entitled to more ground, as per transfer, than the said 78 morgen and 30 square roods.

We bequeath the said share for the sum of three hundred pounds sterling, with interest at 6 per cent. per annum, but after the death of the first dying of us the interest shall be decreased to 3 per cent. The said ground may never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs.

This bequest shall be attached to the deed of transfer.

(Sgd.) J. J. MULDER.

(Sgd.) J. H. MULDER (born Olivier).

As witnesses:

1. (Sgd.) A. MOELICK.

2. (Sgd.) B. T. RHEEDERS.

The defendants' plea was as follows:

1. They admit the allegations in paragraphs 1 to 8, save that as to paragraph 4. They refer this Honourable Court to the terms of the document therein referred to for the true meaning and effect thereof. The said document is hereinafter referred to as "the document."

2. They say, further, as to paragraph 2, that the persons, Andries Hermanus Mulder and Anna Catharina Hester Mulder, therein mentioned are the son and daughter respectively of the late Johannes Jacobus Mulder, sen., and his wife, Jacoba Hendrina Mulder, referred to in paragraph 6.

3. The allegations in paragraph 6, other than the first portion thereof, dealing with the effect of the document are admitted; but the allegations and contention in such first portion (down to and including the words "father's death") are expressly denied.

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4. As to paragraph 6, they say that by and under the provisions of the document the ownership of the land dealt with became and was vested in the late Willem Gerhardus Mulder; that the said W. G. Mulder during his lifetime had (and his executors now have) the right to alienate the said land, such right being either absolute and unconditional, or should this Honourable Court not deem it to be absolute and unconditional, subject only to the personal right of the legal heirs of the late aforementioned Johannes Jacobus Mulder and his wife, to claim, as against the said W. G. Mulder or his estate, that such alienation (if made) should be only to and in favour of the said heirs, such legal heirs having no real right in respect of the said land; that the plaintiffs herein have no real right or interest in and to the said land, nor any right whatsoever under the document; and that the said W. G. Mulder had power to hypothecate the said land, and that the mortgage bonds now in question are valid and of full force and effect.

5. In the alternative (to paragraph 4), should this Honourable Court hold that under the document the said W. G. Mulder took only a life interest in the said land, defendants say that plaintiffs are not legal heirs within the meaning of the document, or successors in title to such legal heirs; that the said plaintiffs have no right or interest in and to the said land, or at all, under such document; and that the mortgages in question do not prejudice, or infringe on, any right or interest of the plaintiffs, and are valid, and of full force and effect.

6. Defendants say generally that by reason of the premises plaintiffs have no ground of action against them, nor have such plaintiffs been injured in their rights by any acts of the defendants. They deny the justness of the contentions in paragraph 9.

The replication was general.

The facts of the case being common cause, no evidence was led.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for plaintiffs: It is common cause that the first party to this will died in 1887, and the second party in March, 1890, and that the transfer was made after the death of both parties. The important question is, What is the meaning of the clause "The ground shall never be parted with," etc.? Surely that meant that the property should go to the legal heirs. The defendants held that by the term "legal heirs" was meant the legal heirs of the original testators. It would be very unfair to uphold any such contention because the property was to pass

only on payment of a certain sum of money; and clearly the heirs would be prejudiced by such payment if the property did not go to them. Defendant's contention was that W. G. Mulder could do as he liked with the property. If such were the case, why should it have been ordered that a copy of the will should be attached to the deed of transfer? Surely the intent of this provision must have been that everybody should have notice of the entail.

[Maasdorp, J.: Even if there is a restriction on selling, it does not follow that you may not leave it by will.]

No, not if the future devolution of the property is provided for. Our point is that W. Mulder during his life passed a mortgage. Even if he could dispose of property by will, could he dispose of it *inter vivos* by mortgage? The first sale was in 1900, and W. G. Mulder had died in 1899; so Chiam Joseph bought after his death. Had then W. G. Mulder any right to mortgage the property to strangers? There can be no doubt that if a man buy land with knowledge of an equity thereon he must give up such land. *Sternkamp v. De Villiers* (10 Juta, 56). In this case it is not material whether the document referred to in annexure A is a testament, a *donatio*, or a sale.

[Buchanan, A.C.J.: It seems to be a sale. J. J. Mulder seems to have parted with possession *inter vivos*.]

The document is not suited to the form of a sale. Such a phrase as "We declare to have bequeathed" would be quite out of place in a contract of sale.

[Buchanan, A.C.J.: Yet on March 13 following he made the ordinary declaration of seller.]

I do not know how he came to sign that. In *Van Wyk's Case* (5 Juta, 1) a similar document was held to be a testamentary bequest.

[Buchanan, A.C.J.: Is not the test, was it revocable or irrevocable during J. J. Mulder's lifetime?]

I think irrevocable; the bequest of property for a certain sum is very common in this country.

[Buchanan, A.C.J.: A will would speak only on the death of the testator.]

There was a subsequent will though not affecting this property. This was no ordinary agreement of sale, for there was a condition which gave the purchaser merely a life interest with remainder over to his legal heirs. This amounted to a *fidei-commissum*. Even had he been insolvent, the creditors could not have taken the property, because of the condition, *ne exeat extra familiam*.

[Buchanan, A.C.J.: You say that this clause prohibits him from in any way dealing with the property?]

Yes; he would not, for instance, leave all the property to one of his children. That would be contrary to the feeling of the people of this country. And if it must go to the legal heirs, these could be ascertained only at the time of the death of the testator.

[Maasdorp, J.: If a restriction is so wide that you cannot determine its meaning it is void.]

This is not an indeterminate restriction. It is definitely stated that the property must remain amongst the legal heirs. The term "stranger" is used in antithesis to "legal heir." Even granting that W. G. Mulder had a right to dispose of the property by will, or to sell, he did neither. He mortgaged it, and certainly he had no right to do that. He was prohibited, not only from selling the land, but from parting with it, and hence he could not dispose of it by will. The real point in this case is: "Do mortgages to strangers hold good, and are we—both as legal and as testamentary heirs—entitled to the property?" The translator was not accurate in stating that the property was to "remain." The Court does not favour *fidei-commissum*. The ordinary meaning of the term "legal heirs" would be legal heirs of the first generation of the beneficiaries.

[Maasdorp, J.: Do they not here mean legal heirs of the old people—the original testators?]

The original testators by "legal heirs" could not have meant their own legal heirs. The declaration of seller made by old Mr. Mulder and his directions to annex the document to any deed of transfer shows that. If that were the meaning, why should the other brothers and sisters come in?

Mr. Close (with him Mr. C. W. de Villiers), for defendants: If there be any doubt as to the intention of parties who are respectively promisor and promisee, such doubt must be given against the promisor. The presumption is always in favour of the person burdened. Hence I would infer that by "legal heirs" was meant "legal heirs of the testator." I object to the words "made over" and "bequeath"; they do not represent the original Dutch words, "blyven voortduren." Again, "shall permanently remain" ought to be rendered "shall continue to remain." Plaintiffs' declaration discloses no good ground of action. They will not say whether the document in question is a will, a sale, or a donation. It is not a will, because it has been treated by the Master as a sale. Declarations of purchaser

and seller were made in the usual way, and the language of J. J. Mulder in this document could not be set against the solemn official language of these declarations. If this document is to be regarded as a will, the restrictions at the end thereof must be regarded as void, on the ground of uncertainty. (*Jarman on Wills*, p. 326 and 327.) Whether it is a will or not, the term "legal heirs" must mean legal heirs of the person who draws up the document. I contend that as W. G. Mulder and J. J. Mulder both had legal heirs, the clause is void, on the ground of uncertainty.

[Buchanan, A.C.J.: Then do you say that the purchaser of the property could not hand it over to his own children?]

We say that the heir had entire freedom of selection provided he confined his testamentary disposition to his legal heirs (*Voet*, 36, 1, 29). The real question at issue is: Had W. J. Mulder a right to pass bonds on the property to persons who were not legal heirs, and are these bonds good or bad?

[Buchanan, A.C.J.: They are good to the extent of the interest of the mortgagor.]

We do not admit this restriction. The ground has not been parted with and the original word "voortdurend" does not necessarily include mortgage. The presumption is in favour of the mortgagor (*Burge Col. Law*, Vol. 2, chap. 8, Juta's edition, p. 114). *Burge* cites *Voet* (36, 1, 27). The "parting with" in the document means parting with by total alienation. We have not "parted with" the property in this sense. The bondholder took with notice of the terms of the document and the plaintiffs now come in as strangers. The last thing old Mr. Mulder ever thought of was that Chiam Joseph would come in and claim two-sevenths of his estate. W. G. Mulder could do as he pleased with the property, provided he did not alienate it out of the family. If bonded property is left, the bond is a charge on the estate.

[Maasdorp, J.: Suppose the estate is insolvent?]

Then the estate has the burden upon it. Somebody must pay.

[Maasdorp, J.: If the estate was insolvent could not the creditors have seized and sold it?]

I would go so far as to say yes. But any pact or contract is void if uncertain, and then the document imposes no penalty for alienation.

[Maasdorp, J.: Have you any authority to show that property which cannot be alienated may be sold in execution?]

The interest of a fiduciary may be sold in execution. But whether the document was a will or a sale, it was void on the ground of uncertainty (*Van der Linden*, Juta's Translation, p. 67; *Hayter v. Joinville*, 3 East, 173; *Leek on Contracts*, pp. 985 and 591). We hold that it is a sale with a pact annexed. The presumption is against a *fidei-commisum*: *Voet* (36, 1, 10). True that *fidei-commisum* may be constituted by act *inter vivos*. *Voet* (36, 1, 9). But such *fidei-commisum* gives no real right but only a personal right.

[Buchanan, A.C.J.: It has not been shown whether or not the bonds can be paid out of the estate.]

No. We say here is a *fidei-commisum* constituted by act *inter vivos*. What remedy then remains to plaintiffs? If they can have a *reivindicatio*, they can claim free of burdens. If they have a *condictio*—a personal claim, they can only sue the alienator for damages (*Williams v. Williams*, 6 Sheil, 215).

[Buchanan, A.C.J.: Does not a personal right affect landed property by registration?]

No. Registration is a mere notice to the whole world, but a registered *fidei-commisum* may found a real right—*Voet* (36, 1, 9)—but I would observe that he contradicts himself (39, 5, 43). *Sande* (*Restraints on Alienation*, p. 306 of Webber's Translation, section 14) says that a real right can be transferred only by delivery or by will. I admit that *Sande* (par. 36, pag. 314) is against me; but *Perezius* (8, 55, 6) and *Consult. Holt* (V. 3, p. 693) are in my favour. Also *Mühlentruhl* (section 266) and *Zoesius* (39, 5, 63). These authorities do not consider so much the question of notice as the way in which *dominium* is transferred, and this, they say, can be done only by delivery. Our third point is that this is a *fidei-commisum* constituted by act *inter vivos*. In *De Jager v. De Jager* (1 App. Cas., 429) it is implied that the word "heirs" is used in a vague sense unless coupled with some prefix. (*Sande*, p. 231 of translation, 3, 6, 18, and 3, 6, 15, page 230 of translation.) These authorities show that in cases of doubt nearness in blood to the maker of the document shows in whose favour it should be interpreted. *Smith v. Momberg* (12 Juta, 295). I must admit that this case seems to go against us, but the circumstances were very different from those of the present case. To sum up briefly: There is no form of real right under which this claim can be brought. It is neither a pledge, a servitude nor a will.

The terms "legal heirs," "sold and parted with" must be construed in favour of liberty. We hold that the bonds are valid, and that W. G. Mulder had not a mere life interest in the property, but could do as he pleased with it, provided he did not sell it to a stranger; also that the term "legal heirs" in the document means the legal heirs of the original testators.

Sir H. Juta, K.C., in reply: I will take my learned friend's last point first. If property which cannot be alienated be sold, does the purchaser acquire a *jus in rem*? If we have *Voet* and *Sandc* on our side in favour of the negative, we may well dismiss inferior authorities. *Voet* says that the holder of such property is bound by the restraint, and that he cannot sell. In this case the purchasers knew what they were doing. The registration of the will with the title deed was notice to all the world. My learned friend said the action was premature because the property was not yet sold. Had we waited for the sale defendant would have told us that not he, but the Sheriff, had sold it in execution. Under a general prohibition against alienation, alienation by will is forbidden. *Voet* (1, 36, 27). Mortgage is the first step towards alienation.

[Maasdorp, J.: There was no prohibition against alienation, but only a restraint.]

Alienation to a stranger was forbidden, and the property has been mortgaged to a stranger. Rules of construction of wills are all very well, but we have to try to find out what the testator meant. If the beneficiary has alienated to a stranger, somebody must have the right to object, and if a beneficiary is forbidden to alienate, and the devolution of the property is then indicated, this amounts to a *fidei-commissum*. *Voet* (1, 36, 27). This is a much stronger case. The original testators said, "You must not alienate to a stranger."

[Maasdorp, J.: In the case instanced by *Voet* the property had to go for nothing. In this case the beneficiary could have sold it to anybody in the family.]

I never admitted that. Even if a certain class (*viz.*, strangers) only was excluded, these mortgagees belong to that class.

[Maasdorp, J.: W. G. Mulder had a right to give the property to any other heir for a price?]

That would give rise to fraud. He might have mortgaged it, let us say, to Smith, and then bequeathed it to Willem for £6,000. Let us suppose the property was worth only £1,000. Of course Willem would not buy for £6,000; it would then go to Smith, and

the intention of the testator would be frustrated.

[Buchanan, A.C.J.: Why cannot he sell with a condition?]

He has not sold to the heirs, but mortgaged to a stranger.

[Buchanan, A.C.J.: The real question is, do the children take a vested interest under this document?]

If they do not, nobody does. Either it creates a *fidei-commissum*, or it is inoperative. The only restraint on alienation known to Roman-Dutch law is a *fidei-commissum*. Here there is a clear restraint, which had to be annexed to the title deed.

[Buchanan, A.C.J.: Then you say Willem was bound to leave equal shares to each of his children?]

The bequest leaves them equal shares. It might be that under the will we could not claim any specific property, but we could under the document. By it a *fidei-commissum* is clearly constituted. "It must be attached to the title deed." That shows that testator's intention was to burden the property in favour of his legal heirs. It is not necessary to consider whether Willem could have disposed by will, or by deed *inter vivos*, to others than heirs. When speaking of heirs, the old people could not have meant their own legal heirs, *quia nemo est heres viventis*.

[Buchanan, A.C.J.: That would also apply to W. G. Mulder. But the moment the testator is dead, there are legal heirs.]

Yes. I have never known a will to be set aside because it was too difficult to interpret. It evidently means that the son was to be fiduciary heir, and then the property was to go to his legal heirs.

[Maasdorp, J.: Suppose he had alienated it to one of the family?]

Then on his death it would have gone to the next-of-kin.

[Buchanan, A.C.J.: What if he had become insolvent?]

That would have made no difference. There cannot be a sale of *fidei-commissary* property in insolvency.

[Buchanan, A.C.J.: You say Willem could not alienate to anybody?]

We need not go as far as that, since it is admitted that the present bondholders are strangers. If the restraint is worth anything, the *fidei-commissary* beneficiaries cannot alienate, and mortgage is the first step in alienation. Then, again, are the children of Willem entitled to a share in the property? My learned friend thinks not, but even if it were held that legal heirs were not

entitled to share, the document cannot refer to the legal heirs of J. J. Mulder. (*Sande and Fort.*) The intention of the old people was obviously to constitute a *fidei-commissum*, and the fiduciary could not alienate. Then if there is a *fidei-commissum*, who are to be the legal heirs? Clearly not the mortgagees. My learned friend has said that all we can do is to claim damages on the estate. It is quite true that in a case of "massing" if the property be alienated to a *bona fide* purchaser for value it cannot be reclaimed. But here there was no *bona fide* purchaser. *Lange v. Scheepers* (Buch., 1878, 92). Even an unregistered servitude can still be claimed if the purchaser of the servient tenement had notice.

Cur. ad. vult.

Postea (July 2, 1901).

The Acting Chief Justice delivered judgment as follows: The issues raised in this case depend upon the construction to be placed on a clause of a document annexed to the transfer of a portion of the farm Armoed, in the district of Oudtshoorn. In September, 1881, the late J. J. Mulder, in his lifetime, made over certain of his landed property to his sons, one of whom was Willem Gerhardus Mulder, now also deceased. A document was signed by the elder Mulder and his wife, in which they declared to have "bequeathed" a specific share of the farm Armoed to their son Willem for £300, upon which sum the son was to pay 6 per cent. per annum during the joint lives of his parents, and 3 per cent. during the lifetime of the survivor. The document concluded, according to the translation annexed to the declaration, with the following clause: "The said ground may never be sold or parted with in favour of a stranger, but shall permanently remain among legal heirs." It also required that this "bequest" should be attached to the deed of transfer. Plaintiff's own counsel did not approve of this translation, taking exception mainly to the word "permanently." The original Dutch is: "Gezegde grond zal nimmer aan eenen vreemden kunnen verkocht of afgestaan worden maar onder wettige erfgenamen blyven voortduren." This may be more accurately rendered: "The said ground shall never be sold or disposed of to a stranger, but shall continue to remain among the legal heirs." The difference, however, between these translations is not after all very material. Though termed a bequest, the transaction was treated as a sale and purchase. Possession was immediately taken by the son, and the elder

Mulder made the declaration of seller necessary to effect transfer, though the actual deed was not registered till after his death, when his executors, in 1890, passed transfer, stating therein that the property had been sold by the elder Mulder to the son. The document has never been filed as a testamentary bequest. After its execution, the elder Mulder and his wife made their last will, in which no specific reference was made either to the document or to the property dealt with therein. After he had obtained transfer the son Willem passed three mortgages upon the property for debts which are still unpaid. Willem died in 1899, leaving seven children, one of whom had become insolvent before his death and one after, and the first-named plaintiff, Chiam Joseph, bought from their estates, and held by cession from the trustees, all the rights these two children might have under the said deed signed by their grandparents. Another of these children was a co-plaintiff, and the defendants were the widow and executrix of Willem's estate, and the bondholders. The declaration alleged that the true effect of the document annexed to the transfer was to confer upon Willem merely a life interest in the property, and that upon his death his children succeeded jointly to the full ownership therein. The plaintiffs therefore claimed a declaration of rights, and an order declaring that the mortgage bonds were now null and void, and should be cancelled, and that transfers of their respective shares should be passed to the claimants. The construction put upon the document was contested by the defendants. Though Willem bonded the property, which with us only imposes a burden and does not effect any alienation of the *dominium* therein, he does not appear to have made any attempt during his lifetime to sell the same. By his last will, executed mutually with his wife, he instituted generally his wife and children his heirs to all his property, movable and immovable, giving the right of possession of the immovable property to his wife until their children should marry, when each one was to receive his or her share subject to certain conditions as to the produce; and he further prohibited his children from selling their share to any stranger, or to exchange the same except as among themselves. If Willem had a power of disposition, and his children took the property subject to the prohibition, the plaintiffs, who are strangers, would not be entitled to claim transfer. The plaintiffs recognise this, and consequently they found their claim solely

upon the original document. Several interesting propositions of law have been raised at the hearing of this case. For instance, considerable argument was expended on the question whether or not the document was to be considered a testamentary bequest, or a contract; and the point was made that when title was given by will a real right was created, whereas under a contract only a personal right could be acquired, and consequently the mortgagees were not bound by a condition which did not run with the land. Such a distinction, however, even if it existed, became immaterial as soon as it was admitted that the mortgagees took with notice, which admission they could not well escape, seeing that the document had been registered against the title to the property before the mortgages were passed. So, too, it is not a matter of practical importance to reconcile the conflicting opinions of the text-writers as to whether a *fidei commissum* can be created by agreement or only by will. A *fidei commissum* may be either absolute or it may be conditional, and what is of importance is, the terms it imposes upon the person or property subject thereto. So also in a contract, what has to be considered is, what are the terms agreed upon? Whether in the construction of this clause we approach the question from the standpoint of a testamentary disposition, and endeavour to discover from the language used the intention of the testator; or whether we regard it as a contract, and look at it to ascertain what was agreed upon between the parties, the result will be the same. What, then, does the clause in question stipulate? *Sande*, in the 5th chapter of his treatise on "Restraints upon Alienation," draws the distinction clearly between a direct bequest to a class coupled with a prohibition, and a bequest which prohibits alienation outside of that class. The first he says, imposes a *fidei commissum simplex et purum*, or *simplex et absolutum*, and has the effect that the prohibited person cannot change the order of succession which the law interprets as having been laid down by the testator. In the latter instance the *fidei commissum* is conditional, the testator not himself bequeathing the property, but he imposes a trust upon the heir so to bequeath it, and therefore leaves it to his discretion to leave the property to whom he wishes, so long as he leaves it to one coming within the class of persons designated. This appears a sound distinction, and one applicable to a condition contained in a contract equally with a trust imposed by testament. To bring the clause in this case within the

definition of a direct bequest, the plaintiffs wish to read it as if the words "to a stranger" had not been inserted, or rather that these words were used in a sense antithetical to "legal heirs," and as supplying only a reason for the prohibition. It may be observed that neither side adopted the view that the clause imposed an entail upon the property. Such a burden should not be presumed if the words do not clearly justify such a conclusion. In construing this document, the fact must not be overlooked that the context shows that this was not a donation, but that a substantial price was paid for the land, and unless it was clearly prohibited, the purchaser might reasonably consider he could at any time reimburse himself his outlay. If that was so, the clause was not a bequest to any of the legal heirs, and gave them no vested right in the property itself. They might have a right of pre-emption, but that was very different from a right to the property. I see no reason why effect should not be given to all the words inserted in the clause, including "to a stranger." Giving all the words their ordinary significance, the clause appears to me not to be a bequest to the legal heirs, but rather that the parties intended to place a restriction on the purchaser, prohibiting alienation outside of that class. And there is the authority of *Sande* in support of the view that such a condition would be satisfied if the property was sold or disposed of to any one of the legal heirs. The question of the rights of the parties under the will of Willem Gerhardus Mulder is not raised on the pleadings, and cannot now be determined. All the Court can deal with is the document signed by the elder Mulder and his wife, and annexed to the transfer, and we are of opinion that under that document there was no bequest to the children of Willem Gerhardus Mulder, and consequently there cannot be such a declaration as is prayed in this case. Judgment will therefore be for the defendants, with costs.

[Plaintiff's Attorney, G. Trollip; Defendant's Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice). and the Hon.
Mr. Justice MAASDORP.]

PURCELL, YALLOP AND ANOTHER (1901.
V. PITT. (June 14th.

Provisional sentence was prayed for on two promissory notes, which had become due. One of these was for the sum of £393 12s. 2d., and the other for £300 16s. 8d.

The defence was that the defendant ceded certain claims he had against other people to the plaintiff, with whom, he alleged, it was agreed that these amounts should be appropriated towards the payment of the promissory notes. Defendant said that there now only remained an open account. Plaintiffs denied this.

Mr. Upington appeared for the plaintiff.

Mr. Searle, K.C., for the defendant.

In giving judgment, the Acting Chief Justice said that the defendant in this case signed two promissory notes, which had become due, and in respect to which plaintiffs sued. In answer to this claim, defendant said that he ceded certain claims, which he had against other people, to the plaintiffs, and that it was agreed between them that the amounts of these claims should be specifically appropriated as against the promissory notes. This was denied by plaintiffs, who said that the cessions were as payments for other matters, and that most of the cessions were made before the promissory notes were ever signed or entered into. The Court found that there had been no agreement for the specific appropriation, and provisional sentence was granted as prayed, with costs.

M-SHWAKAZELE V. GUDUSA. { 1901.
{ June 14th.

Booty captured by the enemy *Jus postliminii*—Roman and Roman-Dutch Law.

The distinctions made by the Roman law between various classes of movables as to jus postliminii are not recognised in Roman Dutch law.

The original owner of movable property captured by the enemy

is divested of such property when the enemy has acquired firm possession of the goods and they have been carried infra præsidia, that is to say, to a place of safety.

This was an appeal from a judgment of the Resident Magistrate of Mafeking.

In the Court below plaintiff (now respondent) issued the following summons against defendant (now appellant):

Summon Mshwakazele, of Mafeking (hereinafter styled the defendant), that he appear before the Court of the Resident Magistrate of this district to be holden at Mafeking on Tuesday, 19th February, 1901, at 10 in the forenoon, with his witnesses, if he have any, to answer Jacob Gudusa, of Mafeking (hereinafter styled the plaintiff) in an action as follows, to wit, and thereupon the said plaintiff complains and says that on or about January 2, 1901, and near Mafeking, defendant wrongfully and unlawfully possessed himself of three donkeys of the value of £15, the property of plaintiff, and which said donkeys defendant unjustly detains and refuses to restore to plaintiff, although requested to do so.

Wherefore plaintiff prays that defendant be adjudged to restore to him the said donkeys or to pay the value of the said donkeys, viz., £15; also the sum of £5 as and for damages for the wrongful and unlawful detention of the said donkeys as aforesaid, and costs of suit.

To this summons defendant pleaded the general issue, and the Resident Magistrate gave judgment, after taking evidence at great length, for plaintiff for the restoration of the three donkeys claimed, or payment of their value, £15, and £1 10s. damages and costs.

The Magistrate's statement, under section 7, Act 43 of 1885, was as follows:

1. Plaintiff contends:

(a) That the three donkeys claimed were never the property of the defendant, and

(b) That even if they were at one time the defendant's property, having fallen into the hands of the enemy during the siege of Mafeking, the defendant, *ipso facto*, lost his right of ownership over them, quoting 34), 2, (14

Van der Linden (1, 7, 2 (c), and section 4, *Grotius* (Ch. 4), and *Van der Kessel* (2, 4, 34); and

(c) That plaintiff acquired such right in respect of two of the donkeys by *bona fide* purchase from the estate of one Bradley, and

in respect of the third donkey, by purchase from one Tawana, who had obtained it by capture from the enemy under authority.

It was pointed out further that a claim for compensation for the loss of these donkeys had been filed on behalf of the defendant, who thereby practically accepted the position that he had lost his right of ownership in the donkeys.

Defendant's attorney stated in reply that in the event of his client recovering the donkeys any compensation awarded in respect of their loss would of course be withdrawn.

On behalf of the defendant it was contended:

(a) That the three donkeys claimed are three of the six owned by the defendant prior to the siege of Mafeking.

(b) That in accordance with the law as laid down in *Van der Merwe v. Webb* (3 E.D.C., 97), and *Kitchen v. Stroebel* (Buch., 1878, 125), defendant was entitled to demand the return of the two donkeys purchased from Bradley's estate by plaintiff.

(c) That the third donkey having belonged to defendant, a British subject, prior to its capture by the enemy, and having subsequently been purchased by plaintiff, also a British subject, is still the property of the person from whom it was captured, viz., defendant, quoting in support the judgment in *Woodward v. Larkin* (Fisher's Common Law Digest, Vol. 7, p. 405).

(d) That plaintiff's claim to the ownership of the three donkeys being no better than that of defendant, the latter, as the person in possession of them, should be allowed to retain them until plaintiff brings more conclusive evidence of his right of ownership; and that defendant is therefore entitled to a judgment of absolution from the instance.

3. In reply to defendant's contention of possession, paragraph 2 (d), *Kemp v. Roper* (3 H.C., 458), confirmed on appeal, was quoted by plaintiff's attorney.

4. Plaintiff's case that the donkeys now claimed are not those formerly owned by defendant was based mainly on the grounds:

(a) That the two old donkeys originally bought by defendant at the rinderpest time, viz., 1896-1897, were both branded C.O. on their necks, whereas of the two donkeys now said to be the same, are not so marked, while one—the one in defendant's possession, and not in dispute, which was brought up for the Court's inspection—still has the C.O. The other, which is one of those bought by plaintiff from Bradley's estate has a brand like an

S placed horizontally on the neck, and cannot therefore be one of those originally owned by defendant.

(b) That the evidence as to marks on the donkeys is so conflicting that the witnesses cannot be relied on, and

(c) That the identification by defendant's witnesses is only from the several appearances, and is not sufficiently definite to be accepted as evidence.

5. The C.O. on the first donkey mentioned in paragraph 4 (a) is very indistinct, while the S on the other is fairly clear. It is possible, looking to the time—about four years—since the brand C.O. was put on, that it has become obliterated, and that the S was placed on the donkey during the time the animals were out of defendant's possession. The same brand is on this donkey's foal, the second animal bought from Bradley's estate by plaintiff. One of the witnesses identifies the foal as one of those that belonged to defendant, and states that the S was not on it when it was lost by defendant.

6. The conflict of evidence in regard to the brands can, to some extent, be accounted for by the fact that the witnesses are natives, the majority of whom, while they are quite able to recognise animals, cannot tell one letter from another. I came to the conclusion that the evidence was in favour of defendant's contention that the three donkeys claimed are three of those lost by him during the siege.

7. I further found that the fact that the donkeys were captured by the enemy was proved.

8. In view of the Roman-Dutch law authorities quoted above, paragraph 1 (b), I held that defendant lost his right of ownership over the donkeys when they were captured by the enemy. Defendant having thus been deprived of his right, the law as laid down in the cases of *Van der Merwe v. Webb* and *Kitchen v. Stroebel* does not apply in this instance.

9. I held further:

(a) That as regards the two donkeys bought by plaintiff from Bradley's estate, he had acquired by purchase a right of ownership, which, so far as defendant is concerned, is good; and

(b) That in respect of the third donkey, Tawana, having captured it from the enemy under authority of the officer in command of His Majesty's Forces here, his right of ownership was a good one as against all claimants, and that this right he transferred for value to plaintiff.

10. I therefore ordered the restoration of the three donkeys to plaintiff, on payment of their value, £15.

11. I thought the claim for damages would be met by allowing 10s. for each donkey, and gave judgment for plaintiff accordingly for 30s. damages, and costs.

From evidence led in the Court below, it appeared that the donkeys in question had strayed into the enemy's lines during the siege of Mafeking, and been captured, and that they were originally the property of the defendant. The only question of fact at issue was whether they had been taken firm possession of by the enemy.

Mr. Searle, K.C., for appellant: The Magistrate found as a fact that these donkeys were in possession of the enemy during the siege. The point is, was there sufficient evidence to justify this finding? Movable property becomes the property of the enemy by capture. *Van der Linden* (1, 7, 1 (e), citing *Grotius* (2, 4, 34) and *Van der Kessel* (Th. 191 and 192).

[Maasdorp, J.: If a ship has been confiscated, the owner loses his property?]

In order that the enemy may be said to have firm possession, he must have retained the property 24 hours, and have carried it *infra præsidiu*. *Wharton* (Sec. 398); *Woolkurd v. Larkin* (3 Espinasse, 286); *Kitchen v. Stroebel* (Buch., 1878, p. 125); *Van der Merwe v. Webb* (3 E.D.C., 97).

[Maasdorp, J.: If the donkeys were found in possession of the enemy, Bradly cannot set up his title?]

It would be very dangerous to hold that if the enemy remains 24 hours on a farm, all movables on the farm pass to them. In every case there should be proof that the property was removed to some place where they could hold and keep it, *infra præsidiu*. The Magistrate was clearly wrong as to the two donkeys. The other donkeys were said to have been looted by a native; but these natives are not enemies. The donkeys had not been shown to have been brought *infra præsidiu*.

Sir H. Juta, K.C., for respondent: These donkeys had strayed beyond the British lines during the siege, and we may be sure that when they did so they were taken possession of by the enemy. There is no doubt about the law. By Roman law, movables captured were booty. *Sandara* (2, 1, 17). So in Dutch law. *Grotius De Jure Belli ac Pacis* (Book 3, chap. 9) says: Movables become prize, and do not return by *postliminium*. So also *Grotius* (Book 2, C. 4). Things captured by the enemy are *res nullius*, and become *primi occupantis*. In

this case the donkeys were captured, and one of them was found in possession of a native, who had been fighting on the side of the enemy. The enemy had firm possession of these donkeys; they had not obtained them by a mere raid. If this doctrine of *infra præsidiu* were to be strictly construed, we should have a most complicated state of things, e.g., as to cattle looted from the enemy by our troops.

[Buchanan, A.C.J.: As to the two donkeys, the evidence only shows that they wandered into the enemy's lines.]

If they did that, they were captured.

Mr. Searle (in reply): The Magistrate did not appreciate the law on this subject. The evidence is very vague, and in a case of this kind it ought to be very strong. The donkeys may have been recaptured next day, as far as we know. The enemy never took firm possession of them, and they were found in possession of a British subject. The Magistrate mistook the law. There should have been evidence to show that the property had been adjudicated to be "loot" by some Court or other. The judgment of the Resident Magistrate should be reversed, at least as to these two donkeys.

The Acting Chief Justice said: This appeal has raised an interesting question of international law, though there has been no dispute as to what the law really was. At the siege of Mafeking defendant was in possession of certain donkeys which strayed away into the enemy's lines. After the siege was raised the defendant found his donkeys in the neighbourhood and took possession of them. The plaintiff now claimed these donkeys, and the onus was upon him to show that his title was a better one than that of the defendant. The ground upon which plaintiff based his title was that the donkeys had been captured by the enemy, and that the defendant had, therefore, lost his property therein. The text writers lay down that as regards movable property, the goods of the enemy were in the same position as *res nullius*, the ownership of which could be acquired by the party first taking possession of them, and *Grotius* states that it does not matter whether such party be in military service or not. As to property taken by the enemy and recaptured from him, in general such property was considered as *præda*, that is, part of the spoils of war, but under the Roman law there were certain things to which from their particular character a *jus postliminii* attached, and which on being retaken reverted to their original position or to their original owner. As to immovable property, that was governed by different

rules. *Grotius*, in the passage cited from *De Jure Belli et Pacis* (b. 3, c. 9, s. 15), states that as regards the *postliminium* of movables, the distinction between different classes which existed under the old law was abolished. The statement in section 359 of *Wheaton's International Law*, seems to me to correctly lay down the law which applies to movables. Upon capture, the original owner was divested of his property when the enemy had acquired firm possession of the goods, or, as he stated, after the booty had been carried into a place of safety, *infra præsidia* of the captor. Though probably a *præsidium* originally implied some fortified place or entrenchment or camp, it would not necessarily be confined to such a place in modern warfare. But it meant something more than a casual occupation, followed by an abandonment of the property. The Magistrate has found as a fact that the donkeys were originally the property of the defendant, and he also found that they had been captured by the enemy. The evidence, it is true, shows they had strayed into the enemy's lines, but as to two of the donkeys at least, there is nothing to show any taking firm possession of by the enemy. One of the donkeys was taken into the enemy's country, and was there recaptured by certain natives, who said they had been sent to loot the natives who had helped the enemy. The plaintiff bought this one donkey, and as regards it, there is ground for holding that the defendant has lost his title, for the donkey had been captured by the enemy and removed to a safe place. The person some months afterwards retaking it had, therefore, the better title to its possession. As to the two donkeys, there was no such evidence from which the Court could conclude that they had been captured and taken to a safe place, so as to give the captors a firm possession. They were lost during the siege, and after the siege was raised were found at Mafeking among the property of the estate of a Mr. Bradley, in whose estate they were afterwards sold by auction and bought by plaintiff. The plaintiff could not, on such evidence, be said to have discharged the onus cast upon him of proving that he had a better title to the donkeys than had the defendant. The judgment in the Court below should, therefore, have been an order for the return of the one donkey to plaintiff or the payment of £5 as its value, and 10s. damages and costs, and absolution from the instance in regard to the two other donkeys. The appeal will be allowed, with costs.

[Appellant's Attorneys, Minchin and Sonnenberg; Respondent's Attorneys, Findlay and Tait.]

MPAZWE V. MILLER. { 1901.
June 14th.

Attorney—Discretion to compromise—Responsibility.

Appellant engaged respondent to conduct his case in a certain R.M. Court against one Phillips. Respondent sent his clerk to conduct the case, which was called before appellant had arrived, and in consequence the clerk agreed to compromise the case with Phillips.

Held, That his error (if any) in so doing was at most an error of judgment, and that as he had shown neither mala fides nor want of ability in his conduct of the case, his principal had incurred no liability to appellant.

This was an appeal from a judgment of the Resident Magistrate of Ngamakwe.

In the Court below the defendant (now respondent) had been summoned to show cause why he should not be adjudged to pay plaintiff (now appellant) the sum of £23, which plaintiff claimed from him by reason of the following, and thereupon:

1. That defendant is an attorney-at-law practising in Ngamakwe and other districts of the Transkei.
2. That at the beginning of March, 1901, plaintiff instructed defendant to sue a certain man for £20, and that said plaintiff paid defendant £3 as a consultation fee.
3. That during said consultation, plaintiff informed said defendant that Phillips had tendered him £10 (which said plaintiff had refused to accept), but that he refused to pay the remaining £10, as he alleged he had suffered damages to that amount, owing to said plaintiff having been an unusually long time in delivering his goods.
4. That said defendant thereupon issued summons against the said Phillips for £20, and informed plaintiff that the case would be heard in the Tsomo Court on 14th inst.
5. That plaintiff thereupon appeared at the said Court on said date, when he was informed by defendant's articulated clerk that he had accepted £10 from the said Phillips in settlement of his (plaintiff's) claim against him.

6. That said defendant had no right to accept the sum of £10 in settlement, and that by reason of his having accepted it, he (plaintiff) has lost his claim against the said Phillips for balance of the said £20 (viz., £10).

7. That plaintiff has not received said £20 or any portion of it.

8. That by reason of defendant not having properly conducted the said case, plaintiff considers he is bound to refund the said fee of £3, and to pay him the sum of £20—in all £23.

Which sum defendant neglects and refuses to pay.

To this summons defendant pleaded: That without any negligence on the part of himself or his articted clerk, the sum of £10 was received from Phillips owing to plaintiff not appearing in the Resident Magistrate's Court at the proper time, and that such amount was received in good faith, and further, that the actual sum claimed by plaintiff, was £16, and £20 was claimed in the summons by defendant's own idea, and further, that he has tendered £8, which has been refused, and claims in reconvention from plaintiff £2 due on a promissory note signed by plaintiff in defendant's favour, and also the sum of £2 2s. 1d., which defendant claims as due on a bill of costs.

Plaintiff joins issue on the claim in reconvention.

In his reasons for the judgment appealed against, the Resident Magistrate says:

I find the following to be the facts of the case:

1. Plaintiff is a native, residing at Toloni, in the district of Butterworth. Defendant is an attorney practising in this village.

2. Plaintiff was engaged to convey a load of merchandise to the store of one Phillips, a trader residing at Tsojana, in district of Tsomo.

3. Plaintiff was delayed by a flooded river, and eventually went to Phillips for instructions, who directed him to leave the load with one Smith. This plaintiff did.

4. Subsequently plaintiff demanded from Phillips £20 0s. 9d., which he states was due to him for carriage of the goods. Phillips, however, repudiated liability for this amount, and tendered plaintiff one-half, which plaintiff refused to accept, and instructed defendant to proceed against Phillips in the Resident Magistrate's Court of Tsomo.

5. Defendant informed plaintiff of the date the case would be tried, and that de-

fendant's articted clerk, Kilfoil, would proceed to Tsomo to conduct it.

6. The case was set down for hearing at 10 a.m. At that hour plaintiff had not appeared, while Phillips had arrived, and thereupon Kilfoil, acting for plaintiff, accepted £10 from Phillips in settlement of plaintiff's claim.

Plaintiff now sues defendant for £23, being £20 he considers due to him from Phillips, and £3 he had paid defendant to conduct the case against Phillips.

Defendant claims in reconvention £2 due to him on a promissory note signed by plaintiff, and £2 2s. 1d., which he states would have been the amount of his bill of costs in the case of plaintiff versus Phillips, had plaintiff appeared in time.

It does not appear to me that defendant is guilty of such negligence (through his clerk Kilfoil) that he can be made liable for plaintiff's claim, especially as plaintiff himself did not appear at the Resident Magistrate's Court at the proper hour, and Kilfoil seems to have acted in what he considered the best interests of plaintiff by accepting Phillips's offer instead of allowing the case to be dismissed owing to the failure of plaintiff to put in an appearance, and thereby putting him to the expense of instituting fresh proceedings. I therefore consider that plaintiff cannot recover from defendant more than the sum actually received from Phillips. I also find that plaintiff is liable on the promissory note made in favour of defendant, but not for defendant's prospective bill of costs. As each of the parties partially succeeded in his claim, I came to the conclusion that there should be no order as to costs.

Sir H. Juta, K.C., for the appellant; Mr. Benjamin for respondent.

In giving judgment, the Acting Chief Justice said: On the day fixed for the hearing of the action between the appellant and Phillips, the respondent sent his clerk to conduct the case, and the appellant seems to have known that the clerk was coming, and raised no objection. When an attorney sends a clerk to do work for him, he is answerable if the clerk does not do the work with proper care and due diligence. When the clerk to accept, but at the same time the plaintiff had not arrived. There was only this case on at the court that day, and at ten o'clock, when the court opened, plaintiff, who was a native, had not arrived. The clerk then saw Phillips, and in the exercise of the discretion vested in an attorney, he accepted a compromise, thinking

it would be better in the interests of the plaintiff to accept the £10 offered than to allow a non-suit to be entered against him, and incur the costs by reason of his non-appearance. It was a very great risk for the clerk to accept this, but at the same time I think he had acted *bona fide*, and the Magistrate has so found. The native, not being satisfied, summoned the attorney for £23, on the ground that he had not properly conducted the case. An attorney is supposed to be reasonably proficient in his calling, and is liable in damages if he does not bestow sufficient care and attention in the conduct of business entrusted to him, but in this case the unfortunate result was due rather to the plaintiff's non-appearance at the proper time than to negligence on the part of the attorney's clerk. The clerk acted *bona fide*, and in the interests of his client in taking the action he did. It might be an error of judgment, if there was an error at all, rather than a want of care or a want of ability in the conduct of the case. The Magistrate in the Court below, after hearing the evidence, found that there was no want of care, and on the record as it stands, I am not prepared to say that the Magistrate was wrong in his finding. The appeal must be dismissed, with costs.

[Appellant's Attorneys, Messrs. Walker and Jacobsohn; Respondent's Attorneys, Messrs. Faure and Zietsman.]

THOMAS V. CABRITA. } 1901.
June 14th.

Costs — Taxation — Jurisdiction of Resident Magistrate.

Appellant was a witness in a Supreme Court action in which respondent was defendant. Appellant had been subpoenaed both by plaintiff and defendant. Judgment was given in favour of Cabrita and appellant applied to respondent's attorney for his witness's expenses. These were not paid. The taxing master refused on appellant's application to tax his expenses. Appellant thereupon summoned respondent for the amount (£3 15s.) in the Resident Magistrate's Court. Respondent excepted to the jurisdiction on the ground that the aforesaid

sum was claimed as S.C. (untaxed) costs and the Resident Magistrate upheld the exception.

Held, that as the amount claimed was within the jurisdiction of the Resident Magistrate the exception was bad, and the case must be remitted to the Resident Magistrate for hearing on the merits.

This was an appeal from a decision of the Resident Magistrate of Cape Town. Appellant (plaintiff in the Court below) was a witness in a Supreme Court action, in which Cabrita was defendant. He was subpoenaed by both sides. A verdict was given for Cabrita, and Thomas applied to Cabrita's attorney to have his expenses included in the bill of costs for taxation. This was not done, and Thomas asked the taxing master to include his expenses, but the latter refused to do so. Thomas then took out a summons in the Magistrate's Court to recover the amount of his expenses, £3 15s. Defendant took exception to the summons on the ground that the amount sued for was in relation to a witness's expenses, not taxed, and which were based upon the Supreme Court tariff, and that therefore the Magistrate had no jurisdiction. This exception was upheld, and the decision was now appealed against.

Mr. Wilkinson, for appellant: The sum claimed is well within the Magistrate's jurisdiction, and is on the same footing as any other illiquid debt.

Mr. Searle, K.C., for respondent: Appellant should have got his costs taxed. Nothing is due until the amount has been fixed by the taxing officer, the Magistrate had no power to tax.

By the Court: There is no provision for taxing costs between attorney and client in the Resident Magistrate's Court. *Manby v. Williams* (5 Juta, 183). It is only done as a matter of grace.

In giving judgment, the Acting Chief Justice said that the amount was within the jurisdiction of the Magistrate's Court, and the Magistrate ought to have heard the case. The appeal would be allowed, with costs, and the case remitted to the Magistrate for hearing on the merits.

[Appellant's Attorney, C. Brady.]

BOMOFF V. UNION-CASTLE CO., } 1901.
TABLE BAY HARBOUR BOARD } June 14th.
AND MCKENZIE AND CO.

Cause of action—Pleading.

Appellant had sued the above three sets of respondents (in the Magistrate's Court, Cape Town), the first for non-delivery of luggage at the Cape Town Docks. The second for not having deposited the said luggage in their warehouse. The third for not having delivered to him (appellant) the luggage in question. In none of these three cases did appellant aver that the party sued had not fulfilled the respective duty in question.

Held, that such a summons did not disclose any cause of action and that the appeal must be dismissed.

This was an appeal from a decision of the Resident Magistrate of Cape Town.

The summons in the Court below stated that plaintiff was a passenger from Southampton to Table Bay by the S.S. Arundel Castle, owned by the first-named defendants.

That as such passenger he had certain luggage which it was the duty of said company to deliver in the Prince Alfred Docks at Cape Town according to law. That upon delivery in their docks at Cape Town, it was the duty of the second-named defendants to receive and safely deposit the said luggage in their baggage warehouse at Cape Town according to law. That the third-named defendant, as the duly appointed contractor for said Harbour Board, was in duty bound to remove all baggage from the wharf to the baggage warehouse, but failed to do so. Moreover that though certain of his baggage by this ship was delivered by said McKenzie and Co., yet one package of the value as aforesaid has not been delivered, and while the said first-named defendants say the package was put on shore, the others deny this, and after being referred in vain from one to the other for some weeks past, he now prays that these several defendants may be held severally liable.

To this summons the first-named defendants pleaded that there was no allegation

that they had not landed the package in question at the Docks.

The second-named defendant pleaded that no privity of contract between themselves and plaintiff had been alleged and that there was no allegation that they had received the baggage or had failed to deliver it.

The third-named defendants pleaded that there was no allegation that the baggage had been landed and placed in their possession.

In his reasons for his judgment the Resident Magistrate says:

"It appeared that plaintiff sought in one and the same plaint to allege as against the first-named defendants that the baggage had not been landed, and as against the second and third named defendants that it had been landed, although this does not appear to be clear from the wording of the plaint itself. It was also argued by the third-named defendants that the prayer of the summons was defective, but I held that the first part of the plaint showed that delivery of the baggage in question was claimed or otherwise the payment of £20 as its value. The other exceptions I sustained with costs."

Mr. Wilkinson for the appellant.

Sir H. Juta, K.C., for the Union-Castle Co. and Mr. Upington for McKenzie and Co.

The Acting Chief Justice remarked that he appreciated the difficulty the plaintiff was in of finding out who was liable, and could quite understand his vexation in finding the parties shifting the responsibility from one to another. If three different cases had been instituted the Court might have heard them together, but even then the plaintiff would necessarily be unsuccessful in two of the actions. His lordship thought that the manner in which unfortunate consignees who had lost goods were referred about from one to another, without being able to find the responsible party, was disgraceful.

Mr. Wilkinson (for appellant): The summons discloses a cause of action. It is not necessary that the summons should set out the cause of action with the same technical precision which would be required in a declaration. It suffices if it clearly informs the defendants what the complaint is which they have to answer. This summons does so. The main object of a summons is to bring defendants into court. *Inglesby v. Colonial Government* (Buch., 1876, p. 125).

Sir H. Juta, K.C. (for the Union-Castle Co.), and Mr. Upington (for McKenzie and Co.) were not called upon.

In giving judgment, the Acting Chief Justice said that the plaintiff in this case was a passenger by one of the Union-Castle Mail

Company's steamers to Table Bay. He brought with him certain luggage, part of which he said had not been delivered to him. He sued for the value of this, and proceeded against three different sets of people. The first defendants were the Union-Castle Company, against whom he alleged that they received this luggage, and that it was their duty to deliver it at the Prince Alfred Docks at Cape Town. But nowhere in the summons did he allege that there had been a failure of this duty. He also sued the Table Bay Harbour Board, alleging that it was the Board's duty on receiving these things to have safely deposited them at the warehouse. Here again it was not alleged that the Harbour Board did not fulfil their duty. The third defendant was McKenzie, whose duty plaintiff said it was to have delivered the luggage to him, but, again, he did not say either that McKenzie received the things or failed to deliver. Exception was taken in the Magistrate's Court on the ground that the summons was embarrassing and vague, and did not disclose any cause of action. There was no allegation of a breach of duty by one of the defendants. He (the Acting Chief Justice) greatly sympathised with the plaintiff, because he had, as he had said, been driven about from one to the other, but he could not in consequence set aside the elementary principles of pleading. Two out of the three defendants could not be liable, and the plaintiff must sue the right one to be successful. It might possibly be that, if the Harbour Board and McKenzie denied receiving the goods plaintiff could recover from them the costs which he had been forced to incur in unsuccessfully suing the Shipping Company, if that company established that delivery had been made. This, however, was not at present the question. Plaintiff had failed to comply with the rules of pleading, and the Magistrate was bound to sustain the objection. The appeal must be dismissed. His lordship added that this was not the first case which had come into court in which people had been driven about from pillar to post, and could not discover who were liable for goods not delivered at the Docks.

Maasdorp, J., concurred.

SHARPLES V. WOOLVEN'S } 1901.
AGENCY. } June 14th.

Non-joinder of parties—Amendment of summons.

Appellant had sued one F. (carrying on business as Woolven's Agency) in a Resident Magis-

trate's Court. After summons had been issued, appellant discovered that F. had a partner named Woolven. Defendant F. excepted to the summons on the ground that Woolven was not joined, and the Resident Magistrate upheld the exception and refused leave to amend the said summons.

Held (on appeal), that the exception was good, but that as the non-joinder of parties was a matter peculiarly within the knowledge of defendant and as no laxity on the part of appellant had been shown the Resident Magistrate ought to have allowed the amendment asked for

This was an appeal from a decision of the Court of the Resident Magistrate of Cape Town. The present appellant (plaintiff in the Court below) had taken exception that a certain Woolven (a partner in the said firm) had not been joined in the action. Appellant applied for leave to amend the summons by inserting Woolven's name. The Resident Magistrate refused leave to do this.

Mr. Wilkinson (for appellant) : Under the Resident Magistrate Court Act of 1856, section 50, the discretion conferred on the Magistrate to amend the summons is a judicial discretion, and must be exercised judicially and not arbitrarily. *Haisman v. Maasch* (Buch., 1879, p. 119). The Magistrate's refusal to amend the summons by adding the name of Woolven as a co defendant was not a judicial exercise of his discretion. *King v. Porter, Hodgson and Co.* (Buch., 1879, p. 117).

Mr. Close (for respondent) was not called upon.

In giving judgment, the Acting Chief Justice said that unfortunately plaintiff's summons only mentioned the name of one of the men by whom the business was carried on, and it afterwards transpired that there was a partner. Plaintiff thereupon gave notice of an application to amend the summons. This non-joinder of partner was a matter directly within the knowledge of the defendants, and when it was brought to the notice of the Court, the amendment ought, as a matter of course, to have been allowed, unless some laxity on the part of the plaintiff had been shown. There was

no laxity in this case. and, while the Magistrate did right in sustaining the exception, he had acted unreasonably in refusing to allow the amendment. The case would be remitted to the Magistrate to allow the amendment. Costs would be costs in the cause.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

BOIHA V. CHAPMAN. { 1901.
June 17th.
" 18th.
" 19th.

The declaration stated that plaintiff was a son-in-law of the late Mr. Chapman, and that between March, 1895, and July, 1900, Chapman lived with the plaintiff, and received board and lodging at plaintiff's expense. The late Mr. Chapman agreed, in consideration of this, to pay the plaintiff £5 per month. On July 14, 1900, Chapman died. The defendants are the lawfully appointed executors testamentary of his estate. It was alleged that there was now due the sum of £322 6s. 6d., being the amount due to plaintiff for Chapman's board and lodging for the period named under the aforesaid agreement. There was an alternative claim for the amount specified as a *quantum meruit*. The plea admitted that the late Mr. Chapman resided with the plaintiff, and received board and lodging for the period named first on a farm in the division of Worcester, and then in the town of Worcester itself, from March, 1895, until his death in July, 1900, but he went there at the special and urgent request of the plaintiff and his wife. It was denied that there was any agreement to pay £5 a month. and it was further pleaded that Mr. Chapman (who was then about 77 years of age) had rendered valuable and substantial assistance in superintending the farming operations which service was of more value than the amount now claimed. It was further set forth, and admitted, that shortly before his death Mr. Chapman had given plaintiff's wife £100 in return for the care and kindness that had been shown towards him. In regard to the *quantum meruit*, it was denied that there was anything due.

Sir H. Juta, K.C. (with him Mr. Gardiner, for plaintiff; Mr. Searle, K.C. (with him Mr. Close), for defendant.

Anthony Botha, the plaintiff, was the first witness called. He said he married a daughter of the late Mr. Chapman by ante-nuptial contract, and had lived in Worcester since 1899. In February, 1895, witness's father-in-law sold his farm and stock owing to old age, and the sale left the old gentleman, who was then almost 77 years of age, independent. It was agreed, on the suggestion of the late Mr. Chapman, that the latter should come and live with witness and his wife, and that he should pay £5 per month for board and lodging. The old gentleman still had a couple of hundred lambs and ewes. The old man agreed that witness should get payment for the board and lodging out of his estate. While the old man was living with witness he never did any work. Witness was appointed an executor in the late Mr. Chapman's estate. Mr. Dempers was also an executor, and a liquidation account was drawn up by him in which witness's claim appeared. Mr. Chapman had given witness's wife £100 as a present. Mr. J. D. Chapman, son of the old gentleman, and also a co-executor, refused to sign the liquidation account containing witness's claim. Witness then sent in a claim.

Cross-examined: Mr. Chapman died in July last year. In August, Mr. James Delamore Chapman, son of the deceased, and executor of the estate, came down from Kimberley. Witness did not say to him, "Now we are executors, we must fill our pockets." Witness did not beg the old gentleman to come and live with him. The old man never discussed with witness, in the presence of discussed with witness in the presence of Mrs. Chapman and Mrs. Koenig, the question of where he was going to live. Mr. Chapman did not bring his bedroom furniture to witness's house when he came there to live. He only brought an old bed and an old clock. The old man did not superintend the farming operations. If Wessels, who was formerly employed by witness, said that the old man constantly did so, he was wrong. The old man suffered from kidney disease, and was often laid up. Witness did not tell Mr. A. P. Groenewald that the old man was to pay nothing.

Eliza Sarah Botha, daughter of the late Mr. Chapman, and wife of the last witness, gave corroborative evidence.

Among the witnesses called for the plaintiff was,

C. P. du Plessis, clerk in the A.B.C. Bank, who said that the late Mr. Chapman had told him he was a man of independent means, and that he paid plaintiff well for what he got. This was a few months before he died. He did not mention the specific amount which he paid to plaintiff.

For the defence,

James Delamore Chapman said he was a son of the late George Chapman, and was an executor in the estate. Witness said that in a conversation subsequent to the old man's demise, Botha told him that, as they were executors, the best thing they could do was to fill their own pockets. Botha did not tell witness about his present claim. When witness heard of the claim through Mr. Dempers, he refused to sign the account.

Johanna Rebecca Chapman, wife of the last witness, said that in 1895 she heard plaintiff ask old Mr. Chapman to come and live with him. He said he would be a great help to him on the farm, and could live there for nothing. Plaintiff urged the old man to come and stay with him, saying he would not charge him a penny. Botha went on his knees to the old man. When old Mr. Chapman went to plaintiff's house, he took with him 300 lambs and ewes, a quantity of farm produce, and some good furniture of the value of about £70 or £80.

Cross-examined: She saw the farm produce being taken away on Botha's wagon. She did not see the furniture being taken away. She knew it was put aside before the sale, and was not sold.

By the Court: Witness offered to take the old man free.

Elizabeth Johanna Koenig gave evidence to the same effect as that of the last witness.

In cross-examination she said she saw Botha's wagons go away with the furniture. She was there after the last witness, but did not see the farm produce going away.

Petrus Herrard Pretorius, of Kimberley, deposed that Botha had told him that Chapman did not pay him for staying at his house. He said he (Botha) ought to pay Chapman, as he looked after his business.

Cross-examined: Chapman went now and again to see the pigs. He was not the sort of man to whom one would pay £60 a year as overseer.

Further evidence having been led for the defence, Sir H. Juta, K.C. (with him Mr. Gardiner), for the plaintiff, and Mr. Searle, K.C. (with him Mr. Close), for the defendant, addressed the Court.

Mr. Justice Jones, in giving judgment, said that the plaintiff Anthony Botha sued the executors in the estate of the late George Chapman for £322 6s. 8d., alleged to be due for board and lodging between March 1, 1895, and July 14, 1900. The plea set up by the defendants was that no such agreement as alleged in the declaration had ever been made, and that plaintiff's wife had been given £100 for her care and kindness to her father, Mr. Chapman. The whole case, his lordship said, really depended upon whether they believed the evidence given by the witnesses for the plaintiff, or by the evidence for the defendant. The circumstances were very simple. In February, 1895, Chapman, who was an old man of seventy-seven years, sold his farm and went to live with the Bothas. The reason for his going there, if they believed the evidence of plaintiff's witnesses, was that the Bothas were particularly fond of the old man. The exact relationship between him and the other daughters and sons-in-law did not appear from the evidence, but if they looked at the documentary evidence, it would be seen that Chapman preferred Mrs. Botha to his other daughters. This was shown by the manner in which his will was drawn up. There was independent testimony to prove that during his lifetime Chapman had admitted his liability to pay for his board and lodging, and had mentioned the amount of £5 a month. Under all these circumstances, judgment must be given for plaintiff as claimed in the declaration, with costs.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney, John F. Bernard; Defendant's Attorneys, Messrs. Dempers and Van Ryneveld.]

VELENSKI AND HARRIS V. (1901.
HASSFORTH.) June 19th.

The declaration of the plaintiffs was as follows:

1. The plaintiff, Abraham P. Velenski, is a farmer, residing at Zeekoegat, in the district of Oudtshoorn; the plaintiff, Solomon Harris, resides in Cape Town. Defendant is a farmer, residing at Hassfort, in the division of Vryburg.

2. On or about November 14, 1898, plaintiff Velenski delivered to defendant certain 151 head of cattle for the purpose of defendant taking charge of and grazing the same upon his property at Vryburg, under a written agreement, entered into between the parties, whereof a copy, marked A, is hereto annexed; and on or about June 12,

1899, the said plaintiff handed over to defendant thirty-five other head of cattle, under the like conditions.

3. Thereafter, on or about September 15, 1899, one Fincham offered to purchase from plaintiff Velenski, through defendant, upon whose farm the cattle were then, under the above agreement, certain seventy head of the said cattle, selected by him from the cattle grazing under the above agreement, at £14 per head.

4. On or about September 21, 1899, plaintiff Velenski sold to plaintiff Harris one-half interest in the said seventy head of the said cattle, and gave notice to defendant thereof, and instructed him not to sell the said head of cattle to Fincham or anyone without consulting the said Harris.

5. Thereafter, on or about November 8, 1899, defendant, without the knowledge or consent of plaintiffs, or either of them, sold to one Van Coller, then residing in Vryburg division, forty-eight of the said head of cattle for £14 each, and on November 5, 1899, he sold to the said Van Coller eighteen more at the same price, and also ten at £13 each; of the said ten, four belonged to plaintiffs jointly and six to plaintiff Velenski alone. Defendant received from the purchaser on account of the seventy cattle sold as aforesaid the sum of £1,054, whereof the sum of £976 was received for the said seventy-six head of cattle belonging to plaintiffs jointly.

6. The true value of the cattle belonging to plaintiffs at the date of sale by defendant as aforesaid was the sum of £1,120—that is, £16 each; and plaintiffs are entitled to claim from defendant the difference between the sums of £1,120 and £976 as and for damages.

7. Although all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle plaintiffs to demand from defendant payment of the sum of £1,120, defendant has neglected and refused to pay the said sum, or any portion thereof.

Plaintiffs claim:

(a) The sum of £976, being the purchase price received by defendant on account of plaintiffs.

(b) The sum of £144, as and for damages.

(c) Alternative relief.

(d) Costs of suit.

Defendant pleaded as follows:

1. Defendant admits paragraphs 1, 2, and 3.

2. Defendant has no knowledge of the sale by Velenski to Harris, and does not admit it, and he denies every other allegation in paragraph 4.

3. Defendant carried out his part of the said agreement, and in October, 1899, the forces of the S.A. Republic and of the O.F.S. Governments, which were then at war with the Government of her late Majesty, occupied the district of Vryburg.

4. Defendant admits that he sold seventy-six cattle to one Van Coller for the sum of £1,054, and that he received the sum of £1,054 therefor; but he denies that any of the cattle belonged to plaintiffs jointly.

5. Thereafter, on or about the 5th December, plaintiff Velenski sold 100 head of the said cattle on defendant's farm, and subject to said agreement, to one Chas. Sonnenberg. There became due to defendant under said agreement upon said sales, and for the increase in said agreement, the sum of £187, which defendant retained, as he was entitled to do.

6. Thereafter, in the said month, the said forces of the enemy seized, and by force of arms compelled defendant to deliver up to them the sum of £867, the balance of the price of the cattle sold by him as aforesaid, and which he was holding for plaintiff Velenski.

7. Defendant says he sold the said cattle at a fair and true value, and he denies every other allegation in paragraphs 5, 6, and 7, save that he admits that he refuses to pay the sum of £1,120, or any other sum.

The plaintiffs' replication was as follows:

1. As to paragraph 5 of the plea, plaintiffs admit that they gave the right in or about December, 1899, to one Chas. Sonnenberg to purchase 100 head of the said cattle at £19 per head, provided that the said Sonnenberg was able to obtain the said cattle, but the said Sonnenberg was unable to obtain the same, and never paid for them, or for any of them.

2. They admit that under the said agreement of November 14, 1898, defendant was entitled to £1 for every ox sold by him of the cattle mentioned in the said agreement, but they deny that defendant is entitled to make the charge of £187, or any portion thereof, against them; defendant had no right to sell the seventy-six head of cattle to Van Coller without plaintiffs' consent.

3. They have no knowledge of the allegations in paragraph 6, and they do not admit the same.

4. Save as above, and save for admissions, they plead general issue.

Abraham F. Valenski gave evidence in support of the allegations contained in the declaration. He said that when he agreed to let Harris have a half-share in seventy of the cattle he telegraphed to Hassforth telling him in future to communicate with Harris at Cape Town. After the relief of Kimberley and Vryburg, witness went and saw defendant, who said he had sold a number of the cattle. He said that after the sale he received a letter from the Transvaal authorities telling him to give the money up, and he did so. He said that he was not bound to give the money up, but that if he did not they would seize his stock. He said it was because Sonnenberg was taking stock into Mafeking that the stock was seized. Hassforth was afterwards arrested on a charge of treason and released on bail. He told witness that his (witness's) cattle had been taken, but he did not say that the Boers took any of his own stock. Witness, as far as he knew, never gave Hassforth authority to sell any of his cattle.

Certain correspondence, including letters and documents, between Hassforth and Boer officials in relation to the confiscation of plaintiff's cattle and money was read.

Cross-examined: He claimed before the Compensation Court for £14 per head for all his cattle. Witness did not tell Hassforth or Scholtz to sell or exchange before consulting with witness. Scholtz told witness that Hassforth had sold to Van Collier at £14. He expressed no disapproval. Witness saw Hassforth after the relief of Vryburg. He did not disapprove of the sale; he was too excited. Witness told one Adams, a Mowbray butcher, that he had cattle for sale. Witness gave this man no price, but referred him to Hassforth.

Re-examined: It was agreed that if Hassforth obtained a buyer, and witness could not go up himself, he (witness) should give his instructions to Hassforth. He never told Adams that defendant had full power to dispose of the cattle as he liked.

William Crosbie deposed that he was a partner with one Fincham, and speculated in cattle. In October, 1899, the price of cattle in Bechuanaland was from £14 to £16. Witness offered Hassforth £14 per head for seventy-five cattle, but Hassforth said he would first have to wire to Valenski. Witness did not hear from Hassforth again. Witness shortly afterwards returned to Cape Town, and offered Harris £16 per head for seventy-five of the cattle. Harris, however, refused to sell at that price.

Cross-examined: After the war broke out, £14 would have been a very good price.

Herbert John Morkel, teller in the employ of the Standard Bank at Vryburg, put in books showing the banking account of the defendant at different dates. On November 13, the sum of £1,054 was paid in to defendant's account by a Mr. Scholtz, who was accompanied by defendant, a Mr. Marlow, and a Mr. Pretorius. The last two named persons had come into Vryburg just previously for the purpose, witness believed, of purchasing cattle for the Transvaal Government. Hassforth's account was then overdrawn to the extent of £700. Hassforth was a well-to-do man. The money was paid in Transvaal, Orange Free State, and Standard Bank notes, and in Republican coins. Van Collier kept no account at the bank. The money was not paid in to Valenski's account, though it could have been if desired. Later in November witness was ordered out of Vryburg by the enemy.

Cross-examined: Hassforth had authority to over-draw up to £1,000. After the enemy occupied the place, no fresh accounts were opened. Witness did not know that defendant applied to put money to Valenski's account, and was refused. Van Collier, witness believed, joined the Boers and was killed. Witness had seen Whitney, the manager of the bank, and Hassforth in conversation, but did not hear what they said.

Re-examined: Scholtz did not speak to the manager when he came and put the money in.

William Munroe, formerly an accountant at the Standard Bank at Vryburg, said that during the Boer occupation the business at the bank was not interfered with by the enemy. No request was made to witness to receive money on Valenski's account. He would not have raised objection to this being done. Money was transmitted to other branches.

Cross-examined: He could not, without the books, mention any instances of money having been transmitted. The Boers allowed correspondence to pass through Delagoa Bay. Witness did not know that the Boers had said they would confiscate all of Valenski's property. Witness thought the Boers censored all the correspondence.

Re-examined: The Boers never interfered with any of the accounts at the bank.

Solomon Harris, Schoonder-street, Cape Town, deposed to having entered into the agreement with Valenski to have half the

cattle. Witness had never given Hassforth authority to sell. Witness was present when Valenski sent a telegram to tell Hassforth not to sell until he had received authority from witness. Witness had refused to sell the cattle to Crosbie at £16 per head.

Cross-examined: It was before the occupation of Vryburg that he refused to sell to Crosbie. He considered them worth the same during the Boer occupation, as, if anything happened, he expected to get compensation.

George C. A. Hassforth was called, and said it was arranged that if witness had a buyer for the cattle he should, if possible, let Valenski know, and the latter was to act likewise if similarly placed, so that there should be no over-selling. There was no agreement that witness should not sell without Valenski's permission. He (witness) could do as he thought best about the cattle. Witness had not received a telegram from Valenski to the effect that he (witness) should not sell for less than £15. Witness wired to Valenski that he had received an offer from Crosbie and Fincham of £14, but received no reply, and did not sell. He never sent a telegram to Valenski saying he had received an offer and would sell, on receiving Valenski's approval. The Boers had complete occupation and government of Vryburg, and it was impossible to get outside communication. Witness sold cattle for Valenski for the sum mentioned, and tried to get it placed in the bank in Valenski's name. Witness offered the money to Morkel to place to Valenski's account, but he said that witness must see the bank manager. The bank manager refused to open an account in Valenski's name. In December, four Transvaal policemen came to witness's house and said they wanted all the stock belonging to Sonnenberg, Valenski, Rosenblatt, and Solomon. They demanded the stock-book, which they examined, and they afterwards took Valenski's cattle. Witness did not know at that time of a transaction between Valenski and Sonnenberg. It was in consequence of Sonnenberg's going to drive cattle into Mafeking that the Boers acted. When witness sold to Van Coller he did not know the latter was buying for the Transvaal Government; witness believed he was merely speculating. The enemy subsequently demanded that he should pay over to them the money belonging to Valenski. This was in January. They came to arrest witness, but he was then seriously ill, and they took his good-for for £867. They told witness that they would not confis-

cate his stock as they found that he was innocent of sending stock into Mafeking, and that Sonnenberg and Valenski were to blame. Witness had tried to get the Boers to leave Valenski's stock, and had offered them security. Vryburg was relieved in May, and Valenski came up in June. Witness explained everything, and agreed to help Valenski in his compensation claim. He did not then say that he was going to hold witness liable for what had occurred during the Boer occupation. Witness gave up all the documents to help Valenski in the latter's claim for compensation. Witness was first informed that he was held liable in August. Fourteen pounds was a very good price to get for the cattle at that time; many people sold for £5. They commandeered a wagon, oxen, and horses belonging to witness, because of his and his sons' refusal to go on service.

Cross-examined: Witness asked Mr. Morkel whether Valenski had an account there, and he said he had not. Witness did not ask Mr. Morkel if the money could be put to Valenski's account.

Christina Sophia Hassforth, wife of the defendant, said that in June, 1899, before the war broke out, she heard Valenski tell her husband that he could do as he pleased—sell or exchange. The Boers picked out all Valenski's cattle. They got the stock-book, which showed how Valenski's lot were marked. After the relief Valenski came up. He (Valenski) said nothing about holding defendant liable. He said he was only sorry that Hassforth did not send the money to Cape Town, but defendant said it was too dangerous.

Isaac Adams, butcher, Woodstock, said that Valenski referred him to Hassforth about certain cattle witness contemplated purchasing. Valenski said that he (witness) would have to deal with Hassforth. Witness and a Mr. Louw sent a man named Breda up, and he reported that the cattle were inferior.

This concluded the evidence, and Mr. Searle, K.C. (with him Mr. Close), for plaintiff, and Sir H. Juta, K.C. (with him Mr. Benjamin), for defendant, were then heard in argument.

In giving judgment, the Acting Chief Justice said that the plaintiff Valenski was in 1898 the owner of certain cattle, and on the 14th November he entered into a contract with the defendant (Hassforth), who was a farmer in the district of Vryburg, by which Valenski gave Hassforth, first, 151 head of cattle and, afterwards, 35 head, making in

all 186 cattle, for Hassforth to fatten for the butcher. Defendant undertook to do this and to pay all expenses, in consideration of his receiving £1 per head for the cattle sold, and, as to the cows, a third of the increase. Hassforth also undertook to let the plaintiff know when the oxen were fat and ready to be sold. There was some conflict of testimony as to whether, after this agreement was entered into, Valenski gave Hassforth the right to sell or not. The correspondence put in gave some colour to the statement that a conversation took place concerning this, but the correspondence also seemed to show that even if the defendant had the right to sell he was to communicate with Valenski, and obtain his ratification before the sale was completed. Whether this was so or not, Hassforth sold 70 head of cattle, in which number Valenski had sold to Harris a half interest, and thus he was joined as a plaintiff. It was admitted that these 70 were sold, 66 of them at £14 per head and four at £13, and the total purchase price received by defendant was £976. Plaintiffs now sued for payment of this amount, and also claimed the sum of £144 for damages. The claim for damages was based on the ground that Hassforth had no right to sell these cattle, without the plaintiffs' consent, and that the cattle sold were worth £16 per head. But he (the Acting Chief Justice) was of opinion that this claim failed for two reasons. The first was that the plaintiffs had adopted the sale made by Hassforth, and the second was that the price obtained by Hassforth was a fair and reasonable value to put upon the cattle. The cattle were sold by Hassforth after the war with the Transvaal had commenced to one Van Coller. Some question was raised as to whether or not this man was buying for the Transvaal Government, but Hassforth said that he knew of no agency existing between the Transvaal Government and Van Coller, and that he believed that the latter had bought the cattle for himself privately. There was no means of contradicting Hassforth on this point, and the Court took his evidence that this was so. During the occupation of Vryburg by the Boers business there was naturally restricted, but the Standard Bank continued to carry on business all the time the Boers were in occupation without molestation. On November 14 the defendant owed the bank £827 2s. 3d., and on that date he paid into the bank the amount received by him from Van Coller, or Van Coller's prin-

cipals. The evidence given showed that on this date it was in the power of Hassforth either to have deposited the amount to the credit of his principals, or to have got an order or draft from the bank on one of its other branches to pay Valenski and Harris this amount, and so enable plaintiffs to receive the money. Instead of this, defendant placed the money to his own account. Whatever was the defendant's position before, whether he was agent or bailee, he now stood towards the plaintiffs in the relation of that of debtor. On February 7, in consequence, he said, of pressure put upon him by the Transvaal Government, he drew a cheque for £840 on the Standard Bank, Hassforth's credit at the time being good at the bank, the bank having given him, by special agreement, the power to overdraw his account to the extent of some £600. This cheque defendant made payable to himself, and he then overdraw his account. Defendant said he told the Boer officials of his contract with Valenski, and that they allowed him to retain £187 as his commission on the whole 187 head of cattle. With the money drawn from the bank and other moneys he had in hand, he made up the balance, and paid it over to them, and produces their receipt. Had the cattle not been sold, the position would have been different. With regard to those remaining, which were removed by the enemy, plaintiffs had not attempted to sue Hassforth. But after the sale of the 70 head and the payment of the price, and the conversion of it to his own use, a debt was contracted as between Hassforth and Valenski. It could not be said that what the defendant did in February amounted to payment of the debt, nor could it be held that it relieved him from liability. There was a debt due by Hassforth to the plaintiffs, and this debt, according to international law, could not be confiscated. On all principles, in both law and equity, plaintiffs were entitled to judgment for £976, from which amount must be deducted £70, which under the original agreement was due to the defendant on the sale of the cattle. Judgment would be given for plaintiffs for £906, and costs.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

HOFFMAN V LOUW. { 1901.
June 21st.

This was an action for damages brought by Willem Cornelius Hoffman, farmer and dealer in live-stock, residing on the farm Schaapplaats, in the district of Malmesbury, against Jacobus Petrus Louw, a cattle dealer, residing at Mowbray. Damages to the amount of £500 were sought in respect to the alleged use by defendant of certain slanderous and defamatory words concerning plaintiff. In November last, plaintiff sold to the defendant a number of sheep and goats, and it was arranged that the plaintiff should make delivery at Malmesbury. Plaintiff sent in the animals with two shepherds, and after receiving them defendant, it was alleged, said in Dutch, in the hearing of one Vondeling Taff and divers other persons. "He (meaning plaintiff) stole five of my best sheep, and took in other sheep in their place." Plaintiff said that these expressions had seriously damaged his business reputation, and he claimed damages to the amount mentioned. In his plea defendant denied having used the words.

Willem Cornelius Hoffman, the plaintiff, said he had had dealings with defendant, to whom he had sold sheep. On the 16th November, Louw and Crosier came to witness's place, and the former bought certain sheep from plaintiff. Crosier was interested with plaintiff. Witness had to send the sheep to Malmesbury. Louw bought all the sheep he inspected, except two poor ones. The price of the sheep was 22s 6d. each. The purchase took place on the Friday. The two sheep which were poor were caught out, the remainder being taken to Malmesbury. Witness was to get £5 extra for delivering the sheep at his (witness's) risk. The boys were to get 5s. each and their food from Mr. Louw. Mr. Crosier refused to do further business with witness on account of certain things said by Louw. He had been otherwise injured in his business.

Foundling Toft said he took the sheep to Malmesbury, and was accompanied by Dirk Josephs. It took about two

or three days to get the sheep to Malmesbury. The sheep were counted, and Mr. Louw said there were three missing. Witness told him three had died on the road. Mr. Louw gave them 2s. 6d., and witness asked him why he did not give 5s. Louw said he could not pay 5s., as Hoffman had caught out the five best sheep, and substituted five poor ones.

(Cross-examined: Louw said witness's master had "stolen" the best five sheep, and was a — rascal. He did not use the words "caught out.")

Dirk Josephs gave corroborative evidence.

Johannes Hendrik Visser, cattle-dealer, Hopefield, said he assisted to count the sheep at Malmesbury. Mr. Louw was present, and said that there was some — humbug going on there. Louw drew witness's attention to one sheep, and witness said that that was not one of Hoffman's, but one which must have dropped in on the road. Witness knew the sheep, as he had sold them to Hoffman. Louw said that Hoffman had stolen some of the sheep. Mr. Crosier was present. Defendant repeated the statement at the A.B.C. bank, and at the Commercial Hotel, and elsewhere, in the presence of Mr. Hoffman, Mr. Walters, Mr. Breda, and other people.

(Cross-examined: Louw used the Dutch word for "stolen"; he did not say "caught out.")

Jacobus Hendrikus Crosier, of Malmesbury, stated that after the counting, Louw said that some sheep which he could have bought for 19s. had been mixed up with the lot for which he paid 22s. 6d. Louw also stated that Hoffman had stolen five of the sheep.

Fredericka Hoffman, mother of the plaintiff, said that Louw admitted to her having used the words "caught out."

For the defence,

Michael van Breda deposed that when the boys demanded 5s., Louw said he made no agreement to pay them. He also said their master had caught out five of the best sheep. Louw did not use the word "steal." Witness was at the counting of the sheep.

Samuel Anthony Walters, speculator in stock, said that after the counting of the sheep, Louw said nothing to the boys, when they asked for 5s., about stealing the sheep. He said to them that five of the best sheep were caught out, and that they had over-driven the animals.

(Cross-examined: Louw said to the boys, "You have caught out five of my best

sheep." Witness heard Louw ask Crosier, "Would you be satisfied if five of your best sheep were caught out?"

Re-examined: Louw never used the word "steal."

Paul Johannes Hoffman, butcher, Malmesbury, gave similar evidence.

Jacob Petrus Louw, the defendant, was then called. He said he went over to plaintiff's farm to see some sheep and goats. It was agreed that witness should purchase the animals, and that in consideration of £5 plaintiff should undertake the delivery and the risks. When the sheep arrived they were counted. Witness told the boys their master had caught out five of the best sheep. He knew of these five sheep, because the boys said their master had caught out five or six sheep. Witness had agreed that Hoffman should take out a couple of sheep, of which witness did not approve, and it was in reply to a question by witness as to how many Hoffman had taken out that the boys made this statement. Witness never meant to accuse Hoffman of theft, and had never done so.

Cross-examined: Witness had said that Hoffman had taken out five of his best sheep. He said so in consequence of the boys' statement, and he still believed that that was his only reason for saying so.

The Acting Chief Justice remarked that if the defendant, on receipt of the letter from plaintiff's attorneys demanding withdrawal and damages, had only written back to say that he never charged Hoffman with stealing, there might then have been no case for plaintiff.

Mr. Searle, K.C. (with him Mr. C. W. de Villiers), for plaintiff: Defendant denies that he used the words imputed to him, and it has also been set up that owing to the nature of the transaction between the parties plaintiff would not have been guilty of theft, even if he had taken the five good sheep out of the flock and substituted five inferior ones. This is not a good defence in our law. With us the line between fraud and theft is very narrow, if it exists at all. If defendant charged plaintiff with taking good sheep out of the flock and substituting inferior ones, that is theft. When Louw accused plaintiff of "taking five of my best sheep," his use of the possessive pronoun showed that he considered that property in these sheep had already passed ("my sheep"), and that the sheep were his. As to defendant having used the words, he had said in court that he would not withdraw the words imputed to him. No less than

three witnesses have deposed to defendant having called plaintiff a "verdomde schelm." Other charges of dishonesty were made by defendant against plaintiff on the same day. As to damages, these are no doubt in the hands of the Court, but defendant's character certainly has been injured.

Sir H. Juta, K.C. (with him Mr. Benjamin), for defendant: In an action for libel the very words must be set out and proved. The very words must be proved (*Odgers*, p. 564), and the very words (even if in a foreign language) must be set out (*Digest of English Case Law*, vol. 5, p. 615). If the words on the face of them are not libellous, the libellous sense must be brought on an innuendo. Hence, if the word "steal" is put in a declaration its use must be proved. It will not do to say that "caught out" means the same thing. The weight of evidence goes to show that "caught out," and not "steal," was the expression used by defendant. As a large dealer in stock, defendant must well know the difference between a breach of contract and a theft. In this case no *dominium* in the sheep had passed, and a man cannot steal his own property. Even the *periculum rei venditæ* had not passed, for the sheep had not been ascertained and set apart. There was not even a breach of contract. Defendant had not parted with any money, and all he had lost was an opportunity of buying five sheep. How could this be a theft? As to damages, none have been proved. All plaintiff can say is that Kreutzer will not deal with him, but Kreutzer said that he ceased to do so on account of what he found out for himself.

Mr. Searle (in reply): If the words proved mean practically the same thing as those set out in the declaration, plaintiff is entitled to damages (*Odgers*, p. 595).

In giving judgment, the Acting Chief Justice said that the only issues the Court had to decide upon were whether the words stated in the declaration were uttered or not, and, if they were uttered, the amount of damages to be awarded. In his opinion the evidence was overwhelming that the word stolen was used. Finding that the word was used, there was no question of the innuendo, as the words used charged a distinct crime against the plaintiff. As to the question of damages, he might say that in his opinion it was not desirable to encourage actions for damages for slander where the matter was a trumpery one, or where it was based upon a mistake or misunderstanding between the parties. But in this case, where the letter of

demand was written, one would have expected defendant, if he had never used these words, to have replied stating that he had not done so. If he had so written, the action might not have been brought into court, but instead of this he took no notice of the letter. Defendant stated in the box that he believed still that plaintiff had committed what amounted to a fraud upon him, but he had not given any sound reason for making such a charge. Under these circumstances, plaintiff was entitled to get damages for an amount which would show that there was no ground whatever for the charge against him. At the same time, the case did not call for heavy damages. Plaintiff had come into court to clear his character, and had succeeded. In his lordship's opinion, a man's character should not be made a matter of commerce and speculation like merchandise. Judgment would be given for £25 damages and costs.

[Plaintiff's Attorney, V. Tennant, jun.; Defendant's Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

OHLSSON'S CAPE BREWERIES
(LIMITED) V. THOMPSON. { 1901.
June 24th.
" 25th.
" 26th.
" 30th.

Servitude—Loss by non-user—Servitude of bailing water from a furrow—*Servitus stilicilii vel fluminis recipiendi*—Cost of surveyor's plans—Case of *Edmeades v. Scheepers* (1 Juta 334), distinguished.

Plaintiffs sued defendant for damages for various acts of trespass committed on a certain strip of land of which they were the proprietors. Some of these trespasses were admitted, and the Court found on the evidence that others had been committed without

justification. It was shown, however, that defendant's property had servitudes over the strip of land in question. One of these entitled the owner of the dominant tenement to dip water from a furrow running through this said strip, such dipping to be done with a clean vessel. Plaintiff's predecessors in title had laid pipes in this furrow which pipes conveyed a considerable portion of the water to a brewery. The water still running in the open furrow was said to be unfit for drinking purposes. There was a further servitude attached to defendant's property giving its owner a right of crossing the strip of land at a certain point. This, plaintiff's maintained, had been lost by non-user per modum et tempus. In reconvention defendant claimed damages against plaintiff's for having stopped up certain pipes by means of which he claimed a right to discharge storm water on to plaintiff's land.

Held (1) *That under his dipping servitude, defendant could not claim to have water brought down to him in pipes; and that the owners of the servient tenement were not responsible for the pollution of the furrow by third parties.*

(2) *That a servitude could be lost by non-user only if it were proved that such non-user had continued during the full period of prescription (30 years) and that hence defendant was still entitled to his right of way across the servient tenement.*

[The case of Edmeades v. Scheepers (1 Juta 334) distinguished.]

(3) *That defendant's own misfeasance in discharging drainage water through the pipes in question justified plaintiff in stopping them, even though defendant was*

thereby prevented from discharging his storm water on to plaintiff's property.

(4) That as the surveyor's plans of the property would be useful to plaintiff in ways not connected with this case half the cost of the survey was allowed as costs in the cause.

This was an action for an interdict and for damages.

The declaration was as follows :

1. The plaintiff is a company duly registered with limited liability and carrying on business in this colony, at Newlands and elsewhere.

2. The defendant is the registered proprietor of certain landed property situated at Newlands, and hereinafter referred to as the "Hotel Cecil," and he there resides and carries on business.

3. Adjoining the defendant's property is situated a certain strip of land, the property of the plaintiff, specially reserved and excluded from the sale and transfer of certain land (whereof the "Hotel Cecil" then formed a part), effected by deed of transfer executed by J. Letterstedt in favour of Johannes Nicolaas Hamman and registered in the office of the Registrar of Deeds on the 26th October, 1841.

4. By the said deed of transfer the following conditions were imposed in regard to the said strip of land, to wit :—"That the reserved ground of thirty feet wide as shown on the diagram on both sides of the watercourse shall not be made any other use of by the seller or his successors than that of preserving and conducting the water from the Newlands Spring to the remaining part of the seller's property and also to the estate called 'Moedersbewys' the property of H. C. Dreyer, who has also a right to the water supplied from the Newlands Spring according to a notarial agreement dated 24th Aug., 1819. That the purchaser or his successors shall not be allowed to cross the said reserved ground at any other spot than that indicated on the diagram at 'A' where the purchaser shall be allowed to construct a bridge at his own expense. That the purchaser or his successors shall be allowed to bale out with a clean vessel as much of the water supplied from the Newlands Spring as shall be sufficient for the use of his house and cattle, with this understanding, however, that should the purchaser or any of his successors think proper to divide the

estate into two or more lots the right of using the said water or any part thereof shall not be transferable to the purchaser of any one lot separated by such division from the main body of the estate."

5. The defendant acquired the "Hotel Cecil" by transfer dated the 3rd day of September, 1900, but was theretofore for some time occupier as tenant of the said property.

6. The plaintiff annexes hereto a true and correct plan framed by the surveyor, Charles F. Marais, from actual survey, whereupon the figure denoted by the letters F, G, H, I, K, represents the "Hotel Cecil" now owned by the defendant and the figure denoted by the letters A, B, C, D, E, F, G, H, H1, N, O, P, Q, R, S, T, U, V, W, X, A, represents the said strip of land owned by the plaintiff.

7. The plaintiff or the predecessors in title of the plaintiff have preserved and conducted the water from the Newlands Spring since 1841, and caused a cement dipping basin to be constructed at a convenient spot (marked a.a. on the plan) in the watercourse along the said strip of land, and to be fed with pure water from their pipes conducting the said water in accordance with the above condition, all which was done and all which at any convenient spot selected by the defendant, the plaintiff is at all times willing again to do in order to afford the defendant enjoyment of the right to bale out with a clean vessel so much water as shall be sufficient for the use of his house and cattle, but the defendant wrongfully and unlawfully broke the said cement dipping basin and by his own act deprived himself of the enjoyment of the said right.

8. The grievances whereof the plaintiff complains are indicated upon the plan and are, briefly stated, the following :

(a) The defendant has wrongfully and unlawfully trespassed upon the said strip of land and has cut two furrows therein as indicated upon the plan with the object of diverting water on to his property, and of discharging water, including impure and polluted water, on to the said strip lower down, and has wrongfully and unlawfully used the said furrows accordingly.

(b) The defendant has wrongfully and unlawfully trespassed upon the said strip of land and has erected thereon fences enclosing or partially enclosing portions of the said strip of land and wrongfully and unlawfully claims to be entitled to maintain the said fences and enclose the said portions of the said strip of land of all which the details are indicated on the plan.

(c) The defendant has wrongfully and unlawfully trespassed upon the said strip of land by erecting on portion thereof, and by taking possession and keeping under lock and key a certain bath house (shown on the plan) and by coming himself or by persons professing to act with his authority from the "Hotel Cecil" to use the said bath house.

(d) The defendant has wrongfully and unlawfully trespassed upon the said strip of land and upon the pipes (the plaintiff's property) which have been laid in the said strip of land for preserving and conducting the water as aforesaid; by breaking the said pipes at a spot beside the bath house, and there inserting one or more pipes by one of which water is tapped for use in the bathhouse aforesaid in large quantities and by the other whereof, as indicated on the plan, water is tapped and led along or across the said strip of land on to defendant's property, where it is wrongfully and unlawfully used by the defendant to the detriment of the plaintiff, who is entitled thereto.

9. All of the grievances aforesaid are continuing grievances in which the defendant persists despite lawful demand for their abatement and removal and the plaintiff is entitled to a perpetual interdict and to judgment for £500 as and for damages sustained by reason of the aforesaid wrongful and unlawful acts of the defendants, which damages the plaintiff submits should be held to specially include the expenses entailed by the preparation of the plan rendered necessary by the aforesaid persistent trespass and wrongful acts of the defendant.

10. The plaintiff further says that at no time since 1841 has any attempt been made by the defendant or any predecessor in title to make use of the privilege of constructing a bridge at the point "A" correctly shown upon the said plan and for thirty years and upwards the land adjoining the said strip of land opposite to the said point "A" now owned by the plaintiff has not been owned by the proprietor for the time being of the "Hotel Cecil" property, but by the plaintiff or the predecessors in title of the plaintiff, and the plaintiff claims that the privilege of right of constructing such bridge has been lost and no longer exists and that the condition aforesaid has been nullified by the non-use of the said privilege or right in the time and manner contemplated in 1841 and by the adverse ownership and possession as aforesaid by the plaintiff and the predecessors in title of the plaintiff of the land adjoining the said strip of land wholly inconsistent with

the erection of the bridge contemplated in 1841 but the defendant wrongfully and unlawfully claims to be entitled to erect such a bridge at the point "A."

Wherefore the plaintiff prays for :

1. A perpetual interdict restraining the defendant from trespassing upon the said strip of land, from making any furrow therein, or any fence thereon and compelling the defendant forthwith to remove the aforesaid fences, bathhouse and bath and pipes inserted by him referred to in sub-paragraphs (b), (c), and (d) of paragraph 8 of this declaration.

2. Judgment for £500 as and for damages.

3. A declaration that the defendant is not entitled to the privilege or right of erecting a bridge at the point "A" across the said strip of land.

Or that this Honourable Court may grant such further or other relief in the premises as to it may seem meet, together with costs of suit.

Defendant's plea and claim in reconvention was as follows :

1. He admits the first five paragraphs of the declaration.

2. He does not admit the correctness of the plan referred to in paragraph 6 thereof.

3. As to paragraph 7 thereof, he admits that plaintiff or his predecessors in title have conducted water from the Newlands Spring since 1841, but he denies that plaintiff or his predecessors in title caused a cement dipping tank to be constructed at a convenient spot in the watercourse and fed the same with pure water as stated. On the contrary, the predecessors in title of plaintiff laid down iron pipes in the water furrow wherein the water from Newlands Spring was formerly conducted, and the furrow has been allowed to become contaminated so that the water therein is useless and no proper provision for defendant's dipping rights has been made. Save as above, he denies paragraph 7.

4. As to paragraph 8 thereof

(1) He denies sub-section (a) but he admits that he cut a short furrow at Letterstedt-road on the strip of land referred to, near the point "H" on the said plan, in order to release certain storm-water which the plaintiffs had unlawfully caused to be diverted and thrown on to his (defendant's) land by blocking up a culvert or pipe under the Letterstedt-road, which culvert or pipe had been in existence for more than 30 years.

(2) He denies sub-section (b) and says that the fence is on his boundary line.

(3) As to sub-section (c) he admits that he covered in a cement bath or tank which was

in existence for many years and long before he became the owner of the "Hotel Cecil" property, but he is willing, and hereby undertakes forthwith to have the cover removed and to cease to use the said bath. He denies that plaintiffs have sustained any damage by acts as above.

(4) As to sub-section (d) he admits that he inserted a small pipe in the large pipe which had been laid in the furrow as set forth above, but he submits that he was entitled so to do inasmuch as no provision was made for his water supply from the said furrow. Save as above he denies paragraph 8.

5. He denies paragraph 9 thereof.

6. As to paragraph 10 thereof he says that he and his predecessors in title have without let or hindrance crossed the said water furrow at various points, and more particularly at the point marked "Gate Bridge" from which spot there is a road leading direct to the street running at right angles to Letterstedt-road. He does not admit that the spot marked "A" on the plan is the place referred to in the said deed of transfer. He specially denies that his right to erect or to use a bridge or to cross the water furrow has been lost. Save as above he denies paragraph 10.

Wherefore he prays, subject to his undertaking in paragraph 4, sub-section (3), of this plea, that plaintiffs' claim may be dismissed with costs.

And for a claim in reconvention defendant (now plaintiff in reconvention) says :

1. He craves leave to refer to paragraph 1 of the claim in reconvention.

2. In or about 1900 plaintiffs (now defendants in reconvention) wrongfully and unlawfully blocked up a certain culvert or pipe running under the Letterstedt-road, a road separating the properties of defendant and plaintiffs, which said culvert or pipe had been in existence for more than 30 years, and had carried off storm-water.

3. The effect of the above wrongful and unlawful act was to divert and throw on to the property of the plaintiff in reconvention a considerable body of storm-water ; and by reason of such diversion plaintiff in reconvention has sustained damages in the sum of £100, which sum the defendants in reconvention refuse to pay. The defendants in reconvention claim the right to block up the said culvert.

Plaintiff in reconvention claims :

(a) An interdict restraining defendants in reconvention from blocking the said culvert and diverting the said water on to the property of plaintiff in reconvention,

(b) The sum of £100 as damages sustained by such diversion.

(c) Alternative relief.

(d) Costs of suit.

Plaintiff's replication and plea in reconvention was as follows :

1. As to paragraph 3 of the plea, plaintiff says that part of the water runs in the furrow and he denies that the water has become contaminated by any act or allowance of his, and part of the water has been led down in pipes for over 30 years to the knowledge of defendant's predecessors in title, who were supplied from the water which ran into the said pipes, and from there into the catch-pit which defendant wrongfully converted into the said bath. Plaintiff denies that no provision for defendant's dipping rights was made, and says that plaintiff constructed the dipping tank in the declaration mentioned for that purpose and which was destroyed by defendant, and thereupon plaintiff offered to erect an iron tank from which water could be drawn through a tap therein or to construct the said dipping tank in the declaration mentioned.

2. As to paragraph 4, plaintiff says he did close up a culvert on his land under the said road, but he denies that it has been in existence for more than 30 years, or that he had diverted or thrown water on to plaintiff's land, and he denies that defendant has any right to throw water on his (plaintiff's) land.

3. Save as aforesaid and save for admissions he denies the allegations in the plea contained, and joins issue thereon.

For a plea to the claim in reconvention, plaintiff says :

1. He admits he blocked up the culvert on his land, but denies all the other allegations in paragraphs 2 and 3 of the claim in reconvention.

2. He denies the right of defendant to discharge water on to his land, and says that defendant has wrongfully diverted and collected water on to his land in quantities much greater than heretofore, which water together with drainage defendant wrongfully and unlawfully discharged on to plaintiff's land and refused to desist therefrom ; whereupon plaintiff blocked up the said culvert. He denies that defendant has sustained any damage through any act of his. Wherefore he prays, etc.

Defendant's rejoinder and replication in reconvention was as follows :

Defendant says that save in so far as the said replication admits of any of the allegations in the plea and save that he admits that plaintiff offered to erect an iron tank, as

alleged, which offer defendant considers insufficient, he denies all and singular the allegations of fact and conclusions of law, etc.

Replication in reconvention general.

The facts sufficiently appear from the judgment.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for plaintiff: The first thing to be considered is the deed of transfer mentioned in the declaration. No servitude was thereby constituted in favour of Hamman. He reserved the 30 feet strip for the purpose of conducting water. He could use it only for that one purpose. The tenant of the house which is now the "Hotel Cecil" had the right to cross that strip by a bridge at one particular spot. Now, it was contended by the defendant that he had a right to go on that land to put in pipes, etc., etc. A servitude, even if there were one, must be construed restrictively. Some 40 years ago the predecessors in title of the vendor put in earthenware pipes. Ohlsson did all he could do by offering defendant a tank. Defendant had no right to take the law into his own hands and drill a hole in the pipe. He was merely allowed to bale water, and plaintiff was under no obligation to guarantee the water. We cannot go back to 1841 in order that my learned friend may have a right to bale water — a right which he has no intention of using. Till 1896 the *dominium* was in Letterstedt. There is a certain small quantity of water to be delivered, but Ohlsson's Brewery has a right to the rest. Even if all the water now in the pipe came down the furrow I would not advise anybody to drink it. It is no part of our duty to keep the furrow clean, and defendant has no right to divert water to flush his premises.

[Buchanan, A.C.J.: Mr. Searle gave that up.]

[Mr. Searle: No, we never did it. It is no question of giving up.]

Their witnesses say that the water was diverted in that way; they cut the furrows to flush their drainage. Mr. Arnold and Mr. De Witt were animated by hostile feelings towards the managing director of the brewery. Mr. Wood and Mr. Meacham were the cutting of the two furrows. Defendants have pleaded that there was no encroaching fence. They have abandoned that part of their plea to-day; but there is the fence. Clearly he meant to claim half the ground, and would claim half the water. I ask for an interdict against both the wire fence and also the fence, I to H on the plan, and

for an order for their removal. The bath-house has been given up, and it is now admitted that defendant had no right to the use of the bath-house pipe. He also gives up his claim to cross the furrow at the place marked "gate," and admits that he may cross only at "A," and there by a bridge. As to loss of servitude by non-user, *per modum et tempus*, see *Edmeades v. Mostert* (1 Juta, 334), *Edmeades v. Scheepers* (1 Juta, 334), and *Ludolph v. Wagner* (6 Juta, 193).

Mr. Searle, K.C. (with him Mr. Gardiner), for defendant: As to plaintiff's claim in convention. The declaration complains: (1) That two furrows have been cut. Thompson never claimed a right to make the upper furrow. It was useless to him. The only witnesses who spoke of this furrow were Marais and Meacham, and they did not say we made it. (2) As to the lower furrow, I can best discuss that when speaking of the claim in reconvention. It was only cut to carry off the storm-water after the pipes had been blocked up. We did claim a right to the furrow. The hotel property was flooded, and a nuisance was caused, and if we had a right to claim that the pipe under the road should be free, we had a right to cut the furrow when plaintiff blocked up the pipe. (3) As to the fences, there is no claim for a declaration of rights. (4) With regard to the bath-house, we have dealt with that in the plea, and we agree to remove it. Defendant did not make the bath. It was originally a filtering bed, and was disused before defendant made use of it. He had no right to do it; nor had he any right to connect it with the iron pipe and take water therefrom; but as plaintiff was not using the water he has not been damnified. (5) The pipe near the bath-house has been broken and a pipe inserted. He has laid a pipe on to his stable, and during the last few months has used it. This is the only point which raises the question of the servitude. (6) As to the dipping tank, it was not supplied with pure water, and defendant never gave any positive instructions to break it, though he admitted it might have been broken by his gardener. Coming to the nature of the servitude, my learned friend said it was in favour of Letterstedt. That was not so; it was in favour of the purchaser. Nor can I agree that the purchaser was bound to construct a viaduct over the whole reserve; all that was contemplated was a plank bridge.

[Buchanan, A.C.J.: It is a question whether there has been non-user of the bridge for thirty years, but you had better leave Mr. Schreiner to argue that.]

Section 7 of the contract of sale provided for the servitude, and gave the purchaser a right to bale. We must consider the state of things at the time the servitude was granted. Much more water used to come down then than now. Then the water was kept clean, and was used for drinking and for brewing. About 1858 earthenware pipes were put in, but there was still a good flow of water in the furrow. Now there is no water to dip. Plaintiffs admit that a tank in the bed of the furrow is necessary in order to get any water. But that is not the servitude, and the tank is only to be a temporary arrangement, for they say they intend soon to take all the water. Now, no one could "bale out with a clean vessel," for the present water would dirty it.

[Maasdorp, J.: All the witnesses agree that you can keep the water clean only by conveying it in pipes.]

Why cannot it be done now as well as formerly?

[Maasdorp, J.: The population near the stream has increased.]

Be that as it may, the servitude is connected with this case only as a possible justification of taking the water through pipes. The pipes were there in 1893, and possibly in 1881, when Sheasby was there. The long time during which this was done shows it was not regarded as a very serious offence. According to plaintiff's attorneys, the iron tank was offered only on condition that defendant would give up all claim to the bridge. That was an unreasonable condition. Suppose no provision had been made for defendant to get his water, would it be said that he had committed more than a technical trespass? It is for the Court to decide whether plaintiff's offer was reasonable.

[Jones, J.: No, we have to see what your legal rights are.]

No, no declaration of rights has been asked for. As to the breach in the pipe, that was not serious, and there is no proof of any loss resulting, and no special damage has been pleaded. The costs of the surveyor's plan have been claimed as damages, but it is really a question of costs, and the charge is excessive.

As to the claim in reconvention, viz., that plaintiff has blocked up the pipe. We do not claim to send down sewage water. Only storm-water is mentioned in our plea. Plaintiff has claimed a right to block up the pipe under the Letterstedt-road. Mr. Dreyer said the bulk of the storm-water used to run to Mariédahl), where the pipe under the road now is. Other witnesses corroborated this.

Meacham had no right without notice to stop up the culvert, and thus flood the hotel property.

[Maasdorp, J.: Has he not a right to stop dirty water?]

He stopped storm-water too. He only says that on one occasion there was an ooze of dirty water. Plaintiff's case is that we have no right to send any water on to his land.

[Maasdorp, J.: You are claiming damages for the stoppage. When they stopped the water had they not a right to do so?]

No, they have left it stopped for the last nine months. The case of *Ludolph v. Wagner* (6 Juta, 193) is quite in our favour, as the *natura loci* gives us a right to discharge water.

[Jones, J.: You must not send it down in an artificial channel.]

If it flows in the same artificial channel for thirty years immemorial user is presumed; and here we have proved a flow for more than thirty years.

[At the request of the Court, Mr. Schreiner confined his reply to the question of the bridge.]

Mr. Schreiner (in reply): See *Edmeades v. Scheepers* and also *Edmeades v. Mostert* (sup. cit). A servitude is lost by non-user.

[Buchanan, A.C.J.: The non-user must be for the period of prescription.]

No, my point is that these cases show an adverse user for only sixteen or eighteen years. In *Edmeades v. Scheepers*, De Villiers, C.J., cited *Voet* (8, 6, 5) and *Grotius* (2, 37, 4). As soon as the property on the other side of the reserve strip was cut off in 1867, the right of crossing was at an end. This was no true servitude—it was merely a right reserved by the *dominus* to a purchaser. Once this right had died it could not be revived. Hammon had a right to cross by a bridge, but by selling the land on the other side he lost the right to cross. His act was inconsistent with the enjoyment of the servitude. The bridge had to span the whole of the 30 feet of the reserved strip. As to the surveyor's expenses, plans are necessary in a case like this, and of great help to the Court.

[Jones, J.: See *Knox v. Koch* (2 Juta, 382).]

Cur. ad. vult.

Postea (June 30).

The Court delivered judgment.

The Acting Chief Justice, in giving judgment, said that the action which had been brought before the Court did not deal with all the questions in dispute between the parties, and in that respect was unsatisfactory.

The plaintiffs did not pray for a declaration of rights, which might have covered all disputes and settled them for the future, but limited their action to a claim for damages for trespass and for an interdict. Plaintiffs were the owners of a strip of ground 30 feet in width, through which ran a watercourse, leading water from the Newlands Spring to a mill and brewery, and which formerly also carried water to properties situated lower down, which had certain servitude rights. A block of land, some 28 acres in extent, on both sides of this strip was sold in the year 1841, by Letterstedt to his son-in-law, Hammon. Letterstedt, while reserving the strip, limited his right of user, and also gave to the purchaser and his successors the right to cross the land and watercourse at a specified point, marked A on the plans, and also the right to bale out water from the furrow with a clean vessel for the use of the purchaser's house and for his cattle. It was expressly stipulated that this right should not be enjoyed by the owners of any lots which might at any time be cut off from the land sold. Hammon and his successors in title sold off a quantity of land, so that now the remaining extent was reduced to about an acre of ground, being one corner of the old property, and all being on one side of the reserved strip of 30 feet, which bounded it on the east side. Plaintiffs now complain that the defendant on various occasions committed acts of trespass upon this strip. The first of these grievances is that defendant had cut two furrows, connecting with the main watercourse. Defendant denied cutting one of these furrows, but admitted he had cut the other, which he said he had done to remedy a grievance he had against the plaintiffs. As to the upper furrow, which led water on to defendant's ground, the evidence was that from time to time it was found to be open, but by whom this was done there was no evidence. However, the defendant does not claim to have any right to this furrow, and it may be closed by the plaintiffs. As to the other, the defendant had failed to establish any right or justification for his act, and on this point judgment must go against him. The second complaint was as to the fences. The survey of the strip showed that an old line fence was cut along the true boundary of defendant's land, but as there was no declaration of rights asked, but only damages for acts of trespass, as this fence and its continuation to the point "h" on the plan was in existence before the defendant took possession, it cannot be dealt with in this action. But

as to the other fence, the defendant has been guilty of deliberate trespass. It appeared that a former action had been commenced against the defendant, who was then occupier, and the S.A. Breweries Company, who were the registered owners of the remaining extent, now known as the Hotel Cecil property, but on the S.A. Breweries Company disclaiming all rights, and stating they had sold the property to defendant, this action was discontinued. After that had been done and before summons in this case, defendant had deliberately encroached nearly half-way across the strip, and erected a fence, which he maintained, and had only in court through his counsel given up. That and the other unwarranted acts would have to be considered when dealing with the question of damages. Next, as to the bath-house. In the old water furrow there had been a collecting tank or filtering bed, from which the water had been led in pipes to the brewery. The brewery had not been worked for some years, and the defendant, without leave or licence, and without any justification, had built a bath-house over this tank, and converted it into a bath-house, keeping the key at his premises. This bath-house was not even on the portion of the strip which adjoined his property. Although one of the complaints made by the defendant was that the plaintiffs had not kept the stream pure and fit for drinking purposes, here was the defendant himself polluting the water. For the purpose of getting clean water for this bath defendant had drilled a hole into the iron pipes leading to the brewery, and had also inserted a branch pipe to take water away to his stables. These acts also had been committed without a shadow of right or justification. The defendant in his plea gave up the use of the bath, but he tendered no damages or costs. Then, again, the plaintiffs had made a cement tank on the strip of ground for the purpose of giving the defendant a convenient dipping place. This tank the defendant had caused to be smashed up and destroyed. These were the principal acts of trespass complained of. Plaintiffs further claimed a declaration that the defendant had lost the right of crossing the strip of ground and furrow which had been reserved to the original property in the deed of transfer. It was urged that the original servitude had been lost by non-user *per modum et tempus*. This time must be for at least the period of prescription; and the evidence has shown that within the last thirty years the owners or occupiers of the Hotel Cecil property had

used this crossing to get to a field on the other side. There had, therefore, not been a non-user for a sufficient period to entitle plaintiffs to a declaration that the right was lost on that ground. But it was further contended that in consequence of the cutting-off of the lots of ground on the other side of the strip of reserved land from the remaining extent, the servitude had been destroyed, and the case of *Edmeades v. Scheepers* (1 Juta, 334) was relied upon in support of that view. That decision, however, is not in point in this action. There the plaintiff sought to insist upon a servitude, as to which, it was held, he was estopped by his own conduct from doing. In that case the servitude in question was in favour of all the erf-holders of the town, and the learned Chief Justice in his judgment carefully reserved the right of the other erf-holders, and decided only that the plaintiff by his acquiescence was prevented from insisting upon his rights. That case did not go upon the ground that the servitude had been destroyed. In this case the servitude might be of no benefit to the defendant, but at present plaintiffs were not entitled to a declaration that it had been lost by non-user, *per modum et tempus*. The defendant had attempted to justify his breaking of the cement tank on the ground that its construction would not give him his right to dip water; and it was contended that defendant was entitled to have the water brought down to him in pipes, so as to be uncontaminated, and that these pipes should be opened, so that he could bale water from the full flow of the stream. But there was nothing to support the claim that defendant was entitled to have the water brought down to him in pipes. His servitude was a right to dip water from the furrow with a clean vessel, and as long as sufficient water came down in the furrow for that purpose he could not complain. There was no doubt that the furrow water was now liable to pollution to a greater extent than formerly, but the plaintiffs were not answerable for that. That was due to the number of other people who now had residences abutting on the watercourse. The plaintiffs had endeavoured to meet the defendant in every possible way, and to give him a supply of pure water from their pipes into an iron tank, but the defendant would not accept any offer. He had himself only to thank if he was now relegated to his legal position. Coming to the claim in reconvention, his lordship said that since the

sale of the property a road had been made along the northern side of defendant's property, leading to the railway-station. From time to time this road had been raised, and it now prevented the water from draining across from defendant's to plaintiffs' side of the road. There was now a pipe running under this road, but as to when that pipe was placed there there was no evidence. A previous owner of the property had connected that pipe with defendant's property to carry off the storm-water. Defendant now claimed damages because the plaintiffs had stopped up that pipe on their own land. But they justified having done so on the ground that defendant was discharging offensive matter and contaminated house water through the pipe. That plaintiffs had ground of complaint was fully established and damages could not be given against them for preventing the defendant from committing a nuisance upon their land. No declaration of rights as to storm-water was asked for, and indeed the evidence was insufficient to allow such a declaration to be made. Absolution from the instance would, therefore, be given on the claim in reconvention. In giving judgment on the claim in convention, no special damages had been pleaded, except that the expenses of survey and of making plans were asked for. But these were a matter of costs, not of damages. If they were necessary they would follow the judgment; if they were unnecessary, they would not be allowed. In this case the plans were of great assistance to the Court—indeed, the case could not have been heard without them. But as the survey would be useful in regard to other properties, and would be valuable to the plaintiffs on that ground, half the expenses of survey would be included in the costs, and also the expenses of making the plans, the amount to be allowed to be determined by the Taxing Officer. As to damages, the amount would be sufficiently substantial to mark the condemnation by the Court of the improper conduct of the defendant. The judgment of the Court would, therefore, be for the interdict prayed, and for £100 damages and costs; with absolution from the instance on the claim in reconvention.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. J. and H. Reid and Nephew.]

ABRAHAMSON V. RUTTER. { 1901.
June 27th

This was an action brought by plaintiff for the sum of £211 14s. 6d. for certain tin supplied, together with some other articles, less a sum of £5 owing to defendant by Plaintiff. The parties were tinsmiths, carrying on business in Cape Town. A contract had been entered into between them whereby plaintiff was to supply to defendant 40,000 water-bottles at 1s. 5½d. per bottle. It was admitted that 25,787 had been supplied by plaintiff. Defendant refused to accept 1,722 of these bottles, on the ground that they had not been approved of, and had been rejected by the military authorities as being not according to contract.

The defendant (plaintiff in reconvention) claimed the sum of £54 18s. in respect of the covering of a certain number of the bottles with cloth, which bottles were afterwards rejected by the military authorities; also a sum of £25 10s. for testing the bottles, and the sum of £5 for certain two cases of tin delivered. According to the original contract the bottles were to have been made with three-cross tin, but this particular quality of tin ran out, and it was now contended that it was agreed between the parties that another and inferior tin should be substituted. Defendant tendered 15s. 3d., which he alleged to be the amount due to plaintiff.

Mr. Benjamin (with him Mr. C. W. de Villiers) for plaintiff.

Sir H. Juta, K.C. (with him Mr. Solomon), for defendant.

Benjamin Abrahamson, the plaintiff, said he entered into an agreement on the 11th February, 1900, to supply defendant with 40,000 tin bottles at 1s. 5½d., less those manufactured by defendant on his own premises. The agreement was that the material should be three-cross tin. This quality of tin ran out in Cape Town, and witness tried, but failed, to get any from the coast. He cabled to England, but the tin had not yet arrived. The last two deliveries were made on March 19 and 20. A day or two before this, defendant sold witness two cases of two-cross tin. Witness told defendant that he could not get any more three-cross, and his foreman showed defendant a sample bottle made with two-cross one side, and one-cross, double, the other side. Rutter was satisfied with this. When witness first told defendant that three-cross tin was exhausted, he said: "All right; we'll have to see what we can get." He afterwards

supplied witness with the two cases of tin. It was not until April, when witness demanded payment through his attorneys, that the complaint was made about the bottles. Witness did not sell subject to the bottles being passed by the military expert. Previous to this, witness had sent for the money, but had been put off.

Cross-examined: Witness knew Private John Strachan. He did not know that Strachan was a foreman tinsmith of the Army Ordnance Department. Strachan had been to witness's place, but not to examine the bottles. Strachan had not been to witness's place and complained that the bottles were being made with one cross-tin. Possibly witness told him he had been away from his business with the toothache. He did not tell Strachan that while he (witness) was away with toothache, his men had been using the one cross-tin without his knowledge. Witness did not go to Rutter's place and offer to replace the bottles complained of. Witness employed a man named Morris Goldstein to solder the tins. This was the last process in the making. Witness did not tell this man to look out for Rutter and the sergeant, and that if they came into the shop, he was to cover over the bad bottles and put good ones on the top. The bottles made with two-cross tin and one-cross double were 6s. or 7s. more per hundred than the three-cross. At the beginning of the contract three-cross tin was 34s. 8d. per case. Afterwards, on becoming scarce in the city, it went up to 45s. Two-cross tin was 33s. or 34s., and one-cross 22s. 6d. per case, so that one-cross double would amount to 45s. Rutter did not tell witness that the bottles would have to be covered and sent to the military to test, and that if they were rejected, witness would have to bear the cost. Witness did not reply that his work would bear the test.

Re-examined: There was extra labour required in the making of a one-cross double bottle, in addition to the material being more expensive than three-cross.

Max Harris, one of plaintiff's employees, said he was in the shop when defendant came in and suggested making the bottles of two-cross tin, as the three-cross tin was exhausted. Witness cut out a bottle with one side of two-cross tin, and the other side of one-cross double. Defendant inspected the bottle, and was quite satisfied with it. Abrahamson soon afterwards came in and went into the office with defendant. Witness was afterwards told to continue making bottles as per the sample he had cut out for

defendant's examination. After the order was completed, defendant told witness not to dismiss the men, as he expected another big order. The order, however, never came. Witness did not remember Private Strachan objecting to the quality of the tin. Soldiers often came round and looked at the bottles.

William Henry Wallace, bookkeeper to the plaintiff, said he heard Rutter arrange with the last witness to have a sample bottle made as described by Harris. Rutter said it would do splendidly. Abrahamson came in later, and Rutter and he agreed that the balance should be made according to the sample made by Harris. Rutter never complained about the bottles not being made of proper material.

Cross-examined: Witness never heard Strachan say to Harris that proper tin was not being used.

John William Marshall, who was formerly employed by Rutter, and is now working for Abrahamson, said he tested the bottles. It was possible to test between 1,800 and 2,000 bottles per day. There were several people who used to make bottles for defendant. Witness noticed several bad bottles. They came from Duffett, who also made for Rutter.

Mr. Benjamin closed his case.

For the defence, John Strachan was called. He said he was a private in the Army Ordnance Corps, and was foreman tinsmith. A number of bottles had to be supplied to the military by Isenberg, who sub-contracted with Rutter and others. Plaintiff did work for Rutter. It was witness's business to visit the shops where the bottles were being made and see that they were made properly. Witness often went to Abrahamson's for this purpose. Abrahamson knew perfectly well what witness came for. Witness always went in uniform. In March witness saw bottles made by Abrahamson, which were made with very inferior material. The tins were made with "I.C.," which was the lowest grade of tin, or one cross. Witness spoke to one of the employees about it. This man said his master was not there. He admitted having used half a box of "I.C." Witness saw Abrahamson and told him he was using the wrong material. Abrahamson said he had been sick, and the man had used the wrong material while he was away. Abrahamson said they were not all bad, and witness told him to send them up to Rutter's. They were sent up, and witness told the man to separate the good and bad and make two heaps of them. He divided them, and witness, on examination, found both lots the

same, with the exception of about 50. There were about 500 bottles in the lot. Wallace, the bookkeeper, was present when witness spoke to the foreman (Harris) about the inferior material used in the bottles.

Charles Cook, glass-cutter, carrying on business in the same building as the defendant, said he heard Abrahamson tell Rutter that he would give good bottles instead of some about which Rutter had complained that the tin was weak. Abrahamson said he had been away ill, and his men had made a mistake. Rutter asked plaintiff what would be the position if the bottles were rejected by the military, and Abrahamson said he would take the risk, as he knew his bottles, with the exception of the lot examined and complained of, were good.

Morris Goldstein, tinsmith, said that in February last he worked for Abrahamson in making these bottles for Rutter. Witness was employed in soldering. For a week and a half witness was working on the bottles with two pieces of one-cross. Witness heard Abrahamson tell Harris and Moses to make the bottles with three-cross one side and two pieces of one-cross the other. He told witness to look out for the sergeant and Rutter, who often came to the place, and to cover the bad bottles up and put good ones on top when they came. When the sergeant came he only examined the good bottles on the top. He did not examine the bad ones beneath.

Cross-examined: Abrahamson did not discharge witness because he could do nothing else but soldering. Witness was an experienced tinsmith.

By the Court: Three-cross tin was used on one side, right up to the end.

John Robert Rutter, the defendant, said he contracted to supply Isenberg with three-cross tin. Witness said that Abrahamson told him at the time of the first delivery that witness's men could test them, and that he (Abrahamson), as in the case of other contractors, would repair all defects. He never told witness that he could get no more three-cross tin. If witness had not understood that Abrahamson had plenty of three-cross tin, he would have given the work to one or two other tinsmiths whom he knew to have stocks of three-cross. When witness complained to Abrahamson of the quality of a certain lot, he said he was positive they were all three-cross. Witness told him that they would have to be covered, and tested by the military, and Abrahamson said he was not afraid of that, as they were made of the right material. After Strachan had

seen the tins, Harris came round to sort out the tins, and to divide the good and the bad. Harris made two heaps, but Strachan only selected a few as good. Witness had offered the 1,722 rejected bottles to Abrahamson. Plaintiff had said he would give good bottles in place of those rejected; but when he sent the alleged good bottles, they also were condemned. He told witness to put the bad ones aside, and witness had done so. They lumbered his establishment now. Witness had never seen a water-bottle made with a double side like the one-cross double-side bottle produced. Witness believed that the one-cross tin was put double on one side in order to make up the weight, and so deceive him into believing it was three-cross. It took quite three minutes to test one bottle.

Cross-examined: Witness had no written agreement with plaintiff that the bottles were subject to the approval of the military. He took Abrahamson's word, which was given in the presence of witnesses. Witness never agreed to the substitution of the two-cross tin.

Frank William Duffett, tinsmith, Cape Town, said he was one of those who contracted with Rutter to supply water-bottles. Witness made 4,800 bottles, all of which were of three-cross tin. Witness had never known of water-bottles made with double pieces of tin.

Sir H. Juta closed his case.

Mr. Benjamin (for plaintiff): Admittedly a written contract can be varied by a subsequent parole agreement, and plaintiff has sworn that in this case it was so varied. The evidence of defendant was that it was not, and it must be left for the Court to decide whose evidence they will accept. All the probabilities of the case are, however, in favour of that of plaintiff. Defendant had a large contract to complete within a certain time, and he knew that the material agreed upon was not procurable in this country. Provided the bottles were good enough to pass the military inspector and were completed in due time, defendant had no particular interest in the literal fulfilment of the written contract. Plaintiff, however, had no contract with the military, and it is on evidence that it was not provided in his contract with defendant that the bottles should be subject to their approval. Defendant accepted the bottles which the military afterwards rejected—he covered them at his own risk. He must, therefore, pay for the goods which he had ordered and accepted, and if he had failed to fulfil his contract with the military he had only himself to blame.

P 2

Sir H. Juta, K.C. (for defendant): It is common cause that 1,722 bottles were not made according to the specifications of the written contract of 11th February, 1900. Plaintiff's contention is that this contract had been varied by subsequent parole agreement. The onus is on plaintiff to prove this agreement, and this (in face of defendant's denial on oath) he has certainly not done. Besides it was (I submit) most improbable that he would consent to accept at full price an article admittedly inferior to that for which he had contracted. If plaintiff could not get three-cross tin other tinsmiths had plenty of it, but naturally they did not wish to supply a rival in the trade. As to the claim in reconvention, defendant (plaintiff in reconvention) thought he could take plaintiff's word that no more inferior bottles should be supplied. He tested the weight and found it to be that of bottles made of three-cross tin, and, believing that they were made of that material, he covered them. Clearly plaintiff is liable for the expense to which defendant has thus been put by the trick played upon him.

Mr. Benjamin in reply.

The Acting Chief Justice, in giving judgment, said that on February 11 last, the defendant Rutter accepted, in writing, a tender made by plaintiff, to make certain water-bottles of three-cross tin at the rate of 1s. 5½d. per bottle, the work to be done in a satisfactory manner. Forty thousand bottles Rutter had contracted to supply Isenberg, who was a contractor with the Government. Of these bottles Rutter made some himself; others he got made at two tinsmiths, and a great number he got made by plaintiff in this case. It was common cause that 25,787 bottles were made by plaintiff and delivered to Rutter, and if these bottles were satisfactory, the account between the parties showed a balance of £210 odd as due to the plaintiff. But the defendant said that 1,722 of these bottles were not according to contract. They were admittedly not according to the contract entered into on February 11, because they were not made of the tin of the quality therein stated, which was three-cross. Plaintiff, however, said that by a subsequent agreement between the parties, the original contract was varied in respect to certain of the bottles, by which he was allowed to substitute one-cross tin double on one side, and two-cross tin on the other side. This agreement was denied. There was evidence that defendant was present when the conversation occurred in respect to this, and that he authorised the change to be made. This defendant

positively contradicted, and the Court failed to see what there was to induce defendant to accept a bottle which was *prima facie* inferior to that which was contracted for. In view of the conflict of testimony, he must, his lordship thought, revert to the written contract between the parties. If a party wished to set up a verbal variation of a written contract, he must prove such variation to the satisfaction of the Court beyond all reasonable doubt. He (the Acting Chief Justice) had a very grave doubt whether any such variation was made, in face of the positive contradiction of the defendant, and the absence of any reason why he should have altered the contract. The Court was of opinion that the plaintiff could not recover the amount claimed in respect to the 1,722 bottles, which were not made according to the contract entered into. Defendant tendered to deliver these bottles to him, and he would have to accept them. This, however, did not settle the whole case. There were other bottles still unpaid for which had been accepted by defendant, and against the sum due for these bottles the defendant said he was entitled to set off the sum of £54 18s. for special damages for breach of contract, and the sum of £25 12s., which it was specially agreed upon plaintiff would pay, leaving a trifling balance of a few shillings, which he tendered. The £54 18s. was claimed on account of the expense incurred by defendant in covering bottles which had been rejected by the military. He (the Acting Chief Justice) did not think that this was recoverable from plaintiff. After the bottles were made, defendant could have discovered the defects, in fact he had done so in regard to a great number of the bottles. The Court thought it was shown clearly by Strachan's evidence that these defects were patent. Strachan himself said he would have rejected them before they were covered. The refusal by the military authorities was not by the contract made the test between the parties. The plaintiff had to deal with the defendant alone, and his acceptance would be final as between them. The cost of the covering of these bottles could not, therefore, be charged to the plaintiff, and this £54 18s. must be paid to the plaintiff. As to the other amount of £25 12s., it was contended that the bottles were not finished and completed in a satisfactory manner until they were tested. The duty of testing would, under the contract, have been plaintiff's. It was a practice among tinsmiths to test the work, and

it was also shown that the other smiths had in this case handed the bottles to defendant to test, and agreed to pay him. Defendant swore positively that plaintiff came to him and asked him to do the testing. His lordship was of opinion that the Court must accept the testimony of the defendant. The defendant's own witness gave evidence that he could test 100 bottles per hour, and that at 2s. per hour was a reasonable rate, to pay for such testing. This would be £1 per 1,000, and the total amount would be practically that stated in the plea. This left the sum of £54 18s. retained for the covering, and the sum of 15s. 3d., which had been tendered, and these two amounts defendant must pay to the plaintiff. Judgment would therefore be given for plaintiff for £55 13s. 3d., defendant to return the bottles as tendered in the plea. As to the question of costs, this must fall under the ordinary principle that the successful party was entitled to costs. The tender made was altogether insufficient, and the judgment for plaintiff must carry costs.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinné; Defendant's Attorney, A. W. Steer.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

EXECUTORS ESTATE DAWES V. SCOTT. 1901. June 28th.

This action was for the sum of £250, being the amount of money paid to defendant as portion of the purchase price on the sale of the lease and goodwill of the Pekin Hotel, Cape Town. The lease and goodwill of the place in question had belonged to the late Mr. Dawes, and Messrs. Lindemann and Joliffe had agreed to purchase the said goodwill for the sum of £2,500, and a sum of £250 was deposited by the intending purchasers with Mr. Scott, a broker, as part payment until possession was taken. The purchasers failed to take possession on the day they were to do so, and the sale did not go through. As a consequence, the late Dawes lost the lease and goodwill, and his estate had to be surrendered. The £250 was

still in the possession of Scott, who in his plea claimed £125 of that amount as brokerage.

Plaintiffs sued in their capacity as trustees in the insolvent estate of the late Dawes.

The defendant admitted the capacity of the plaintiffs, and that he was instructed to sell the goodwill, etc., of the hotel. He also admitted that Lindemann and Joliffe did not take possession, but denied the other allegations contained in the declaration. He further claimed the sum of £125 as brokerage, and agreed to pay the balance over to anybody appointed by the Court to receive the said amount.

Karl Ludwig Luresen said he was an executor in the deceased's estate. He instructed Scott to sell the goodwill, furniture, etc., of the Pekin Hotel. The purchasers were Lindemann and Joliffe. Possession was to be given them on November 1. It was tendered them, but they did not take possession. Witness attempted to sell to other parties afterwards, but without success. He then lost the goodwill and the lease of the hotel.

Cross-examined: Lindemann and Joliffe did not take possession. In consequence of this witness tried to sell the hotel again. He accepted the broker's note, but did not pay the brokerage. He did not admit that any brokerage was due to Scott.

Charles W. Herholdt, an attorney, said that he was acting for the trustees in the insolvent estate of the late Dawes. After the sale to Lindemann and Joliffe he before November 1 and subsequently tendered them possession of the Pekin Hotel. He met Lindemann and Joliffe, who said they were not prepared to pay. Subsequently Lindemann absconded. Witness met Joliffe, who said he would like to get out of the mess. From Joliffe's conversation witness considered that Joliffe looked upon the £250 as lost.

Cross-examined: It was understood that Lindemann and Joliffe would pay in a short time. The attempt made to sell the hotel again was after Lindemann and Joliffe had cleared. Witness considered that plaintiffs had a claim against Lindemann and Joliffe for damages for non-fulfilment of the contract.

Alfred Newton Foote, a clerk in Syfret's office, said Messrs. Syfret and Steytler were trustees in the estate of Dawes. Mr. Syfret was sole trustee in the estate of Lindemann. The sale of the furniture of the Pekin Hotel realised £102.

Cross-examined: He was not aware of any communication with Scott in regard to

the estate of Lindemann. He was aware that Scott was willing to pay the money, but did not know to whom to pay. As trustee in Lindemann's estate, Syfret claimed the money in that estate from Scott, and again afterwards in the estate of Dawes.

This closed the case for plaintiff.

Reginald Metcalf, a clerk in the firm of defendant's attorneys, said he had attempted to pay the money in to the Registrar of the Court. The Registrar refused to accept the money. The tender was not made to the plaintiff.

James Scott, the defendant, said that he sold the property to Lindemann and Joliffe. He was a broker. The purchasers did not close the agreement of sale. Syfret first claimed the £250 on behalf of Lindemann's estate, and afterwards on behalf of the estate of Dawes. Joliffe had also claimed the money. Witness had tried to pay the money into court. Syfret would give him no security.

Cross-examined: Joliffe claimed the money personally and not by letter. Joliffe originally handed witness the money.

This closed the case for defendant.

Mr. Benjamin said that he was prepared to admit that the plaintiffs could only set up a claim for £125. Lindemann and Joliffe had forfeited their claim to the £250 for failing to carry out their contract. Scott received the £250 as agent for plaintiffs, therefore plaintiffs were entitled to the money. Counsel quoted *Howe v. Smith* (L.R., 27 Ch. D., p. 89), to show that part payment of purchase money as deposit of security was forfeited by non-fulfilment of contract. On those grounds plaintiffs were entitled to the earnest money. Scott's position was a curious one. His retention of the £125 was a tacit admission that plaintiffs were entitled to the money.

Sir Henry Juta said that if the law made no provision that where a man holds money which he does not claim he should not be made the buffet of all probable or possible claimants; it would be creating a most dangerous state of affairs. The £250 had been paid in trust until possession was taken. Defendant was merely a stake-holder, and was quite prepared to pay over the money to anybody who could show a good title to it. The money could not be regarded as a part payment.

In giving judgment, the Acting Chief Justice said that, on the death of the late Walter Thomas Dawes, the executor in the estate employed defendant as broker to dis-

pose of the Pekin Hotel, with the goodwill. Defendant, as broker, sold the same on the 14th September to Lindemann and Joliffe, and according to the broker's note, which was accepted by the executor, a deposit of £250 was paid in trust to the defendant until possession was taken, when the balance would be paid. This deposit was clearly, from the tenour of the note, part of the purchase price of the property. It was paid in trust to Scott until possession was taken. It was also clear from the evidence that Scott knew of all the transactions between the parties, and was present at the negotiations which took place with the parties who held the lease. The purchasers were unable to complete the purchase and take possession of the premises when the same was tendered to them. The time had arrived when the trust in Scott came to an end, and he should then have paid the amount over to the proper persons. Possession was tendered on the 1st November, and on the 20th November the executor demanded from Scott the £250 which he held in trust as part of the purchase price. In consequence of the failure of the purchasers to complete their contract, the lease of the premises was lost, the goodwill was also

lost, and the assets in the estate so reduced that the estate had to be made insolvent, and the present plaintiffs were made trustees. They now claimed the £250 from Scott. Though the declaration carried a repudiation, the evidence did not show that there had been a repudiation of the contract, but rather a failure on the part of the purchasers, and consequently the plaintiffs called upon the defendant to pay over this money to them. This the defendant failed to do, and now took up the position that he was merely a stake-holder for whoever was entitled to the money. But the defendant was in this dilemma. The defendant claimed the right to take, and pleaded that he had taken his commission out of this amount, and he could only do this if the money belonged to the seller. If the money had to be returned to the purchasers, Scott, of course, would not be entitled to take his commission out of the amount, for by the broker's note that would have to be paid by the seller. With regard to the brokerage, the Court held that as the sale had been concluded, the defendant would be entitled to his £125. Judgment would be given for plaintiffs for £125, with costs.



"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and
the Hon. Mr. Justice MAASDORP.]

SHAUBAN V. GOVEIA. (1901).
(July 1st.

Misrepresentation—Fraud—Brokerage.

To succeed on a plea of fraudulent misrepresentation, it is necessary to prove that the representations made were false in fact and to the knowledge of the person making them, or were made regardless of their truth or with the intention of deceiving.

This was an action in which the plaintiff, Joseph Shauban, sued the defendant, John Goveia, for the recovery of the sum of £60 12s. 6d., being the brokerage on the purchase price of certain property.

The declaration set forth that the plaintiff was a broker, carrying on business in Cape Town, and defendant a landed proprietor, living at Salt River. In November, 1900, defendant, through the plaintiff, sold to one Ali Mahommed, a certain shop and house for the sum of £2,425. Plaintiff now claimed the sum of £60 12s. 6d., being 2½ per cent. commission on the purchase price, also interest and costs of suit.

The plea alleged that defendant had been induced to sell the property by fraudulent misrepresentation on the part of the plaintiff, who had represented Ali Mohammed as a man of means possessing several shops and large credit. It afterwards appeared that Mahommed had no means, and although he had

paid the sum of £100 on account he had cancelled the sale as he was unable to pay. Defendant claimed the sum of £100 in reconvention for alleged damages sustained by the sale not going through.

Plaintiff, in his replication, denied having made false or fraudulent misrepresentations, and also denied that defendant had sustained any damage.

Mr. C. W. de Villiers for plaintiff.

Mr. Searle, K.C. (with him Mr. Percy Jones), for defendant.

The facts appear from the judgment.

Mr. De Villiers (for plaintiff): Plaintiff was merely a "go-between." He brought his client to Goveia's house, and interpreted between the parties. Goveia says that the sale was for cash, but the agreement to let two months pass showed that Ali Mahommed intended to raise money on mortgage. Since the plaintiff's claim was supported by a written document, the strongest proof of fraud would be required to disentitle him to his claim. If a man makes an incorrect statement *bona fide*, it is not fraud. *Durr v. Bam* (8 Juta, 22).

[Jones, J.: To disentitle him there must have been either fraud or a warranty.]

Yes. *Stellenbosch Municipality v. Van Lindenberg* (3 Searle, 345). Defendant treated the transaction as a sale till he found Mahommed could not pay, and then he set up the defence of false representation.

Mr. Searle (for defendant) cited *Tait v. Wicht* (7 Juta, 158), *Derry v. Peek* (58 L.J., Ch. 864), *Erans v. Edmonds* (13 C.B. 777), and *Voet* (4, 3, 5). This man (the purchaser) was a man of straw.

[Maasdorp, J.: His statement that he was worth nothing was not on oath. He was carrying on three shops.]

[Jones, J.: If you allege fraud you must show (1) that a definite statement as to the means of Mahommed was made; (2) that

that statement was a misrepresentation; (3) that the person who made it was conscious of its being without foundation.]

If Ali Mahommed had nothing he should have been called to show that. All we know is that he could not complete his contract.

[Maasdorp, J.: You say he was prepared to pay cash. Why was that not put into the contract?]

He is wholly uneducated, and can neither read nor write. The contract was made out by the broker. The Court must look at the gist of the transaction. Shauban did not claim brokerage till November. He had said to Goveia, "You will get cash before January." He knew the sale would not go through unless he could get cash. Defendant was misled by Shauban. He had no idea that Ali was a man of straw. If he had, his conduct was inexplicable. It was not till February 26 that plaintiff sent in a demand for brokerage. He cannot now recover. *Tait v. Wicht* (7 Juta, 158). Plaintiff has failed to carry out his contract; he cannot now sue for brokerage.

[Maasdorp, J.: But Mahommed says, "I will pay cash on transfer."]

He has nothing. He could not pay cash at any time. He expected to raise money on mortgage. It was not a *bona-fide* contract, and Shauban was not *bona fide*. Having failed to carry out the contract, the broker cannot sue for brokerage.

Mr. Justice Jones, in giving judgment, said: In this case Joseph Shauban sues John Goveia for £62 12s. 6d., being brokerage on £2,425, the purchase price of a certain property. From the broker's note before the Court it is clear that £100 was paid on November 13, and that the agreement was that the balance should be paid on January 15, when transfer was to be given. It has been alleged that defendant was induced to enter into the contract by fraud on the part of the plaintiff, who was stated to have represented Ali Mahommed as a man of means. In every case where fraud is alleged, such fraud must be proved up to the hilt, and be of such a nature as the law could recognise, as was laid down by the Chief Justice in the case of *Tait v. Wicht*, reported in 7 Juta (p. 158). By our law a party who has been induced to enter into a contract by the fraud of a third person has his remedy against such third person. If Ali Mahommed acted fraudulently, either defendant or plaintiff would therefore have his remedy against him. But as to the question between the parties before the Court, I can find no evidence of fraud. If plaintiff made the repre-

sentations alleged, did he make them with fraudulent intent? Were his representations due to false knowledge or bad faith? So far as the plaintiff was concerned, there is nothing in this case to show that at the time the transaction took place he thought Ali Mahommed incapable of paying cash for the property, or that he had any reason to consider him a man of straw. Mahommed evidently had every intention of paying the money. His efforts to raise it were sufficient proof of that. Plaintiff has shown himself entitled to £60 12s. 6d., and it is also clear that at one time defendant was willing to pay. The Court cannot find that fraud has been proved, and plaintiff is clearly entitled to judgment. Judgment must therefore be given for the sum of £60 12s. 6d., as claimed, and costs.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendant's Attorneys, Messrs. Faure and Zietsman.]

MANNERING V. MANNERING. { 1901.
July 2nd.

Mr. Close, who appeared for the plaintiff, said that this matter had come before Court under the following circumstances: The plaintiff had filed his intendit to sue his wife, who was at present in England, for restitution of conjugal rights, failing which for divorce. After the intendit had been filed the defendant came into that Court and made an application for a sum of money to be given her in order to conduct her case, and she obtained the sum of £20. She then filed a plea in which she took exception to the jurisdiction of the Court. That was the only question now before them. At the time she applied for the money there was no question of jurisdiction raised.

Mr. Justice Maasdorp: But even so, if it turns out that the Court has no jurisdiction, parties cannot submit to the jurisdiction in a case of divorce.

Mr. Gardiner (for the defendant) said that this was no exception, but a plea in bar, viz., that plaintiff had not acquired a domicile in Cape Colony, while the defendant had not been within the limits of the jurisdiction of the Court.

Mr. Close proposed to lead the evidence of plaintiff on the question of domicile, but Mr. Gardiner opposed, because he would not, in the absence of further instructions, be prepared to cross-examine the witness, and further, there might be evidence in the shape of letters written by plaintiff to

show that he had expressed his intention of returning to England.

After the Acting Chief Justice had pointed out that the case was really not one of argument on exceptions, but a plea to bar, he said that nothing could be done in the matter that morning, but it might be mentioned again on Friday morning.

Postea (July 5).

Mr. Gardiner applied for a commission to examine certain witnesses.

Mr. Close was not present, but Mr. Gardiner understood that he would not oppose the application. It was desired to take the evidence of the defendant in England, and that of certain other witnesses material to the defence.

The Acting Chief Justice granted the commission for the examination of such witnesses for the plaintiff and defendant as might present themselves. Meantime the trial of the case would be postponed *sine die*.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. } 1901.
July 4th.

Mr. Close moved for the admission of Wilfred Lawson Brown as an attorney and notary public.

Order granted, and the oaths administered.

GENERAL MOTIONS.

PETITION OF J. I. DE VILLIERS.

Mr. Gardiner moved for full powers to the petitioner to administer, and finally liquidate, the insolvent estate of Willem Hermanus Goosen. Petitioner was appointed provisional trustee in the estate by order of the Supreme Court, dated June 17, and by virtue thereof had disposed of certain live-stock in the estate; but there remained certain movables to be sold and outstanding debts to be collected. At the second meeting of creditors there were two candidates for the trusteeship, viz., petitioner and one Marais, and on being put to the meeting each received six votes, but those voting for peti-

tioner represented by far the larger proportion of the value of debts proved. Notwithstanding this, the Magistrate held that, the voting being equal, he could not declare petitioner elected, and accordingly the present application was made. Notice had been served on the other candidate, but there was no appearance on his behalf.

It having been pointed out that proof of such service had not been filed, Mr. Gardiner asked the Court to grant the order, subject to the production of such proof.

The Acting Chief Justice said that the papers must be in order before any order could be given, and the matter must stand over until Friday.

The application stood over accordingly.

Mr. Justice Jones said he could not understand why in such cases, when everybody knew that proof of such service was absolutely necessary, the papers required were not put into court.

Postea (July 5).

The order was granted on production of the affidavit of service.

TRUSTEES OF THE INSOLVENT ESTATE OF J. B. EAYRS AND SON V. MUIR. } 1901.
July 4th.

Insolvency — Undue preference — Tender.

This was an action for the recovery of certain goods, or the value thereof, bought by Messrs. E. B. Garland and E. R. Syfret, in their capacity as the trustees in the insolvent estate of James Burrowes Eayrs, lately trading in Cape Town under the style or firm of J. B. Eayrs and Son, against Matthew Erskine Muir.

The plaintiffs' declaration was as follows: (1) The plaintiffs reside in Cape Town, and are the trustees in the insolvent estate of James Burrowes Eayrs, lately trading in Cape Town under the style or firm of J. B. Eayrs and Son; (2) the estate of the said J. B. Eayrs and Son was duly sequestrated as insolvent by an order of the Supreme Court of this colony on or about the 1st May, 1899; (3) thereafter the plaintiffs were duly elected and confirmed as trustees in the said insolvent estate; (4) the defendant is a merchant carrying on business in London; the jurisdiction of the Honourable Court has been founded in this action by the attachment of property belonging to the defendant, and situated within this colony, by an order of the said Court; (5) in or about May, 1899, and after the sequestration of the estate of

the said Eayrs and Son as insolvent, the defendant, by himself or his agents, wrongfully and unlawfully seized and carried away certain goods, the property of the said estate, and situate in a certain store in Cape Town, to wit: eight cases, Nos. 124 to 131; two cases boots and shoes, Nos. 37, 44; twelve cases boots and shoes, Nos. 139 to 150; eleven cases boots, Nos. 152, 5,482 to 5,491. (6) The value of the said goods is £612. (7) The defendant, though often requested, refuses to restore to the plaintiffs the said goods or to pay their value.

Wherefore the plaintiffs pray that (1) the defendant be compelled to restore to them in Cape Town the aforementioned goods; or (2) the defendant be compelled to pay them the value of the said goods, to wit, the sum of £612; (3) interest on the sum of £612 from the 1st May, 1899; (4) costs of suit.

For an alternative count, plaintiffs repeated the allegations contained in the 1st, 2nd, 3rd, 4th, and 6th paragraphs of the declaration, and: (9) In or about April, 1899, the said insolvent delivered to the defendant, who was then and there a creditor of the said insolvent, the goods referred to in paragraph 5 above, in payment of a debt due by the insolvent to the defendant. (10) At the date of the delivery of the said goods to the defendant the said insolvent contemplated the sequestration of his estate as insolvent, and intended by the said delivery to prefer the defendant above his other creditors. (11) The said delivery of goods to the defendant was an undue preference, and null and void under the 84th section of Ordinance 6 of 1843.

Whereupon the plaintiffs prayed: (1) That it be ordered by this Hon. Court that the delivery of the said goods by the insolvent to the defendant be declared an undue preference, and null and void under the 84th section of Ordinance 6 of 1843. (2) That the defendant be forthwith ordered to restore the said goods or their value, to wit, £612, to the plaintiffs for the benefit of the creditors of the said insolvent estate. (3) Costs of suit.

For a plea to the declaration the defendant says: (1) He admits the first four paragraphs, and that he refuses to restore the goods claimed or their value, but save as above, denies each and every allegation in paragraphs 5, 6, and 7. (2) Prior to April 2, 1899, the firm of J. B. Eayrs and Son was indebted to the defendant in the sum of

£380 14s. for goods sold and delivered, and had given to defendant a bill for the amount of the said debt, falling due on April 2, 1899. (3) The said bill was not paid at the due date, and thereupon the said firm on April 5 delivered over to defendant's duly authorised agent in Cape Town, as security for the said debt, certain 33 cases of boots and shoes, the property of the said firm, and the said agent received the same into his custody, possession, and control for and on behalf of defendant; the value of the said goods pledged was less than the amount of the said debt. (4) Thereafter in the said month, and before the sequestration of the said firm's estate, the defendant, with the knowledge of the said firm, took over the said goods in part satisfaction of the debt owing to the said firm, and despatched the said goods to England for realisation. (5) The said goods have been sold for the sum of £268 14s. 11d., which is the full value thereof; the expenses connected with realising the said goods were £59 9s. 3d., leaving a balance of £209 5s. 8d. Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

Defendant's plea to the alternative count was as follows: (6) As to paragraph 8, he craves leave to refer to the allegations in paragraphs 1, 2, 3, and 4 in the plea to the first count of the declaration. (7) He admits paragraph 9, and as to paragraphs 10 and 11, he admits that the insolvent must be regarded in law as having contemplated the sequestration of his estate and as having intended to prefer defendant above his other creditors. (8) He is therefore willing and has tendered and hereby again tenders to pay the plaintiffs the sum of £325 in respect of the said goods; the above sum exceeds the full value of the said goods, if realised within this colony; he has also offered and again offers to pay taxed costs of the plaintiffs up to the date of the said tender. Wherefore, subject to the above, he prays that the plaintiffs' claim may be dismissed with costs.

The plaintiffs' replication was as follows: (1) As to defendant's first plea, the plaintiffs say that save as to admissions therein made, they join issue with the defendant, and again, as before, pray for judgment with costs. (2) As to defendant's second or alternative plea, the plaintiffs admit the tender mentioned in paragraph 8 of the said plea, and say that the tender is insufficient, and further say that save as to admissions contained in the said plea they join issue thereon with defendant, and again, as before, pray for judgment with costs.

Sir H. Juta, K.C. (with him Mr. P. S. Jones), for the plaintiff; Mr. Searle, K.C. (with him Mr. Gardiner), for defendant.

Benjamin Gottfried Heydenrych said he was a financier carrying on business in Cape Town, and in regard to the goods in question he began advancing money on them to the insolvents in August, 1898. Witness received the invoice for the goods, and he went personally to the store and checked the cases with the invoice, to see that they had not been tampered with. He then advanced the money, and received a pledge of the goods. In the same way he advanced other moneys, and received other goods in pledge. Altogether, there were thirty-three cases pledged. Roughly, witness advanced over £500. The value of the goods, according to the invoice, was £542 14s. 7d., and he brought that amount to £612 by adding 12½ per cent. for landing charges and duty. Witness approved of the store where the goods were as being a fit and proper store for putting boots in. On April 11 witness received a notice calling a meeting of creditors of J. B. Eayrs and Son. There was a ready sale for boots and shoes in Cape Town, and he considered that they could have been sold here at a profit.

Mr. Justice Jones: How do you know? You never saw them.

Witness said they had the invoices there, with the prices.

Cross-examined: The goods remained in the store from August, 1898, until the following April, and so far as witness knew, the cases were never during that time opened and the goods examined. Witness had a good knowledge of the boot and shoe trade, and he did not know that it was necessary to unpack cases of such goods to prevent damage. The store was an old building, and was now used as a stable. The door and windows were rickety, but that was all the better for the draught to go through. A claim had first been made for these goods, and a quantity of leather in the store—£500 being the amount—claimed, but that was a mistake, and it was after witness had been communicated with as pledgee of the goods that the claim for the leather was eliminated, and the value of the 33 cases of goods set down at £612. The leather had been ultimately sold for about £120. Witness knew the basis on which the tender was made up. Witness knew that goods in insolvent estates sometimes went for a mere song, but sometimes they fetched very good prices. Bad goods often realised better prices than first-class goods.

Mr. Searle: Then, if these goods were damaged, it would be in your favour?

Witness: Sometimes damaged goods fetched good prices, as would be seen if sales of goods from wrecked ships were attended.

Herman Ippich, the manager of Messrs. Jagger and Company's boot factory in Cape Town, said he remembered Messrs. Jagger buying certain hides and leather from the insolvent estate of Eayrs and Son. The leather was in good condition.

Cross-examined: The leather was Australian leather. It was loose and not packed in cases. They got it from Eayrs's shop, not from the Dorp-street store at all.

William Faulkman, a clerk in the office of Mr. Syfret, one of the trustees in the insolvent estate, said that the sides of leather in question had realised £120 13s. 8d. net.

Cross-examined: A large number of goods were sold in the insolvent estate, some by public auction and some out of hand.

This closed the case for the plaintiffs.

For the defence,

Lawrence Woodhead, a partner in the firm of Woodhead, Plant and Co., hardware merchants, carrying on business in Cape Town and London, said that his London firm was interested in the business of Muir and Co., but he had nothing to do with the transaction between them and Eayrs, Muir and Co. having appointed their own agent, Mr. Anderson, here. Witness was in London in May, 1899, and then saw the thirty-three cases of goods which arrived by the Gaul, consigned by Anderson to Muir and Company from Cape Town. The cases were placed in Southgate's warehouse in the City, and witness was present when they were unpacked. The cases appeared to have been very much handled, while some of them had apparently been renailed. There was no trace of sea-water on the cases. In some instances the goods were altogether unmerchantable, the leather being mouldy or having perished. If these goods had been in a damp store for some time that would cause the appearance described. Boots of a cheap class were generally unpacked a week or ten days after they arrived here, but goods of a better class could remain longer unpacked. The goods in question were of a cheap class. At Southgate's in London the boots were unpacked by experienced men, cleaned and displayed for sale. So far as witness saw, everything was done to sell the goods to the best possible advantage. Witness knew the basis on which the tender of £325 was made up. After deducting charges, the amount

realised was £255 6s. 2d. Then in order to make up the tender, 50 per cent. was put on for Cape profit. From this total, 15 per cent. would be deducted for landing and Customs charges, etc., leaving the amount of the tender £325. He thought that was a very liberal offer. He had seen the goods, and he was sure they would not realise £325 in Cape Town. In sales in insolvent estates there were very often great depreciations in the value of goods realised. The amount varied, but he would say there was always a considerable depreciation. Witness had that morning seen the store in Dorp-street. It was at present used as a stable. It measured about 8 feet by 4 feet, and the window at the back was simply blocked up by means of a piece of packing-case, and there were signs of water having come in. The place was so small that it was surprising how they managed to get a horse in it. It was not a fit place to store goods in. Witness had been through the books in the insolvent estate, and had found that for over 700 pairs of boots and shoes the average price obtained was 2s. 6d., and the charges on realising this amount would be about 15 per cent. The boots and shoes sold by auction fetched from 1s. 10d. to 3s. 8d. per pair, the average being also about 2s. 6d. per pair, and then that would be less the auctioneer's charges, etc. The 1,507 pairs of boots and shoes sold in London realised about 3s. 6d. per pair, and the tender would be equal to about 4s. 7½d. per pair.

Cross-examined: Witness carried on a hardware business, but he had often purchased boots and shoes at Home for customers, and therefore had some personal experience of the trade, although he did not pose as an expert. At present his firm sold boots to a small extent wholesale. His firm was not practically Muir and Co., so far as this case was concerned. They did not appoint Anderson as Muir and Co.'s agent, and had not given him a document to that effect. Witness was not here when the boots and shoes were sent away, and he first saw the cases in the store in London. The cases had been very much banged about. It was evident that they had been sent from England, and that they had been very much handled. They were not second-hand cases, and that description of them in the bill of lading simply meant that they appeared to have been very much handled. Witnesses had been through the invoices, and he found that they agreed with the goods sold in London with a few discrepancies.

Re-examined: There were slight discrepancies between the numbers of pairs mentioned in the invoices and the number unpacked in London. He thought there was a better market in England for such goods, because in England there were jobbers who devoted the whole of their time to buying damaged goods.

John Anderson said he represented Muir and Co. in Cape Town in April, 1899, and took over 33 cases of boots and shoes from Eayrs and Son. These goods were in a store in Dorp-street. Witness went to the store alone, Eayrs having given him a key. The door was hanging by one hinge, and the bottom flopped about. That was on a Saturday. On the Monday he again went to the store. It was then raining hard, and the store was leaking like a sieve. The back door upstairs was gone, and the aperture was closed by a piece of packing case. The rain was coming through. The goods were shipped to England by the Gaul on April 19, but before then witness had them taken to Attwell's store in the Dock-road. There were no sides of leather in the Dorp-street store when witness went for the boots. Several of the cases had been opened and then reclosed. Witness had not opened the cases.

Cross-examined: Witness entered into an agreement with Eayrs under which the latter pledged the goods to defendant on witness settling a bill at the bank. Witness received notice on April 11 that a meeting of the creditors in Eayrs's estate was to be held, and he removed the goods on April 12. Witness put a new lock on the door of the store when the goods were pledged to him. Witness asked Mr. Woodhead's permission to put the goods in the store in Dock-road, as that firm had hired the store. He did not know that Woodhead, Plant and Co. were interested in the matter. He never got a document from Woodhead, Plant and Co. authorising him to act for Muir and Co. He got his authority from Mr. Muir. He was not in any way authorised by Woodhead, Plant and Co., and had no transactions with them. In the store in Dock-road some of Woodhead, Plant and Co.'s men were working, grinding up some phosphates for manure. The cases were not opened on this side at all. Witness sent the goods to England, simply because he wanted to go up-country. The amount of the debt for which the goods were pledged was £386. It had been agreed with Eayrs that if the goods realised more than that Eayrs should be credited with the difference. Witness knew before the goods were sent

away that there had been a meeting of creditors in Eayrs's insolvent estate, but he sent them away, as before that date he had applied for freight, etc. Witness had told one Frames that Eayrs wanted to turn his business into a limited liability company. Witness never tried to raise £1,000 on the goods. Witness told Frames about the limited liability company, because the latter had previously told him that he represented men with money to invest.

The Acting Chief Justice pointed out that in the criminal case one of the defences set up was that Eayrs intended to turn his business into a limited liability company, and that, if he had succeeded in doing so, he would have paid all his creditors.

Re-examined: At the time of his insolvency Eayrs was actually indebted to Muir and Co. to the extent of between £1,300 and £1,400. Eayrs's shops did a very common-class trade.

James Harrison said that he carried on business in the boot trade in Strand-street, and had been in the trade for twenty-four years. He had just seen the store in Dorp-street, and was of opinion that it was not a proper store to place boots in. Goods stored there for six or eight months, without being unpacked, would be apt to get damaged. Witness's basement was dryer than the Dorp-street store, and yet he would not store boots there. If boots were damp when they arrived, they should be unpacked. Goods from the smaller makers were generally packed damp. Goods like that, if they were not unpacked and dried within a week or so after they arrived, would likely become unsaleable. Anyhow, they ought on arrival to be placed in a dry store. There was no market here for damaged boots, except at very cheap prices. Such goods would not realise half the English prices. It was better to send them to England, where there were proper facilities for drying and cleaning. There were people in London who went in for that kind of trade.

Cross-examined: Witness had only seen the store that morning, and did not know what its condition was in 1899. He did not think the fact that men were working with phosphates alongside the cases would damage the boots. Witness would not buy mildewed or damp boots at any price.

After certain correspondence had been put in, evidence taken on commission in England was read. Mr. Searle said that a joint commission had been applied for, but although notice was given to the plaintiffs, they were not represented at the sitting of

the commission, and therefore only evidence for the defence had been taken there.

Among the evidence taken on commission in London was that of Arthur James Newman, who stated that he was a leather merchant and agent, and on June 5, 1899, he was consulted by the defendant as to the sale of certain 33 cases of boots and shoes (with a few slippers) which had arrived from the Cape. He went to the warehouse of Messrs. Southgate and Co., where those goods were lying unopened. They bore the appearance of cases which had been shipped from England. Some had been opened, while others were intact, as originally shipped. He had all the cases opened. On opening some of the cases he found them in bad condition, and one customer whom he had refused to look at them. He consequently had all the goods taken out and cleaned up. The boots were packed in small cardboard boxes, and he found a number of these boxes were empty and filled with paper. The general appearance of the boots was mouldy, and they were considerably damaged. This damage was undoubtedly caused either by damp packing or damp storage. The storage at Southgate and Co.'s store was excellent. The goods which came out of the 33 cases amounted to 1,507 pairs, and realised £268 14s. 11d. He did everything to sell the goods to the best advantage. The larger the amount realised, the larger his brokerage would have been. Of the persons who inspected the boots, one absolutely refused to buy the goods on account of their damaged condition. Others made offers, but far below the prices realised. They all considered the goods as damaged goods, and their proposals were made on that basis. The damage was not caused by salt water. There was no doubt about that. Witness had had experience of the leather and boot trade for upwards of twenty years.

M. da Costa's evidence, also taken on commission, was to the effect that some of the boots were mouldy, some damp, and some stiff, and what he should term a "right down job lot." He had made an offer of £240 or £250, which was not accepted.

There was further evidence as to the bad condition of the goods when the cases were opened in London, and also as to the amount realised being a very fair price.

Sir H. Juta (with him Mr. P. Jones), for plaintiffs: The onus of proving the value of the goods is on the defendants. Anderson attempted to defraud the creditors of Eayrs's estate, and he got the goods out of this country, so that the creditors should know

nothing about it. There is no evidence that the boots which came out of Anderson's store were the boots sent back to England. Some of the cardboard boxes in those packages had been found to be empty. They were therefore, in all probability, not the boots sent out, as people like Muir and Co. would certainly not send out empty boxes, and we have it that no goods could have been abstracted from the cases in this country, as they were never opened. If the Dorp-street store was not a fit and proper store, Heydenrych (who had been in the boot trade) would not have advanced money on boots which he knew might be ruined in fourteen days. He would not have advanced money on boots placed in a store which (as one of the witnesses had stated) was leaking like a sieve. As the store was so small, no doubt the 33 cases would fill up nearly all the available space. No one would therefore have any chance of tampering with the cases, and Heydenrych, who was a practical man, would take good care that nobody did so. The cases sent back to England had been tampered with. One of defendant's own witnesses said that nearly all of them seemed to have been opened. In the bill of lading from Cape Town the cases were described as "second-hand cases." How could they be "second-hand cases" if they had never been opened? The cases were rehooped and remarked. These goods were said to have been worth £800 when sent out at first, and we are now asked to believe that in the course of a few weeks they had deteriorated down to £600. The goods sent back to England were not the same as those named in the invoice. Anderson had removed the goods in a clandestine manner, and that showed *mala fides*, and was certainly irregular. There are many ways in which the goods might have been damaged, and it was most unreasonable to say that they were damaged in the store.

Mr. Searle, K.C. (with him Mr. Gardiner), for defendants, was not called upon.

Buchanan, A.C.J.: The plaintiffs in this case are the trustees in the insolvent estate of J. B. Eayrs and Son, whose estate, according to the declaration, was sequestrated as insolvent on May 1, 1899. The defendant is Matthew Erskine Muir, a merchant, carrying on business in London, who shipped goods to Eayrs and Son before their insolvency. For these goods Eayrs and Son had given Muir several promissory notes. One of these, for £380, fell due early in April, 1899, and as they could not meet that note on the due date, Anderson, the local

agent for Muir, agreed to take up this bill at the bank, Eayrs pledging and afterwards delivering to him certain thirty-three cases of goods. These goods were afterwards delivered to Anderson as agent for Muir, and were by him in April shipped to England. These boots were not obtained from Muir and Co., but from other sellers of goods to the insolvents, and had arrived here in August, September, October, and November, 1898. It appears that these goods on arrival were placed in a store in Dorp-street in the cases in which they came from England, and according to the evidence before us, were never opened or examined in this country. Eayrs being in need of money, had from time to time pledged the same and other goods to Heydenrych, who held a key of the store. Eayrs apparently pledged the same goods again, and, by means of a duplicate key, or otherwise, gained access to the store, and handed them over to Muir's agent without Heydenrych's knowledge or consent. After Muir's agent had removed these goods, or about that time, he heard of the position of Eayrs's estate, and that a meeting of creditors had been called. Following this the estate was placed under sequestration. Although the agent for Muir knew that Eayrs was in financial difficulties, he shipped these goods to England shortly afterwards. I am not prepared to say that this was a fraudulent act, or that there was any wrongful and unlawful seizure, as stated in the first count of the declaration, as Anderson may have considered that he entered into a contract binding upon Eayrs, and had a right to these goods. But though the contract was not a bad contract with Eayrs, still it was not a contract which could be sustained as against the creditors, as being a transaction which presumably took place in contemplation of sequestration, and with an intent to prefer Muir. Under the circumstances, the goods having been removed from the country, I think it was sufficient for the plaintiffs to establish a *prima facie* case, either by the invoice or by otherwise showing the value, and then leaving the onus on the defendant to show the actual value, as he did not return the goods to the trustees. The proper course would have been to have returned the goods to the trustees, and let them realise them, but instead of doing so, the goods being in London, were opened there, and dealt with there. This, according to Mr. Woodhead, who was in London, and whose London firm was interested in Muir and Co., although his Cape Town firm was not, was done. Now,

I am satisfied that the goods seen by Mr. Woodhead in London were the identical goods obtained by Anderson from Fayrs. Mr. Woodhead has since compared the goods sold with the invoices, and found that the descriptions corresponded. Even had Anderson desired to substitute here other goods, he could not have done so, seeing that he had not the invoices, and would not have known what goods to substitute for those pledged to him. Mr. Woodhead was present when the cases were opened in England, and has given his evidence in the most frank and candid manner, and is thoroughly credited by the Court, and he says that these goods were received in a damaged condition. The cases were not damaged externally by water, and the goods inside were not damaged by sea water. We have evidence that while here the goods were packed in a small store. Mr. Heydenrych himself said that it was a small place—9 feet by 12—and it was certainly in a most dilapidated condition. When Anderson removed these goods from there there had been rain, and the water was coming through the roof. Then the evidence shows that when goods like these articles are received from the smaller manufacturers, they are frequently in a damp condition, and therefore should be unpacked soon after being received here. Instead of this being done, these goods were placed in a store, and remained for eight months, some more, some less, without being opened or attended to, or anything whatever being done to them, and it has also been shown that if these goods were at all damp, or were placed in a damp store, damage would certainly result. As soon as these goods were received in England, and the cases opened, it was found that the goods were seriously damp, and thereupon they were cleaned, dried, and finally disposed of for a net sum, after deducting expenses, of £209. Had these goods not been removed from this country, I have very great doubts, considering the state they were allowed to get into, whether the trustees would have realised anything more than the amount received in England. The defendant, however, has gone even further, and made what I think a very proper offer of £325, an amount arrived at by taking the amount realised, adding 50 per cent. for Cape profit, and deducting the expenses that would have been incurred here. Although the onus is on the defendant to prove the value of the goods, I think he has fully discharged that onus, and that the tender in this case more

than covers the value of the goods. I am convinced that the amount realised in England was as high, if not perhaps higher, than the sum the goods would have realised in this country. The tender was made on October 3, and taxed costs to that date were included in the tender. Therefore the judgment of the Court will be for plaintiffs for the amount of the tender, £325, with taxed costs to October 3, 1900, plaintiffs to pay costs incurred after that date.

Jones and Maasdorp, J.J., concurred.

[Plaintiffs' Attorney, Gus. Trollip; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice JONES.]

ADMISSIONS. { 1901.
{ July 12th.

Mr. Benjamin applied for the admission of August F. Markotter as an attorney and notary.

Granted, applicant taking the usual oath.

On the motion of Mr. Gardiner, Ivon Grindley Ferris was admitted, and took the oath, as an advocate.

PROVISIONAL CASES.

BEALE V. PERRINS AND ANOTHER.

Mr. Alexander moved for provisional sentence on a mortgage bond of £300, with interest at 6 per cent. from July 1, 1900, and costs. Counsel also applied that the property specially hypothecated be declared executable.

Granted.

SPIERS V. VERSTER.

Mr. Benjamin moved for judgment on a promissory note for £313 4s. 9d.

Granted.

BOARD OF EXECUTORS V. VAN ZYL.

Mr. Upington moved for the final sequestration of the defendant's estate. A provisional order was granted on June 12.

Granted.

BENNETT V. ABDoola.

On the motion of Mr. Percy Jones, the defendant's estate was finally sequestrated. The provisional order was made on June 20.

BLACK AND CO. V. PITT.

Mr. Upington moved for the final adjudication of the defendant's estate. The provisional order was granted on July 2.
Granted.

BECKER V. LANGE.

Mr. Solomon applied for a decree of civil imprisonment in respect to a debt of £36 11s. 10d.

Defendant appeared and gave an undertaking to pay within a month.

A decree was granted as prayed, with costs, execution being ordered to be stayed for a month.

ZEEDERBERG V. MACKAY AND ANOTHER

Mr. Solomon moved for provisional sentence on a promissory note for £31 0s. 6d. and costs.
Granted.

MORUM BROTHERS V. STIDWORTHY.

Mr. Close applied for provisional sentence on a mortgage bond for £125, and interest at 8 per cent. from the date due, and for the specially hypothecated property to be declared executable.
Granted.

ROBERTSON AND CO. V. HURST.

Mr. Percy Jones moved for provisional judgment on a promissory note for £26 5s., less £8 paid on account.
Granted.

MILLS V. LANDMAN AND ANOTHER.

Mr. Gardiner applied for provisional sentence for the sum of £200, due on a mortgage bond, with interest at 8 per cent. from July 1, 1899, and costs, and for the specially hypothecated property to be declared executable.
Granted.

JAGGER V. PARKINSON.

On the motion of Mr. Benjamin, provisional sentence was granted in respect of a sum of £75, due as per acknowledgment of debt.

ILLIQUID ROLL.**MARITZ V. GINN.**

Mr. Gardiner moved, under Rule 329d, for judgment for £63 1s. 7½d., less £30 paid on account, being balance of account for goods sold and delivered, with interest and costs of suit.
Granted.

BENNING V. GLASS.

Mr. De Villiers applied for judgment under Rule 329d, for the sum of £29, arrears of rent, with interest and costs.
Granted.

PURCELL, YALLOP AND EVERETT V. THEUNISSEN.

Mr. Close moved for judgment, under Rule 329d, for £7, balance due for goods sold and delivered, interest and costs.
Granted.

AURET V. ESTATE OF ENTRESS.

Mr. Benjamin moved for judgment, under Rule 329d, for £7, balance due for goods sold and delivered.
Granted.

REHABILITATIONS.

Mr. Benjamin moved for the rehabilitation of William George Glenister and the partnership estate of Glenister and Graham. Compulsory sequestration took place in 1880, and the insolvency, was due to the fact that insolvent's partner absconded with the assets.
Granted.

On the motion of Mr. Gardiner, an order was granted for the rehabilitation of Piet Jacobus Smit, whose estate was surrendered in 1897.

GENERAL MOTIONS.*Ex parte* **BOTHA.**

Mr. De Villiers moved that a *rule nisi* granted under the Derelict Lands Act be made absolute.
Granted.

IN THE ESTATE OF THE LATE ALEXANDER SPIES.

On the motion of Mr. De Villiers, the Court made absolute a *rule nisi* for the cancellation of a certain bond.

Re THE ESTATE OF THE LATE ROUX.

Mr. Searle, K.C., moved for an order authorising the Registrar of Deeds to pass transfer to one of the executors of certain property in the estate. The curator of the minors recommended that the motion be granted.

The Court granted the application, and ordered costs to come out of the estate.

CURATOR OF DU TOIT V. (1901.
REINEKE. (July 12th.

Agreement—Lease.

Contrary to the terms of a will restricting the power of leasing, Du Toit had given over under a written agreement the use of certain land therein to him bequeathed to respondent.

Held, that in the construction of a document of this nature the Court would regard the document itself rather than the name which, for their own purposes, the parties thereto may have given it, and that as the document in question was really a lease, respondent must quit and give up possession of the immovable property so demised to him.

This was a motion for the cancellation of a certain lease, and for an order on respondent to give up possession of the property held thereunder.

The applicants were Robert Walter Watson and Elsie Magdalena Crafford (born Du Toit), in their capacity of curators of Peter Cornelius du Toit.

The respondent was David Andries Reineke, jun.

On March 12, 1901, Peter Cornelius du Toit had, by an order of Court, been placed under the curatorship of the aforesaid petitioners.

The joint will of the late Pieter Cornelius du Toit and his wife Elsie Magdalena du Toit, married in community of property, provided *inter alia* that their children and the lawful descendants of such children to the sixth generation should be the heirs of the aforesaid testators.

The said heirs were neither to dispose of or let the immovable property bequeathed

to them, save amongst themselves. They were not to sell *inter suos* for more than £300, nor to let *inter suos* for more than £18 per annum.

On September 20, 1900, the aforesaid Pieter Cornelius du Toit and the respondent entered into an agreement which read as follows:

"The said D. A. Reineke hereby undertakes to do the necessary farming within and as usual upon the properties that may be acquired by the said P. C. du Toit under the will of his late father, for a period of eleven years, commencing from the date that the said P. C. du Toit shall become owner of the same, upon the following conditions, namely:

"The said D. A. Reineke shall be left in free and undisturbed management, and shall have the entire control over all grounds belonging to or bequeathed under the late P. C. du Toit's will, with the exception of properties falling within the village of Ladismith. The water rights and all other privileges in connection therewith, as well as grazing rights, shall be at the disposal of D. A. Reineke without interference.

"The said D. A. Reineke shall have the sole and entire control of the aforesaid properties, and shall have the right to make such improvements as he may deem fit, which, however, shall be borne by himself.

"All seeds required shall be furnished by the said P. C. du Toit at his own expense.

"The said D. A. Reineke shall pay over or divide with the said P. C. du Toit all proceeds of produce derived from the property.

"All grazing rights shall be entirely enjoyed by the said D. A. Reineke.

"The said P. C. du Toit will in no way be responsible for claims for damages which may arise during the period of this agreement in so far as disputes of water are concerned."

The petitioner contended that the aforesaid agreement was virtually a lease, and was therefore in contravention of the terms of the will of the abovenamed testators.

Mr. Upington, for petitioner: This agreement is really a lease. It gives the respondent the use of a large portion of the property of Du Toit for valuable consideration. The respondent was perfectly well acquainted with the terms of the will under which the property cannot be let save to one of the heirs, and at a definite price. There are no facts in dispute between the parties. Respondent is not *bona fide*, and does not pretend to be so. He took what is really a lease with full knowledge of the terms of the will.

Mr. C. W. de Villiers, for respondent: The real parties in this case are P. C. du Toit and his sister, Mrs. Crafford. I do not know in what capacity she appears. She is a beneficiary under the will, and as such can have no *locus standi* in this case. It must also be noted that this agreement was entered into long before P. C. du Toit had been declared a prodigal. Neither Mrs. Crafford nor anybody else (save P. C. du Toit) objects to this agreement. The other beneficiaries under the will ought to have been joined in this application. Reineke is not a lessee; he is a mere manager.

Buchanan, A.C.J.: This so-called "agreement" is clearly nothing more or less than a lease, and in all such cases the Court will look to the substance of the document, and not to the appellation which parties, for their own purposes, may have given it. The respondent must quit, and give up possession of the lands referred to in applicants' petition, and must also pay the costs of this motion.

[Applicant's Attorney, Gus. Trollip; Respondents' Attorneys, Messrs. Dempers and Van Ryneveld.]

MULHERN V. THE REGISTRAR (1901.
OF DEEDS.) July 12th.

Transfer duty—Mutual will—Massing—Marriage without community—Heirs—Transfer of property—Exemption.

M. and his wife married without community, executed a mutual will by which they appointed the survivor with the children sole and universal heirs of the first dying of all his or her estate. . .

which shall be left at the death of the first dying, and provided that the survivor shall keep the whole of the joint estate under his or her sole and entire and full discretion and administration that he or she may be the better enabled to educate and support the children until the death of the survivor when the whole of the joint estate shall be transferred to the child or children of the marriage.

M. died and after his death his

wife adiated and accepted benefits under the will.

Thereafter as she was about to re-marry, she attempted to pass transfer to her minor children of the landed property registered in her name, free of transfer duty.

The Registrar of Deeds having required her to pay transfer duty on the appraised value of the property, she paid under protest and claimed exemption under Act 5 of 1884, section 19, sub-section 3.

Held, that the children were entitled to transfer without the payment of transfer duty.

The petition of Elizabeth Mulhearn, formerly Elizabeth Murray, and lately widow of the late William Murray, set forth that the petitioner was married out of community to her late husband.

On the 24th March, 1891, she and her late husband executed a joint will, which was of full force and effect at her husband's death.

Upon her husband's death the petitioner adiated and accepted the benefits conferred upon her under the will, took out letters of administration as executrix, and filed an inventory of the joint estate and liquidation account of the same with the Master.

The petitioner awarded to the four minor children of the marriage all the property of the joint estate, a large portion of which consisted of landed property registered in her name, and valued for succession duty purposes at £3,635, subject to the terms and conditions in her favour contained in the will.

Thereafter she entered into an agreement of marriage with one Peter Mulhern, and finding it impossible to arrange a sufficient deed of *kinderberys* for so large an amount, she approached the Master with a view to ascertaining the best means of securing, as by law required, the inheritances due to the minors in order to enable her to solemnise the intended further marriage.

The Master expressed himself willing to be satisfied if she transferred to her four minor children all the landed property in the estate.

Thereafter she attempted to pass transfer of the landed property to her minor children under exemption from transfer duty,

but the Registrar of Deeds refused to allow transfer of such of the landed property as was registered in the petitioner's name so to be passed, and claimed full transfer duty upon the appraised value of such property.

The petitioner paid the transfer duty, amounting to £72 14s., under protest; the transfers were executed, and the petitioner married Mulhern.

The petitioner alleged that in transferring the property she was actuated solely by a desire to comply with the law and the requirements of the Master that the whole of the joint estate should be transferred, so as to enable her to celebrate the said marriage, there being no desire or intention on her part to give the children more than they were entitled to by law and in terms of the will.

That she believed it has long been the settled practice in the Deeds Office to allow a survivor of two spouses married in community of property to transfer property bequeathed under a joint will of such spouses to their children subject to a fiduciary interest in favour of the surviving spouse from the joint estate to such children during the survivor's lifetime under full exemption from transfer duty.

She submitted, (a) if the Master were right in his contention, that the inheritance in respect of which the minor children had been secured comprised the whole of the joint estate, then and in such case the transfer above referred to was executed by her in accordance with the joint will, and the minor children being descendants and heirs *ab intestato* to the joint estate, were exempt from payment of transfer duty upon such transfers to the extent of their *ab intestato* portions, which, in the aggregate, amount to the whole of the property so transferred. but that (b) if on the other hand the contention of the Registrar of Deeds be correct, namely, that the minors were not entitled to be protected in respect of the property registered in her name, then and in such case she had been compelled, in order to enable her to re-marry, to transfer property of which she was by law entitled, in spite of such re-marriage, to retain the control and disposition.

That in such last-mentioned case she had further been erroneously compelled to pay an amount of £36 7s., being succession duty of 1 per cent. upon the appraised value of the property £(3,635), as also the sum of £10 15s., being Deeds Registry fees in respect of the transfer of the property.

That without an application to the Court she was unable to obtain relief on any of the grounds referred to in the petition.

The prayer was for:

(a) An order directing the Assistant Treasurer or other proper official to refund to her the full amount of transfer duty paid by her, viz., £72 14s.

* (b) An order authorising her as mother and natural guardian of her children to re-transfer to herself in her individual capacity the aforesaid properties, and that under full exemption from payment of transfer duty, stamp duty, and Deeds Registry fees of office.

(c) An order directing the Assistant Treasurer or other proper official or officials to refund the full amount of the transfer duty, £72 14s., £36 7s. succession duty, and £10 15s. stamp duty and fees of office.

The will appointed the survivor with the children sole and universal heirs of the first dying of all his or her estate which shall be left at the death of the first dying, and provided that the survivor should keep the whole of the joint estate under his or her sole and entire and full discretion and administration, that he or she might be better enabled to educate and support the children until the death of the survivor, when the whole of the joint estate should be transferred to the child or children of the marriage.

The Registrar of Deeds reported on the case as follows: In this case the parties were married by ante-nuptial contract. They made a joint will appointing the survivor usufructuary and the children of the marriage legatees.

The husband died and the wife appears to have accepted benefits under the will.

Being about to re-marry, the Master of the Supreme Court required that transfer of the landed property registered in the name of the deceased, as well as that registered in the survivor's name, should be effected in favour of the children.

Exemption from the payment of transfer duty was claimed, and allowed in the case of the property belonging to the deceased, but disallowed in the case of the mother's property.

Sub-section 3, section 19 of Act 5 of 1884 provides that any heir or legatee of any deceased person shall be entitled to certain exemptions, and it was held that neither this section nor any other would apply to the case in dispute.

* This prayer was abandoned in argument.

J.D.S.

It is true that in regard to the legatees of persons who were married in community of property, exemption is allowed in the lifetime of the survivor, but I have no knowledge of any instance in which the same privilege has either been claimed or admitted *where community did not exist*. The petitioner relies on the fact that the two estates have been massed, but as I am doubtful whether, supposing even that there is any legal obligation on the survivor which binds her absolutely to the terms of the disposition made by her, exemption should be allowed, and as the question is a new one, involving an important principle, I consider it desirable that it should be referred for a decision in terms of section 23 of the Act.

The Master's report was in the following terms: The Master does not grant any certificates under section 1 of Act 12 of 1856 to enable a surviving spouse to re-marry except when the minors' portions have been paid into the Guardians' Fund.

In other cases the Magistrate must be satisfied by a certificate from the Registrar of Deeds that the usual *kinderbeyers* has been passed where the will directs it, or that the minor's property has been otherwise secured, as, for instance, in this case, by the transfer of the property, or the Magistrate must satisfy himself that under the will there is nothing due to the minors, the survivor being sole heir.

The will appoints the survivor as heir with the children, but in the very next paragraph deprives the survivor of such a benefit, for it clearly directs that upon the death of the survivor the whole of the joint estate shall be transferred to the children of the marriage.

As admitted in paragraph 3 of the petition petitioner has accepted the terms of the will.

Being desirous of entering into another marriage, and as the will did not allow the petitioner to pass a *kinderbeyers*, she had in some other way to secure the property of her minor children, and in order to enable her to obtain the certificate from the Registrar of Deeds, required by Act 12 of 1856, that officer was advised of the amount of the property which had to be secured.

It is not a matter in which it is the duty of the Master to give a certificate, and the allegation in the petition that the Master insisted on the transfer of the property is not strictly correct, for it is not the Master, but the law, that required it.

Now, as regards the payment of succession duty, although the property vested in

the children at the death of the first dying, succession duty does not really become due until the death of the survivor, when the children by whom the duty is payable come into possession of the property, but as under such transfers the property would be registered in the names of the legatees on the death of the survivors, it is customary when property is being transferred to charge succession duty in order to secure the collection of the revenue.

The matter first came before a judge in Chambers, but was referred by him to the Court under Act 5 of 1884, section 23.

Mr. Schreiner, K.C. (for the applicant): Under the mutual will there is a massing of the estate. The petitioner has adiated and accepted benefits under the will. No exception can be taken to the Registrar of Deeds referring the matter to the Court, but it is submitted that the Registrar overlooked sub-sections 11, 12, and 13 of section 19 of Act 5 of 1884.

It makes no difference in principle whether the marriage has been in community or not. See *South African Association v. Mostert* (Buch., 1868, p. 286; 1869, p. 231; 1873, p. 31), *Oosthuijzen v. Oosthuijzen* (Buch., 1868, p. 51), *Hiddlingh v. Roubair* (Buch., 1877, p. 36), and authority could also be cited from the common law.

Mr. Howel Jones (for the Registrar of Deeds): The question depends upon the further question, whether or not, where two persons married out of community make a joint will, and one dies, the will binds the survivor, even if there has been adiation. If it does not, then the survivor can make a fresh will, and the property in question, being the property of the survivor solely, though it is bequeathed by the joint will, does not devolve upon the children from the deceased parent. Sub-sections 11, 12, and 13 of section 19 of Act 5 of 1884 do not apply to this case, because the property in question is not burdened with a *fulci-commisum*, and the surviving spouse is not entitled only to a life or other limited interest in it: as long as she survives it is her absolute property. The doctrine of massing and adiation has only been laid down by the Court in cases where the will has been that of persons married in community of property. *South African Association v. Mostert*. No case has been referred to in which the parties were married out of community. As this property, therefore, was not legally bequeathed by the will of the deceased parent,

it does not appear that there was any necessity for securing it by *kinderbeerys*.

[Buchanan, A.C.J. : Do you admit that if the parents had been married in community there would have been an exemption from transfer duty?]

That is the practice of the Registrar of Deeds.

[Buchanan, A.C.J. : By what authority?]

Under sub-section 3 of section 19, Act 5 of 1884. Under those circumstances, there being massing and adiation, the children would take all the property bequeathed as heirs or legatees of the deceased parent, even though the other parent still survived. But it does not follow that that is the case where there has been no joint estate.

In giving judgment, the Acting Chief Justice said: Act 5 of 1884 contains a number of exemptions from payment of transfer duty when transfer takes place between certain persons. In this case we have to deal with transfers from parents to children, and under sub-section 3 of section 19 a transfer to an heir or legatee can be passed without payment of transfer duty to the extent of the share of the property such heir or legatee would have been entitled to if there had been no will at all. In this case the transfer was made by the mother to the children under a joint will made by her and her late husband. Had the parties been married in community the Registrar of Deeds would have followed the established practice of his office, and have passed transfer without payment of transfer duty, under the exemptions allowed by the 19th section of the Act; but as the parties had been married out of community of property, he was not prepared to allow free transfer without an order of Court. But in my opinion the question of community or of non-community of property only affects the parties so long as they are alive. Upon the death of one the estate which was formerly joint between them becomes separate and individual, and I cannot understand why the Registrar of Deeds should have drawn any distinction between persons married in community or in non-community of property. In this case the surviving spouse adiated under the will of her late husband, and transferred the property to her children, as having been specifically bequeathed by his will. There has admittedly been a massing of the two estates, and a disposition of the whole property by the will. In the opinion of the Court, this could be done under the terms of the Act without payment of dues, and I suppose

there will be no difficulty in obtaining from the Government a refund of the money that has been paid under protest.

GASLOLI V. SALT RIVER CEMENT WORKS. 1901. (July 12th.

Company—Liquidation—Interested Liquidator.

The Salt River Cement Works having gone into voluntary liquidation, a certain shareholder alleged mala fides, (1) inasmuch as the liquidator appointed had an interest in the company as a shareholder; (2) that the sale of the company's assets had been advertised only that certain members of the company might obtain sole possession of the aforesaid assets for their own use and benefit.

The Court ordered that a rule nisi prohibiting the sale of the property of the said company, which had already been granted should be extended to August 14th, 1901, and should in the meanwhile operate as an interdict against such sale.

This was a motion for a rule nisi restraining the sale of the whole or any part of the assets of the Salt River Cement Works, granted by Jones, J., in Chambers on June 28, 1901, to be made absolute.

The petition of the applicant set forth:

1. That he was a shareholder in the Salt River Cement Works (Limited).

2. That on or about 17th of May, 1901, he caused a summons to be issued against the said company and the principal shareholders, therein claiming the issue of scrip for 2,500 shares of £1 each in the capital of the said company, and an order compelling the said shareholders to pay to the company £8,000.

3. That he had reason to believe that the aforesaid shareholders had decided to voluntarily liquidate the said company.

4. That at the trial of the action in which the aforesaid summons had been issued applicant would allege certain irregularities on the part of the above-named respondents. *Inter alia*, that the liquidator was one of the said respondents. Petitioner stated his intention of applying to the Court for the appointment of an official liquidator.

5. From the manner in which the said sale had been advertised and the way in which particulars of the property had been withheld from probable purchasers, petitioner stated his conviction that the sole object of such sale was to enable the afore-said respondents to acquire the property of the company for their own benefit, and at their own price, and to deprive him of his interest therein.

In a replying affidavit, the respondents stated that scrip for 2,500 shares had been issued to petitioner, but that in terms of a certain agreement entered into between petitioner and others, of the one part, and respondents, of the other part, the said scrip was marked "not negotiable." Respondents held that petitioner's claim amounted to a demand to have this scrip exchanged for scrip without the words "not negotiable" endorsed thereon. The whole sum of £8,000, with interest thereon, had been paid to the company. There were several shareholders of the company, in addition to those enumerated by petitioner, and that at a general meeting of shareholders, duly convened, at which shareholders holding 10,200 shares, out of a total of 13,000, were present, it was unanimously resolved to liquidate the company voluntarily. Petitioner (together with other shareholders) had received due notice of this meeting, but he did not appear thereat.

They deny that particulars of the property were withheld from probable purchasers, and they refer to advertisement of sale.

Respondents deny that petitioner has any cause of action against the company or any of the respondents, but say that the company has a claim against him for breach of contract.

Mr. Benjamin (for applicant): We object to an interested party having anything to do with the sale. We would be quite satisfied with the appointment of an official liquidator.

Mr. Searle, K.C. (for respondents): We consider that we have a good defence to an action. I presume that the applicant would say that all steps connected with the liquidation of this business should be suspended until the action is brought. Such a course would be very inconvenient, because this is a going concern.

Mr. Benjamin (in reply): We certainly object to the sale going through under the present liquidator. The respondents simply want to get the property into their own hands, and at their own price.

The Court ordered the rule *nisi* already granted to be extended to August 14, 1901, and to operate as an interdict against the sale of the above property. The question of costs to stand over till the trial.

ERLANK V. WENSELS.

This was a motion for leave to sue *in forma pauperis*.

Mr. Benjamin, who appeared for the applicant, consented to take the reference as counsel.

Ex parte COOKE

Mr. Benjamin moved for an order authorising the Registrar of Deeds to amend certain deeds of transfer.

Granted.

IN THE ESTATE OF THE LATE GEORGE WARD.

Mr. De Villiers moved for an order authorising the Registrar of Deeds to cancel a certain bond.

A rule *nisi* was granted, returnable on the 1st August, to be published, once in the "Government Gazette," and once in the "Cape Times."

IN THE MATTER OF THE PETITION OF CATTO AND SHARP.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to amend certain entries in the Debt Register, by inserting after the name Catto and Sharp the words "trading as Carter, Boyes and Co."

Granted.

Ex parte LLOYD. { 1901. July 12th.

Attorney — Suspension — Reinstatement.

An attorney having been suspended from practice for six months, by order of the Supreme Court was after an interval of four years and five months reinstated on producing certificates (1) of good conduct. (2) that he had not during the abovenamed interval attempted to practise his profession.

This was an application for the removal of the suspension of petitioner as an attorney-at-law.

The petition of the applicant set forth, *inter alia*:

That on 26th November, 1875, he had been duly admitted as a solicitor of the Supreme Court of Judicature in England.

That in or about February, 1894, he was admitted as an attorney of the Supreme Court of this colony, and that he practised at Carnarvon, Cape Colony, till February 2, 1897.

That on November 18, 1895, he was admitted as an attorney-at-law of the Eastern Districts Court, and at the date of this application was still on the rolls of such Court.

That while he was suffering from a severe illness the Colonial Law Society took proceedings against him in this Honourable Court, and he was suspended from practising on February 2, 1897, for a period of six months, with leave to apply for his reinstatement.

That after having engaged in various employments (unconnected with his profession) in South Africa, on January 10, 1900, he left for England, where he remained till about April 13, 1901.

That during this period he did not practise his profession.

That he left England on or about April 13, 1901, to return to South Africa, and since his arrival here has not engaged in professional work.

He therefore prayed an order cancelling and removing the order of suspension made on February 2, 1897, and reinstating and authorising him to again practise as an attorney of this Honourable Court, or to grant alternative relief.

On the motion of Mr. Schreiner, K.C., the Court granted an order as prayed.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

IN THE MATTER OF THE MINORS BOURHILL.

Mr. Gardiner moved for an order authorising the Master to pay out of the inheritance of the minors the sum of £50 in respect of each to continue their education.

The application, which was recommended by the Master, was granted.

IN THE MATTER OF THE PETITION OF JACOBUS PETRUS SMIT.

Mr. Benjamin moved for leave to sue by citation.

Leave was granted, the order failing personal service to be published once in the "Johannesburg Gazette" and in the "Government Gazette."

IN THE MATTER OF THE MINORS SMALL.

Mr. Gardiner moved for leave to sell certain property, and to invest the proceeds. Granted.

IN THE MATTER OF THE PETITION OF HERMANUS MATHLATA.

Mr. Searle, K.C., moved for authority to the executor dative to pay over certain money.

The Court granted a decree *nisi* calling on all interested to show cause why the money should not be paid over. The rule was ordered to be published in the "Eastern Province Herald" and the "Gazette," and was made returnable on the 8th August.

IN THE MATTER OF THE PETITION OF THE SOUTH AFRICAN CONFERENCE OF THE SEVENTH DAY ADVENTISTS.

Mr. Searle, K.C., moved for authority to the Registrar of Deeds to transfer certain property.

The matter was ordered to stand over for production of proof of the appointment of applicants as trustees.

IN THE MATTER OF THE PETITION OF SIPANGO DARALA.

Mr. Benjamin moved for a rule *nisi* to transfer certain property to be made absolute.

Granted, subject to a consent paper being filed.

IN THE MATTER OF THE PETITION OF SIYABALALA DARALA ZENZILE.

On the motion of Mr. Benjamin, a similar order was made in this case.

IN THE ESTATE OF THE LATE ALFRED CADEL.

Mr. Schreiner, K.C., moved for an extension of the return day until September 12.

Granted.

JOSEPH V. ESTATE OF MULDER.

Mr. Searle, K.C., moved for leave to appeal to His Majesty in his Privy Council.

Mr. Close (with him Mr. De Villiers) appeared for the respondents, and asked that costs should be paid to the successful party, subject to security being given.

Leave was given, applicant to pay the costs to respondents.

IN THE MATTER OF THE PETITION OF
CATHERINA ELIZABETH VAN SCHULEIN.

Mr. Benjamin applied for leave to transfer and mortgage certain property. Applicant had been ordered by the municipal authorities to effect improvements to certain property, and she sought to mortgage the property in order to get the means of doing this. The will under which she held the property only gave her a life interest, but it was alleged that if she were not allowed to raise money on it she would be unable to carry out the orders of the authorities.

The Court referred the matter to the Master, with authority to allow the raising of such an amount on mortgage as might be necessary for the preservation of the property.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice JONES.]

ESTATE OF HOBBS V. HOBBS. { 1901.
July 15th.

Mr. Benjamin applied to have this case removed for trial to the Circuit Court at Queen's Town.

Mr. Searle, K.C., opposed.

The Acting Chief Justice said: In this case the plaintiff applies to have the case removed to Queen's Town, and the onus is on the defendant to show that it can be more conveniently tried in the Supreme Court than on circuit. Plaintiff's witnesses reside at Queen's Town, and one of them, an old man, cannot attend at Cape Town. It is desirable to have the witnesses before the Court which has to decide the issue, and there is no reason why the case should not be removed to the Circuit Court. The application will be granted; costs to be costs in the cause.

TOWN COUNCIL OF CAPE TOWN }
V. THE SOUTH AFRICAN } 1901.
MISSIONARY SOCIETY AND } July 15th.
OTHERS.

Burial ground—Burger Senate—
Cape Town Council.

In 1818 certain property was transferred to the S. A. Missionary Society by the Burgher Senate for use as a burial ground "for heathens and slaves, who have been instructed in the principles of the Christian religion."

In 1886, the use of the ground as a cemetery was prohibited, and on the 4th July, 1900, the Missionary Society applied for and obtained a rule nisi calling on all persons interested to show cause why they should not be allowed to sell the property. Their proposal was to remove the remains of the persons buried there to Maitland Cemetery, and place a memorial over them. The rule nisi was made absolute on the 4th August, and proceedings had been taken in connection with the transfer of the property to the purchasers.

The Town Council now claimed that the property, having ceased to be used for the purpose specified in the transfer of 1818, reverted to them as successors of the Burghers' Senate.

They applied for a rule nisi to operate as an interdict, restraining transfer from being passed pending proceedings to be instituted by them.

For the respondents, affidavits were read to the effect that the notice of application for the rule was advertised, as also was the sale of the property, and that on the 7th July, before the making absolute of the rule, the Town Council were informed by letter of the proceedings being taken by the society.

The application of the Town Council was refused with costs.

This was an application on a notice of motion calling on respondents to show cause why an order should not be granted restraining the South African

Missionary Society from taking further proceedings in connection with the transfer to Benning and Benning and from transferring to Purcell, Yallop and Everett certain property in the neighbourhood of the Amsterdam Battery, 200 square roods in extent. In 1818 the property in question was transferred to the society by the Burghers' Senate for use as a burial ground "for heathens and slaves, who have been instructed in the principles of the Christian religion." In 1886 the use of the ground as a cemetery was prohibited, and on the 4th July, 1900, the Missionary Society applied for and obtained a rule *nisi* calling on all persons interested to show cause why they should not be allowed to sell the property. Their proposal was to remove the remains of the persons buried there to Maitland Cemetery, and place a memorial over them. The rule *nisi* was made absolute on the 4th August, and proceedings had been taken in connection with the transfer of the property. The Town Council now claimed that the property, having ceased to be used for the purpose specified in the transfer of 1818, reverted to them as successors of the Burghers' Senate. They applied for a rule *nisi* to operate as an interdict, restraining transfer from being passed pending proceedings to be instituted by them.

For the respondents, affidavits were read to the effect that the notice of application for the rule was advertised, as also was the sale of the property, and that on the 7th July, before the making absolute of the rule, the Town Council were informed by letter of the proceedings being taken by the society.

The affidavits for the Town Council stated that they had no knowledge of the condition upon which the ground was held by the society.

Mr. Searle, K.C. (for applicant): The land was vested in the Burgher Senate, and the present Town Council is the successor in title to that Senate.

[Buchanan, A.C.J.: Can this matter be settled on motion?]

We shall bring our action hereafter.

[Buchanan, A.C.J.: But the transfer has already gone through. Can we settle the whole question now?]

[Mr. Schreiner, K.C. (for the respondent society): We are quite ready to meet applicants and settle the matter now.]

Mr. Searle: We say that although an order authorising transfer was granted by the Court, the Town

Council were ignorant of the terms on which the land had been granted to the society. The Town Council is the successor of the Burgher Senate. (Section 3 of Act 26 of 1893.)

[Buchanan, A.C.J.: What does Ordinance 34 of 1827 say about the Burgher Senate?]

It gives authority to abolish the Burgher Senate and to transfer their property to certain trustees. Then Ordinance 3 of 1839 created a Municipal Board, and transferred the property to it. That was again amended by Ordinance 1 of 1840.

[Buchanan, A.C.J.: The point on which we wish to hear you is: How can the Court set aside its own order, such order having been obtained with notice and without fraud?]

We had no actual express notice that the land had been originally granted as a burial ground.

[Buchanan, A.C.J.: Notice was given in the "Government Gazette." On what grounds can the order of Court be set aside?]

On the ground of mistake. It was not sufficiently brought to the notice of the Court that the Town Council is the successor of the Burgher Senate.

[Jones, J.: The notice in the "Gazette" was express notice to you and was the notice the Court ordered.]

There are circumstances under which a decree will be set aside for want of notice.

[Jones, J.: What are the circumstances here? The society has incurred heavy expense in removing the bodies to Maitland; how can we undo what the Court has done?]

We may have to compensate them. If the Town Council had opposed, the Court would not have granted the order for transfer. It was not in the public interest it should do so, and if the land was no longer wanted as a cemetery it should have reverted to us as successors of the Burgher Senate.

[Jones, J.: The Court (Mr. Justice Solomon) granted a rule *nisi* calling upon all persons interested to show cause why the land should not be sold free from any servitude or restriction.]

The question is, will not the Court restore parties to the position they previously occupied? It can be done, and I submit that in the public interest it ought to be done. We ask for restitution on the ground of error.

Mr. Schreiner, K.C. (for the S.A. Missionary Society), and Mr. Gardiner (for the respondent Benning) were not called upon.

The Acting Chief Justice said: This is an application based upon notice of motion call-

ing upon the respondent to show cause why an interdict should not now be granted pending proceedings to be taken by the Town Council to set aside an order of Court granted on the 2nd August. The notice of motion does not state any ground upon which the application is made, but in argument it was stated that the ground was that there had been a mistake or error, and that there had been a want of notice to the Council of the previous application. In 1818 transfer was made, by consent of Government, by two members of the Burghers' Senate to the South African Missionary Society of a certain piece of ground to be used as a burial ground. This burial ground could no longer be used for the purpose for which it was granted, in consequence of the closing of the cemeteries within the limits of the Cape Town Municipality. The wall round the ground was allowed to get into disrepair, and the place became a nuisance to the neighbourhood. Complaints were made by the Town Council and to the owners of the property as to its condition. Correspondence ensued between the Council and the society, and on the 7th July, 1900, in answer to several letters, one of the directors of the Missionary Society wrote to the Town Council informing them that the society had applied to the Supreme Court, and had obtained a rule *nisi*, returnable on the 4th August, calling upon all parties interested to show cause why the disposal of the ground should not be granted to the society. Here was distinct notice given to the Town Council as to what the society was doing. The rule *nisi* was published in no less than six issues of three different papers in Cape Town, and set forth distinctly the intention of the society to get authority to sell without servitude or restriction, and in the rule the property was described as having been transferred from the Burghers' Senate to the directors of the society in 1818, as a burial-ground. The notice also stated what the society were going to do with the proceeds of the sale. Though notice was given to the Town Council the Council took no steps, and the society was allowed in the absence of any opposition on the part of the Council to have the rule made absolute. Now we are asked to set aside that rule, but on what ground I fail to see. Intimation of every material fact was given, so that the objection of error cannot be sustained. There is no legal ground upon which now to interfere with the order of Court given on August 2. If the Town Council had appeared to oppose the making absolute of the rule, a very interest-

ing question might have been raised as to the rights of the Council as successors of the Burghers' Senate, but it is now too late. The society has removed the remains of those who were buried in the ground to the Maitland Cemetery, and have erected a monument there; but while all that was taking place, the Town Council, though they had express notice of what was going on, took no action. It is impossible to go into the claims raised by the Council; and the application must be refused with costs.

LEVITAN V. COHEN.

This was a motion for attachment for contempt of Court.

Mr. Benjamin, for the applicant, asked that the matter should stand over, to enable applicant to file answering affidavits to the respondent's affidavit, which was only served on Saturday.

Mr. Gardiner, for respondent, consented to the case standing over, and it was adjourned until the 1st August.

TOWN COUNCIL OF CAPE TOWN (1901.
V. BROWN, N.O. (July 15th.

Arbitration — Separate awards —
Question of law.

This was an application on notice calling upon the respondent, John Brown, in his capacity as Engineer-in-Chief, and as such representing the Government, to show cause why he should not be ordered to appoint an arbitrator on his behalf to execute and complete a deed of submission for the purpose of deciding the amount of compensation to be awarded to the applicants in respect of two pieces of land expropriated by the Colonial Government in Stuckers and Rutger streets, in Cape Town, and why he should not be ordered to pay the costs of the application. The position taken up by the Government was that the Town Council was only entitled to nominal compensation in regard to Rutger-street, as the portion of it which was expropriated was a cul-de-sac, being bounded at one end and on both sides by railway property.

That it was of no use to anyone but the Government, as it was veated in the Town Council as a street only, and could never, without the consent of the owners of the land abutting on it, that is, the Government, be utilised by the Council for any other purpose.

That the Council lost nothing by its expropriation, but, on the contrary, they were relieved from the expense of keeping it in repair.

Under these circumstances the Government tendered the Council the sum of 1s. as compensation in respect of Rutger-street.

In the event of the Council refusing the above offer, the Government were prepared to submit the matter to arbitration, but insisted upon a separate deed of submission, although both streets had been included in one notice of expropriation, in which they would reserve the right, in the event of an adverse decision, of appealing to the Supreme Court upon the question as to whether the Council was entitled to more than nominal compensation.

The Council declined the tender, and refused to enter into a separate deed of submission with regard to Rutger-street.

Mr. Schreiner, K.C. (for the Council), moved.

Mr. Searle, K.C. (for the Government): It is reasonable that there should be a separate reference in the two cases. It is also proper that the land should be described as being vested in the Council under section 110 of Act 26 of 1893, because there are certain provisions in that Act which apply to streets. See section 157.

The question of compensation for Rutger-street is one of law, and should be settled by the Court. At all events, the arbitrators must make separate awards for the two pieces of land.

Mr. Schreiner, K.C. (for applicants): The Government has now waived their original demand for two deeds of submission, and only insist on inserting the condition in the deed of submission that there shall be an appeal from the decision of the arbitrators to the Supreme Court. We deny that there is any ground for inserting this condition in this special deed; and if such a condition were generally recognised it would practically amount to a repeal of the Arbitration Acts. The only question in this case which could possibly come before the Court on appeal would be: "Was the Town Council entitled to more than nominal compensation?" That surely is a question for arbitrators, if any question is.

Mr. Searle: The main question is as to Rutger-street. It is a question of law whether any compensation is due in respect of that. We want a separate award as to that, and the present deed of submission only provides for a lump sum.

[Buchanan, A.C.J.: The arbitrators ought to award two separate sums.]

[Mr. Schreiner: But will not the arbitrators do so if it is desirable? We must not take for granted that they will do what they ought not. Besides, the point is of no real importance.]

Mr. Searle: We regard it as a very important point, and it is evident the Town Council are very anxious to get a lump sum, so I suppose that they also consider it important. We are entitled to have either two deeds of submission—one in respect of each piece of land—or an instruction to the arbitrators to give two separate awards. As to the right of appeal, of course a question of law may come before the Supreme Court on appeal, as in the Dutch Reformed Church and Strand-street.

[Buchanan, A.C.J.: In these cases, was any appeal provided for in the deed of submission?]

No, but we wish to bring the legal point before the Court as to compensation.

[Buchanan, A.C.J.: Either you have a legal right of appeal or you have not; in the latter case you cannot compel the Council to consent to an appeal; in the former, you need not specially safeguard your rights in the deed of submission. I have suggested two amendments in the deed: (1) That there should be a separate award in respect of each piece of land. (2) That the award should be made under the Act 26 of 1893.

Mr. Schreiner consented.

The Acting Chief Justice said: This is an application to compel the Government to enter into a deed of submission, which is annexed to the petition. The Government have taken several exceptions to the deed, but only three need be particularly noticed now. One is that the Government requires the deed to state that the streets expropriated by them were held by the Town Council under the Act of 1893. They desired it to be stated in the deed that the streets were vested in the Town Council under section 110 of Act 26 of 1893, and as Mr. Schreiner does not object these words will be inserted in the deed. Objection is also taken by the Government that the deed does not impose on the arbitrators the duty of finding separately in respect to each of the properties expropriated. It is desirable that there should be separate findings, and this also has now been inserted in the deed by consent. The Government further object to the deed in that it does not make provision for appeal on a law point. This is not

a voluntary deed of submission, in which the parties can agree to the various points to be submitted to arbitration, but is an expropriation under an Act of Parliament. The rights of appeal are determined by the Act, and parties cannot be compelled to have a condition inserted which is not made appealable by the Act. Whatever rights of appeal either party may have, they will still have without any condition being inserted, but the Court cannot compel a party to assent to an additional right of appeal. An order will be given compelling the Government to enter into the deed as amended, the costs of the application to be paid by respondents.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. J. and H. Reid and Nephew.]

DOYLE V. MCDONNELL. { 1901.
July 15th.
Practice—Rule 329(F)—Setting aside judgment.

Mr. Gardiner applied for a decree of civil imprisonment.

Mr. Benjamin, for McDonnell, moved to reopen a judgment of Court dated May 23, 1901.

Mr. Benjamin said that a default judgment was obtained under Rule 329d by Doyle against McDonnell. Summons was issued on the 4th May, and on the 7th May the defendant in the action gave a warrant to defend to the attorneys in the case. By some oversight, however, appearance was not entered, and on the 23rd May a default judgment was obtained against defendant. On that becoming known to the defendant's attorneys, they offered to pay all the costs incurred, exclusive of the costs of the summons, in order that the case might be reopened, but this plaintiff (now respondent) refused. The affidavits showed a defence on the merits, and there was a charge against McDonnell practically amounting to misappropriation of goods and misappropriation of money.

A number of affidavits having been read, Mr. Gardiner was heard in argument.

In giving judgment, the Acting Chief Justice said that the applicant in this case made a claim against the respondent for salary and damages for wrongful dismissal. After demand had been made respondent (Doyle) took out a summons against ap-

plicant, and thereupon applicant gave a warrant to his attorneys to enter an appearance to meet this claim. There was a *bona-fide* claim between the parties in dispute, and the parties ought to be in court. Through an error on the part of the attorneys this warrant was not filed, and in consequence without further notice the respondent obtained judgment by default. Applicant, upon discovering this, offered to pay all the costs incurred except the cost of the summons to have the case reopened. Respondent, however, refused to consent. Leave would be given applicant to reopen the case on payment of the costs as tendered, and as the Court thought respondents should have accepted the offer made, he must pay the costs of the opposition.

[Plaintiff's Attorneys, Messrs. Moore and Son; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

Ex parte PAYN. { 1901.
July 15th.
Aug. 1st.

Articled clerk—Service of articles—Registration.

Petitioner had been articled to an attorney, who died on March 8, 1901. On the 20th April, 1901, he entered into fresh articles with another attorney. He afterwards applied to one of the judges of the Supreme Court, for leave to register articles and to date them from March 8, aforesaid: and the judge directed that fresh articles should be entered into. Nothing was said in the application about the articles of April 20. He now applied for an order authorising the registration of these articles. The Court granted the application, but in consequence of the irregularity of which petitioner had been guilty, ordered him to pay costs incurred by the Law Society in opposing his application.

This was an application for an order authorising the registration of certain articles of clerkship. The application was opposed by the Incorporated Law Society. The petitioner was formerly in the service of the

late Mr. E. T. Jones, who died on the 8th March, 1901. On the 20th April he entered into fresh articles with Mr. H. D. Coyt, of Kokstad. He sought to have the fresh articles registered, but was advised to apply that the articles should date from the death of Mr. E. T. Jones. Application was made to Mr. Justice Jones, who ordered that fresh articles should be entered into. There were then in existence, in the custody of Messrs. Faure and Zietsman, the petitioner's Cape Town agents, the articles entered into with Mr. Coyt on the 20th April, but mention of these was omitted to be made when the application was made to Mr. Justice Jones. The present petition was that the articles executed on the 20th April should be registered.

Mr. Benjamin appeared for petitioner, and Mr. Searle, K.C., for the Law Society.

Affidavits were read to the effect that the articles executed on the 20th April were sent to Messrs. Faure and Zietsman, who had possession of them when the original application was made to the Court.

The affidavit of Mr. Van Zyl, of the Incorporated Law Society, was read. He stated therein that the statement made in the original petition that articles were about to be entered into justified him in coming to the conclusion that the articles alleged to have been executed on the 20th April had been deliberately antedated.

Mr. Searle: I believe the explanation is that the articles made on the 20th April were not mentioned because it would probably prevent the Court from granting the application for the articles to date from Mr. Jones's death.

The Acting Chief Justice said that what the Court wanted to know was how the attorneys in Cape Town presented the petition in the form they did when they had the articles of the 20th April in their possession.

Mr. Benjamin: There were letters acknowledging receipt of the articles.

The Acting Chief Justice said that, with the suggestion that the articles were deliberately antedated before them, the Court must have the matter cleared up. Let Mr. Faure or Mr. Zietsman give an explanation as to why the existence of these articles was not mentioned. The Court would require some further explanation of this matter before making any order, because if any attempt to deceive the Court in any way had been made, it would be a matter for consideration whether the Court would allow any articles to be entered into at all.

The matter was ordered to stand over.

Postea (August 1).

Mr. Benjamin: There is now an affidavit by Mr. Faure, of Messrs. Faure and Zietsman, who states that while the proceedings were being taken to obtain an order for the registration of the articles from the date of Mr. Jones's death, the articles made on the 20th April remained in the firm's possession.

Mr. Searle: It is a very irregular course not to have mentioned the existence of the articles of the 20th April when the application was made for the dating of articles from Mr. Jones's death. Of course the Law Society does not now say the articles were antedated, but they were perfectly justified in taking the action they had, and in demanding full investigation.

The Acting Chief Justice said that the society had taken very proper steps.

The Court granted the application, but ordered applicant to pay the costs of the Law Society.

MABERLEY V. WOODSTOCK MUNICIPAL COUNCIL.

In connection with this motion for an order declaring the Woodstock Municipal roll as illegal, as revised by the Court of Objection appointed by the Council,

Mr. Schreiner, K.C., counsel for the respondent authority, said that Sir Henry Juta, K.C., who was briefed for the applicant, was too unwell to attend. He therefore asked that it should be adjourned.

The case was thereupon ordered to stand over until the 1st August.

TOWN COUNCIL OF CAPE TOWN) 1901. V. GROMAN AND OTHERS. (July 15th.

Insanitary houses—Ownership—Interdict—Costs.

Certain houses which respondents had purchased, but of which they had not received transfer, had been condemned by the City Medical Officer as unfit for human habitation, and respondents had been called upon to show cause why the premises should not be vacated. This they had not done. The Town Council now asked for an interdict to restrain respondents from continuing to occupy

the said houses whether personally or by their tenants.

Held : (1) That as respondents had by their agent exercised acts of ownership over the said property they must be presumed to be the responsible owners thereof although they had not received transfer; (2) That although the Council might possibly have proceeded against them criminally, it had a concurrent remedy by interdict; (3) That as respondents had come into court and contested the right of the Council to the interdict claimed, they were liable to the said Council for costs incurred.

This was an application for an interdict restraining the respondents from occupying, or allowing to be occupied, certain houses, viz., Nos. 9, 11, 12, 13, and 14, Maynard-lane, which the City Medical Officer had condemned as unfit for human habitation. The premises were sold by Samuel Tonkin to Harris Groman, Morris Kaiser, and Abraham Kaiser (the respondents) in May, but transfer had not yet been made, though respondents had had control of the premises.

In their affidavits, respondents stated that until they were served with the notice of motion they were unaware of the action of the Council. Their agent, Mr. T. H. Tonkin, made affidavit to the effect that he had tried to induce the tenants to leave the premises, but they had pleaded that they could not get any other quarters, and had refused to leave. No rent had been received from them since the 10th June. It was stated in one of the affidavits that the premises had now been vacated.

Mr. Schreiner, K.C. (for applicants), argued that the Town Council were quite within their rights in issuing the above order, and that the parties on whom it was served were to all intents and purposes owners of the premises in question. As such it was for them to evict the tenants holding under them, and not to sit down quietly and say, "It is no affair of ours; if the Town Council want them evicted, they must evict."

Mr. Searle, K.C. (for respondents): We are not the owners of the property. It is

true we have entered into a contract for the purchase thereof, but it has never been transferred to us, and therefore we cannot have any liability in respect of it. Even if we were the owners, the Town Council have mistaken their remedy. They should have instituted a criminal prosecution. That is the procedure provided for by the regulations of the Council. Again, it is in evidence that the applicants have now got all that they asked for. The tenants have been evicted, and hence the only question between the applicants and ourselves is one of costs.

Buchanan, A.C.J.: This application has been made on the ground that the premises specified have been found unfit for human habitation. The Health Officer has inspected them and reported against them, and notice has been given to the respondents calling upon them to show cause why they should not be ordered to have the premises vacated until put into proper repair. The respondents, by their agent Tonkin, appeared before the Council, who, after inquiry, ordered the premises to be closed. This order has not been obeyed, and the Council now applies for an interdict prohibiting respondents from occupying the premises, or allowing them to be occupied. The respondents now oppose, first, on the ground that they are not the owners of the property. It is admitted that they have purchased the premises, but they have not yet taken transfer. It is also admitted that their agent has received the rent, and has given notice to the tenants. No doubt transfer is the best evidence of ownership, but for the purposes of the Town Council Regulations there is sufficient to show that respondents are the proper persons to deal with the control of the property. They acted in every way as proprietors of the property. It is next contended that the parties should be prosecuted criminally. The respondents have neglected to obey the order which under the regulation in question the Town Council has authority to give. They ignored it altogether, and the Council are entitled to come to court and insist on the order being enforced. It is quite possible that respondents might be prosecuted criminally for disobeying the order, but that does not prevent the Council from asking the assistance of the Court to carry out the order. The third ground of objection raised is that respondents have now caused the premises to be vacated, and that there is now only a question of costs. Had the respondents at once complied with the

order the matter might have been different, but instead of doing so they have come into court and contested the right of the Council to proceed against them, and have thus caused the costs complained of to be incurred. On all three grounds of objection the respondents have failed, and the application must be granted in terms of the prayer of the notice of motion, with costs.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Respondents' Attorneys, Messrs. Van Zyl and Buissinne.]

IN THE MATTER OF THE PETITION OF THE SOUTH AFRICAN CONFERENCE OF THE SEVENTH DAY ADVENTISTS.

On the motion of Mr. Searle, K.C., a rule nisi was granted calling on all persons interested to show cause why the petitioners should not, as trustees for the time being, transfer certain property. The rule was made returnable on the 1st August, and was ordered to be published once in the "Gazette" and in the "Cape Times."

SUPREME COURT

Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1901.
{ Aug. 1st.

Mr. Searle moved for the admission of Alexander Fraser Russell as an advocate.

Granted.

On the motion of Mr. Benjamin, Walter George Chubb and Walter Johnson Pugh were admitted as attorneys and notaries.

PROVISIONAL CASES.

ESTATE OF SPANIER V. LE SUEUR.

Mr. Gardiner applied for provisional sentence on a promissory note for £211 4s. 9d., with interest from the 21st July, 1897, less £20 paid on account; also for judgment, under Rule 329d, for £4 8s. 10d., the amount of an insurance premium paid on behalf of defendant.

Granted.

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ALLEN V. JOHANNES ALBERTUS VIXSE-BOXSE.

Mr. Alexander moved for provisional sentence on a mortgage bond, and for the specially hypothecated property to be declared executable, with costs.

Granted.

VISSER V. MARCUS MARCUSE { 1901. AND CO. { Aug. 1st.

This was an application for provisional sentence for £200 sterling, alleged to be due on a certain mortgage bond passed by respondents in petitioner's favour on the 26th September, 1899, by which a certain piece of perpetual quitrent land in the township of Douglas, in the division of Herbert, was hypothecated by respondent to petitioner. On July 5, 1901, petitioner had applied to the Acting Chief Justice, sitting in Chambers, for compulsory sequestration of respondents' estate on the ground that by leaving their place of business at Holpan, in the division of Hope Town, without having in any way provided for the payment of petitioner's aforesaid debt they had committed an act of insolvency. In his petition of July 5, 1901, petitioner had further alleged that he had been informed that the said Marcuse and Co. had assigned their estate to one Backshell. Petitioner admitted that he held security for the debt due to him, which security he valued at £200. The Acting Chief Justice stated on July 5, 1901, that in the circumstances of the country he was not satisfied that any act of insolvency had been committed, and that the petitioner had a remedy in the ordinary process to recover his bond.

To-day Mr. De Waal applied for a postponement *sine die*.

Mr. Percy Jones (for respondents) consented, and the Court ordered accordingly.

JACKENS AND ANOTHER V. BURRELL AND CO

Mr. Close moved for the final adjudication of defendants' estate, and for the appointment of Mr. Harry Gibson as provisional trustee, with power to carry on the business and to collect outstanding accounts.

Granted.

KEMPEN V. SMIT.

Mr. Benjamin applied for sentence for civil imprisonment in respect to court costs due by defendant.

Granted.

SAUERLANDER AND KRUGER V. JAMES
SCOTT.

Mr. Benjamin applied for a decree of civil imprisonment in respect to a judgment of the Court for the sum of £62 7s. 10d., together with taxed costs amounting to £59 8s. 2d.

Defendant appeared, and said he had made an offer of £20 per month, commencing on the 15th inst. This was declined.

Mr. Benjamin said other promissory notes would from time to time become due.

The Acting Chief Justice remarked that it appeared to be a substantial offer. Mr. Scott had been the subject of recent litigation, and the Court could understand his present embarrassment.

A decree was granted, execution to be stayed on payment of £20 per month, the first payment to be made on the 15th inst.

In reply to Mr. Benjamin, his lordship said that there would, of course, be leave to apply again.

WELCH V. JULIUS JOHNSON.

Mr. Percy Jones applied for provisional sentence on certain signed conditions of sale, with interest at 6 per cent. from the 20th November, 1898.

Granted.

MOSTERT V. FREDERICK ERNEST WHITE.

Mr. De Waal applied for a postponement until Thursday next.

Granted.

MASTER V. EXECUTORS, ESTATE OF HEARNS.

Mr. Sheil moved for an order calling upon defendant to file an account, and for costs, *de bonis propriis*.

Granted.

MARAIS V. STEPHANUS ABRAHAM CILLIERS.

Mr. Benjamin applied for provisional sentence on a promissory note for £3,330, purchase price of a farm.

Mr. Searle, K.C., asked for a postponement, as the summons was only served on Friday last.

The case was postponed until Thursday next.

ILLIQUID ROLL.

LEVIN V. WILLIAM H. PICKARD.

Mr. Russell moved for judgment, under Rule 329d, for interest on the sum of £15 0s.

8d., the price of goods sold and delivered, the principal having been paid since issue of the summons.

Granted.

THERON V. JOSEPH NOLAN.

Mr. Benjamin moved, under Rule 329d, for judgment for the return of two crates of tea, or for their value, £10 10s.

Granted.

WITHINSHAW V. SCOTT.

Mr. Benjamin moved, under Rule 329d, for the balance of price of certain goods supplied.

Granted.

DU TOIT V. GERLOFF.

Mr. Gardiner moved, under Rule 329d, for judgment for £165 11s. 6d., balance of purchase price of goods sold and delivered, with interest and costs.

Granted.

TIMOUR HALL SYNDICATE V. SYFRIED.

Mr. Alexander moved for judgment, under Rule 329d, for the sum of £7 6s. 4d., balance of capital and interest due upon balance of purchase price of land situate at New Plumstead, purchased by defendant from plaintiffs on November 1, 1901, for £300.

Granted.

WELCH V. WHITE.

Mr. Percy Jones moved for judgment, under Rule 329d, for the sum of £30 due for two months' rent, with interest and costs.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF
WILLIAM SEARLE.

Mr. De Villiers moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF
MATARE, BRUNS AND CO.

Mr. Benjamin moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF SABA AROOMOOGAN.

On the motion of Mr. Benjamin, a rule nisi under the Derelict Lands Act was made absolute.

ABRAHAMS V. ABRAHAMS.

Mr. Benjamin moved for a decree of divorce and custody of the child of the marriage, with costs. Defendant had failed to return when ordered.

The Court granted a divorce in terms of the rule nisi.

THERON V. ROOS.

Sir Henry Juta, K.C., moved to fix a day for trial by jury.

Thursday, August 15, was fixed.

ERLANK V. WISSELS.

Mr. Benjamin moved for leave to sue *in forma pauperis*.

A rule nisi was granted, returnable on August 15.

IN THE ESTATE OF THE LATE AGUSTA COHEN.

Mr. Russell moved for leave to raise money on mortgage.

Granted.

IN THE ESTATE OF JOHN KELLY.

Mr. De Villiers moved for the cancellation of a certain bond.

An order was granted in terms of the Registrar's report.

IN THE ESTATE OF THE LATE DANIEL GABRIEL DE VILLIERS.

Mr. Schreiner, K.C., appeared for applicant, and Mr. Searle, K.C., for the respondent.

By consent, a rule was made absolute, applicant to pay costs of a new bond.

IN THE MATTER OF THE PETITION OF EMILIE WINTER.

Mr. Benjamin moved for leave to sell certain property and invest the proceeds.

The Court intimated that a report should be obtained from the Master.

IN THE MATTER OF THE PETITION OF EDWARD WEDEL DU TOIT.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

Granted.

IN THE INSOLVENT ESTATE OF JACOB HENBY DREYER.

Mr. Close moved for an order authorising the Master to call a meeting of creditors. Granted.

LAW SOCIETY V. VAN DEN HEEVER. { 1901. Aug. 1st.

Attorney—Removal of name from roll.

The Court ordered the name of an attorney who had been convicted of fraudulent insolvency to be struck off the roll.

Mr. Searle, K.C., moved for an order striking respondent from the roll of attorneys on the ground that he had been convicted and sentenced for eighteen months' imprisonment for fraudulent insolvency.

Mr. Schreiner, K.C., appeared for respondent, and urged that the respondent was led into the crime by speculation. He asked the Court whether it was wise to deprive respondent of any chance of redeeming his position hereafter. He (counsel) asked, though not as a right, that the door should not be absolutely shut to Van den Heever.

The Acting Chief Justice said that attorneys were officers of that Court, and the Court could not lose sight of the fact that it was their duty to protect the public against their officers. It was also necessary to protect an honourable profession from persons who committed serious crimes of this nature. In all the circumstances the Court was bound to order respondent's name to be struck off the roll.

DAY V. DAY.

Mr. Wilkinson moved on behalf of applicant for leave to sue by citation.

Granted, the rule to be published, failing personal service, in the "Government Gazette" and "Cape Times." October 12 was fixed as the return day.

TERRIEN V. TERRIEN.

Mr. Wilkinson moved on behalf of applicant for leave to sue by citation.

The application was granted, publication to be made in the "Gazette" and in "La France," failing personal service. The rule was made returnable on October 12.

IN THE ESTATE OF THE LATE THOMAS FAULKNER.

Mr. Howel Jones moved for an order authorising the Master to pay out £50 for outfit and passage of a certain minor to this Colony. The Master's report was favourable.

Granted.

IN THE MATTER OF THE GARDEN COMPANY.

Mr. Benjamin moved for an order to place the company under liquidation.

Granted.

MABERLEY AND OTHERS v. { 1901.
WOODSTOCK MUNICIPALITY. { Aug. 1st.
Voters' roll—Sections 31 and 34 of

Act 45 of 1882—Court of Revision—Appeal—Meetings of Council in committee—Inspection of Council's accounts.

Applicants asked for an order calling upon the above Municipal Council to show cause (1) why the voters' roll should not be amended in certain respects; (2) why they should not be ordered to admit voters to all meetings of the Council whether they were sitting in committee or not; (3) why they should not be ordered to exhibit to any ratepayer a certain letter referred to in the minutes of a meeting of the Council.

Held (1) that though there had been serious irregularities in the compilation of the voters' roll, the first prayer could not be granted

(a) because there was no appeal from the Revising Court; (b) because the persons whose names it was proposed to remove from the roll were not before the Court.

(2) That in respect of the second and third of the above prayers an order must be granted as prayed; with costs.

This was an application calling upon respondents to show cause (1) why an order should not be granted declaring the voters' roll for the Municipality of Woodstock as passed and revised by the Court of Objection (appointed by the Coun-

cil) on the 24th and 25th days of June last, illegal and irregular as a whole: or especially:

(a) Why all names not being names in full of the voters should not be expunged therefrom.

(b) Why all impersonal names or names of companies—building societies as such, should not also be expunged therefrom.

(c) Why all names unaccompanied by a description of the property giving title to vote should not also be expunged therefrom.

(d) Why all names of persons entered both on owners' roll and occupiers' roll should not be expunged from one or other of them.

(e) Why the name "Carey, J., Mrs." (No. 152) should not be expunged.

(f) Why the name "Maberley, Dr. J., Great Moore-street," should not be amended to "Maberley, John, Essex Lodge, Great Moore-street."

(g) Why the name "Caporn, Dr. A.," should not be amended to "Caporn, Albert William."

(h) Why the name "De Villiers, Rev. J. P.," should not be amended to "De Villiers, Rev. John Peter."

Also (2) to show cause why you should not be ordered to admit any ratepayer or registered voter, desirous of attending, to any meetings of the Council, whether as such or sitting in committee.

Also (3) to show cause why you should not be ordered to show and exhibit to any ratepayer or registered voter so desiring all letters or documents referred to in minutes of Council or committee meetings, and especially that you show and exhibit to the voter Albert William Caporn a certain letter received by you from the firm of Scanlen and Syfret referred to in the minutes of the Council, whether sitting as such or in committee, on the 1st or 5th days of July instant. Or why such further or other relief should not be granted in the premises as to the Honourable Court may seem meet.

Sir H. Juta, K.C., appeared for the applicants, and Mr. Schreiner, K.C., for the respondents.

Sir H. Juta read the following affidavit by John Maberley, who stated:

1. That I am a medical practitioner practising at Woodstock, and am a property owner in the Municipality of Woodstock, and am a ratepayer and registered voter entitled to vote for the election of members of the Municipal Council.

2. That I am president of the Woodstock Voters' Association, an association formed for the following objects: (a) To watch the

interests of the voters; (b) to assist the Mayor and Councillors in promoting the advancement of Woodstock; (c) and generally to encourage the people of Woodstock to take an active and intelligent interest in the affairs of the Municipality.

3. That in the early part of June last, having seen an advertisement that the voters' roll of the Municipality had been prepared, and was open for inspection at the Municipal Office, I called and inspected same.

4. That I subsequently attended at the Court for hearing objections to the said roll, held in the Municipal Hall on Monday, 24th, and Tuesday, 25th June last, and made certain objections to the said roll.

5. That I annex hereto, marked A, a copy of the voters' roll referred to, which has been furnished to my attorneys by the Municipal Clerk of the said Municipality.

6. That the principal objections raised by me before the said Court were the following (The numbers were not used at the time. I append them now for facility of reference, and unless otherwise specified, they refer to the list of owners): (a) I objected to all names appearing on the roll which were not set forth in full as required by section 31 (1) of Act No. 45 of 1882; for instance, No. 1, "Abrahamse, A. J., sen." (b) I objected to all impersonal entries or names of companies, as such, for instance, No. 3, "Abrahamse, Est. of"; No. 368, "Heynes, Mathew and Co."; No. 281, "Friendly Society"; No. 760, "S.A. Milling Co."; No. 547, "Masonic Hall." (c) I objected to all names on the roll which were not accompanied by a description of the property giving title to vote; for instance, No. 532, "Meyer, F., Salt River"; No. 525, "Marais, P., Victoria-road"; No. 554, "Mitchell, J. H., Zonnebloem"; No. 639, "Pearson, Isaac, Walmer"; No. 58 (occupiers' list), "Asphalte Co., Lower Albert-road." (d) I objected to one and the same person being entered on the roll as entitled to vote both in respect of property owned, and also property occupied by him; for instance, No. 880, "Wodson, T. W., Chatham-road, etc." (in the list of owners), and No. 1,918, "Wodson, Thos., 29, Cavendish-square" (in the list of occupiers). (e) I objected to No. 152, "Carey, J., Mrs., Victoria-road," not only on the ground of insufficient description of name and property, but in view of the fact that the husband of this lady was already entered for the full three votes as No. 151, "Carey, J., Victoria-

road," and he being one of the members of the said Court admitted that they were married in community of property.

7. That all the above objections were overruled by the said Court, and the said list of voters hereto annexed is the voters' list as passed and revised by the said Court as the voters' roll for the Municipality.

8. That I objected to the form in which my own name appears on the said roll as No. 515, "Maberley, Dr. J." I was informed by the said Court that my name was fully and correctly given as "Maberley, John." A similar objection raised by Mr. Attorney W. E. Moore has been satisfied, his name originally appearing as "Moore, W. E.," now No. 557, "Moore, William Edward."

9. That I annex hereto a copy of the official minutes of the meeting of the said Court of 24th and 25th June aforesaid, the completeness of which can be estimated when I aver that on the first occasion the proceedings of the Court occupied one hour and a half or thereabouts, and on the second about two hours and a half.

10. That by reason of the defective state of the voters' roll the attainment of the objects of the association, of which I am president, is rendered impossible.

11. That the defective state of the roll also renders it extremely difficult for scrutineers at elections to perform their duty owing to the difficulties of identification, and the facilities it gives for personation.

Sir H. Juta also read the affidavit of Albert William Caporn as follows:

1. That I am a medical practitioner practising at Woodstock, and am a property owner in the Municipality of Woodstock, and am a ratepayer and registered voter, entitled to vote for the election of members of the Municipal Council.

2. That in the early part of June last, having seen an advertisement that the voters' roll of the Municipality had been prepared, and was open for inspection at the Municipal Office, I called and inspected same.

3. That I subsequently attended at the Court for hearing objections to the said roll, held in the Municipal Hall on Monday, 24th, and Tuesday, 25th June last.

4. That I have perused the affidavit of John Maberley of this date, and say that the same is true in substance and in fact.

5. That I personally objected to the form in which my own name appeared on the voters' roll, and claimed that it should be

written in full, but I see that it still appears as No. 147, "Caporn, Dr. A."

6. That the Rev. John Peter de Villiers was also present, and objected before the said Court to his name being inserted on the roll with bare initials, and claimed to have his full name and address inserted, which I understood the Court agreed to do, but I see, however, from the copy of the roll annexed to the affidavit of the said Maberley, that the name still appears as "De Villiers, Rev. J. P."

7. That I attended at the Council Chamber on the adjourned meeting of the Council on Friday, 5th July last. That I annex, hereto marked "A," the agenda paper of the said meeting. When the twelfth item on the paper was reached, the Council resolved to go into committee (of the whole Council). The Town Clerk thereupon asked me to leave, as they were in committee. I objected to leave, and contended that I had a right to remain, under section 85 of Act 45 of 1882. The Mayor, however, ruled that I had no right to remain, and I had to leave, under protest. I subsequently called upon the Town Clerk, and asked to be allowed to see the minutes of the proceedings of the said meeting after I had left, under section 94 of the said Act. He raised no objection to showing me the minutes, but refused to show me the letter from Scanlen and Syfret, or any documents referred to in these minutes.

Mr. Schreiner read the following affidavit of Victor Crooke, Town Clerk of Woodstock:

1. I have read the affidavits of John Maberley, and Albert William Caporn, made by them in the above matter, and which, together with the notice of motion, were served at the office of the Council at five minutes to one o'clock on the 10th inst.

2. On my arrival in this colony on the 4th June last, I found, upon entering upon the duties of my office, that a list of owners and occupiers of property, within the Municipality of Woodstock, entitled to vote, had been prepared by the respondent Council.

3. Copies were made of such list into two separate books, and were duly advertised, and at the sitting of the Court for revising such list one of these lists was placed before the Mayor, and the other was used by me at such sitting, for the purposes of revision.

4. At the sitting of the said Court the room in which the said meeting was held was crowded, and the work of the said Court was much impeded by the said John Maberley and Alfred A. Caporn, and by the dis-

orderly conduct of some of the persons in the room, and it was on this account that the proceedings occupied such length of time as stated by the same John Maberley. On the first day of the sitting of the said Court the Court was adjourned to the following evening. At the adjourned meeting the presiding officer intimated that the Court would go through the list alphabetically, and on calling out the first letter the said John Maberley and Alfred A. Caporn made certain objections. The presiding officer requested them to hand in a list, in writing, of their objections, but this they refused to do, and in the course of making their objections, stated that they intended to carry the matter into the Supreme Court. The said John Maberley did not make the objection to one and the same person voting as owner and occupier, but the question was put by one Neil McKay, and the presiding officer ruled that where a man owned one property and occupied another, he could vote as owner of the one, and occupier of the other, but could not give more than three votes.

5. After hearing objections, the presiding officer inquired whether any persons claimed to have their names inserted in the list, and several persons who were entitled to vote were duly registered.

6. Before the proceedings were closed the said John Maberley requested that his Christian name should be inserted, which was done by me in the list kept by me, and the same request was made by the said Alfred A. Caporn, and by the said De Villiers. This list forms the record of the Court, and was duly certified by the members of the Court. The copy of the voters' roll by the said John Maberley to his affidavit is a copy of the original list as originally prepared, and not of the one where the christian names were given in full.

7. Since the year 1895 the voters' roll has been more or less similar to the one now objected to—in some instances the initials of the Christian names are given and in others the full Christian names are given.

8. In the year 1895 the said Alfred Caporn was elected a member of the Council, and on his retiring by effluxion of time, again became a candidate, but was defeated. In the roll for the year 1895 he is described "Dr. A. Caporn." In the year 1899 the said John Maberley was elected as a member of the said Council; he is described in the voters' roll of that year as "Dr. J. Maberley," and the said Caporn is described as "Dr. Caporn."

9. On the 1st day of July instant at a special meeting of the said Council, the said Caporn was the only member of the public present, and when the Council decided to go into committee, as stated by him in his affidavit, the members of the press, as on all previous occasions of going into committee, retired, and the said Alfred Caporn was requested to retire, which he at first refused to do, but eventually did retire. The object of going into committee was to discuss a certain matter, which it was for the interest of the ratepayers should not have been discussed in Council.

10. Every opportunity was afforded to the objectors, as the Council had nothing to conceal, in the framing and consideration of the voters' roll, and all the proceedings were laid open to them.

11. The list of owners is taken from the roll prepared by the valuers, but for the purpose of obtaining a correct list of the occupiers a house-to-house visitation was made by persons employed by the Council at considerable expense to make such list.

12. On Monday, the 8th inst., the said Alfred A. Caporn called upon me and asked me to furnish him with a letter stating that I refused to allow him to inspect the Council's minutes. As I had not refused, nor been asked by him to allow such inspection, I refused to give such letters.

Sir Henry Juta read the following affidavit by Andrew Chatterton Fuller, attorney, who stated:

1. That I am an attorney of the above honourable Court, and a partner in the firm of Silberbauer, Wahl, and Fuller, attorneys for the above named applicants.

2. That I have perused the affidavit of Victor Crooke, sworn to on the 11th instant.

3. That the voters' roll annexed to the affidavit of John Maberley was forwarded to my firm by the Town Clerk of the respondent Municipality under cover of his letter of July 9 hereunto annexed, marked A.

4. That although this letter purports to forward "another copy," it is the only one I have ever received, and it subsequently transpired that the Town Clerk was under a misapprehension in using the word, being under the impression that he had previously forwarded a copy of same.

5. That on the 11th day of July, inst., I wrote a letter to the respondents' attorneys asking to be furnished with a copy of the Voters' Roll as passed by the Revision Court, and received a reply from them, which I hereunto annex.

Sir H. Juta, K.C. (for applicants), cited section 31 of Act 45 of 1882. You cannot put into the roll an "impersonal person," e.g., "Masonic Hall."

[Buchanan, A.C.J.: Who pays the rates? Whoever pays them may vote.]

Yes. Act 45 of 1882, section 29, makes provision to that effect. But should an election take place, any one of these persons might come forward and say, "I am the Masonic Hall," and a second person might come and say the same. The compiler of the roll cannot put down "Masonic Hall"; no scrutineer could make anything of that. The person who should be on the roll is the person liable for the rates.

[Buchanan, A.C.J.: Then are we to understand that premises such as you describe are not liable for rates?]

No; but under the Act each partner must have an interest in the joint property to the amount of at least £10. If three people held a property worth £15, none of the three could vote in respect thereof.

[Maasdorp, J.: Then you say the qualification must be personal?]

Yes, clearly, and that is shown by the provision that persons claiming to vote must not have been convicted of treason, murder, rape, etc. Any company can nominate a representative by whom they may vote.

[Buchanan, A.C.J.: Then will the company be prejudiced if their nominee has committed any of the crimes you mentioned?]

Should they nominate such a person, they will lose their vote. Again, the whole gist of section 28 was to give at least one vote to every ratepayer. No person can vote for more than one ward, and from section 31 it is abundantly clear that no person may vote both as owner and occupier in respect of the same property. Let us suppose that A is owner of X, but the occupier of Y, and that B is owner of Y, but occupier of X; you might have four votes, two of which might be cast by the owner on a £10 property.

[Buchanan, A.C.J.: The same two properties may qualify four persons?]

Yes, but you cannot reduplicate the votes.

[Buchanan, A.C.J.: A man might own a property entitling him to three votes, and might occupy another property entitling him to other three?]

Yes, and the respondents see the absurdity of this position, and so say that no man can have more than three votes. Then as to Mrs. Carey's case, she and her husband are married in community. The hus-

band has the administration of the property, and therefore the wife cannot claim three votes in addition to his three. Partnership property cannot be split up in that way. Under section 29 of Act 45 of 1882 the value of the property must be divided by the number of co-owners, not exceeding three. If the husband has been registered for the full three votes the wife cannot be registered for other three.

[Maasdorp, J.: Is the property registered in the wife's name?]

The affidavit does not tell us.

[Buchanan, A.C.J.: Has Mrs. Carey had notice that you propose striking her off the roll?]

No; but my point is that you cannot have more than three votes for a partnership. The whole object of the Municipal Act was to limit the votes to three in respect of any property.

[Maasdorp, J.: Suppose the parties own several properties, must you lump them all together and regard them as one?]

Yes, or else a man who owns, say, six properties, might have eighteen votes.

[Buchanan, A.C.J.: But suppose that a man is a property owner and also a trustee, cannot he give more than three votes?]

Yes, because in such a case he votes in two different capacities. The next point with which I have to deal is the right of a ratepayer to be present at any meetings of the Council, even if sitting as a committee of the whole Council. Sections 85, 91, and 94 of Act 45 of 1882 show that the meetings of the Council are public meetings. Can the Council then evade this rule by simply saying, "Now we are going to sit in committee"? The agenda paper of the day in question showed that the Council had been sitting as a Council, and that at a certain stage of the proceedings they said, "Now we are going into committee." Such a resolution is opposed to the whole spirit of the Act. Committees, under section 91, are indeed quite a different matter. The applicants do not ask to be allowed to attend special committee meetings. Section 94 shows that all meetings of the Council are supposed to be public; and this brings me to my last point. At a certain meeting of the Council a letter from Messrs. Scanlen and Syfret was read. The Clerk refused to show that letter to petitioners, and this was certainly in contravention of section 94.

[Jones, J.: Do you mean to say that a letter is a proceeding?]

The proceeding is "received a letter," but section 94 makes proceedings evidence

in a court of justice. How can they be so if letters are not produced?

[Buchanan, A.C.J.: Section 100 certainly seems to imply that you can have access to the accounts.]

Yes, the object of the Act is to make all proceedings open to the ratepayers.

Mr. Schreiner, K.C. (for respondents): The first point before the Court is an application to strike out about three-quarters of the names from a duly-certified roll, and if the Court grants the relief asked for no election can take place next Wednesday, in accordance with the provisions of the Act. It is quite true that the names should be given in full on the roll, but it does not follow that they must be expunged if not in full. The Act only means that the names must be given as fully as possible.

[Buchanan, A.C.J.: The real question is, "Can this Court compel Councils to do their duty?"]

Lex non cogit ad impossibilia. There are hundreds of names on the roll.

[Buchanan, A.C.J.: But surely the christian name of these people can be ascertained?]

My point is that this provision of section 31, sub-section (1), as to "names in full," is only directory.

[Buchanan, A.C.J.: You contend then: (1) That there is no appeal to this Court; (2) that we cannot remove from the roll the names of persons not before the Court?]

Yes.

[Jones, J.: You can hardly say that the man who compiled this roll did his duty. Here are some names without any christian name at all.]

A man can only do his best. Section 31 only provides for "the name in full," and not for the full christian name. Section 50 uses very different language, and insists on the full christian name of a candidate. All that section 31 requires is that a man should be designated in a way which will enable the polling officer to identify him; it would be absurd to say that a man should be struck off the roll because his fourth christian name had been omitted, or indicated by an initial.

[Buchanan, A.C.J.: The whole question is, "Has the Revision Court done its duty?"]

True, but nobody is prejudiced by what it has done. If a man comes and says "I object to be on the roll as A. W. Robinson, and I want to be called Arthur William Robinson," the Court must amend the roll but section 34 does not give any man

right to come and say, "I object to all names where the christian names are indicated only by initials." The Revision Court has done all any Court could possibly do, and certainly all that it was by section 34 required to do. Then (2), why should the names of companies and societies be expunged from the roll? For fully twenty years companies have voted in this colony by representatives. The older companies had trustees, in whom their property was vested. In the case of the more modern companies the property is vested in the shareholders. But, in any case, a company must be regarded as a person of full age. Of course, if a person claims to represent a company, the polling officer could demand his authority for so doing: but surely it will not be said that before a company can thus exercise their franchise through a representative that the name of every single shareholder must be on the list. In the case of a certain Dutch Reformed Church, the name of the clergyman was put in as occupier of the parsonage, but then the Dutch Reformed Church is not a legal *persona*. The same contention would hold good in respect of the Masonic Hall.

[Maasdorp, J.: If you cannot deal with companies under section 29, you cannot get them in at all.]

Oh, yes. The whole point of my contention is that "person" includes "company."

[Jones, J.: Companies have no vote in Parliamentary elections.]

No, but they exercise great control through their employees.

[Jones, J.: So they do in municipal elections.]

The distinction between the Parliamentary franchise on the one side and that for the Municipal and Divisional Councils on the other is that the latter is primarily a property franchise, the former is not.

[Buchanan, A.C.J.: Is it not the principle of our representative institutions that the vote goes with the person, and not with the property?]

But "person" includes "company." Were it not so, companies would not be bound to take out trading licences under Act 38 of 1887.

As to the third point, surely we are not bound in each case to give the number and the street where the property is situated which entitles a man to vote. I will not attempt to argue this point. As to the fourth point, viz., the objection to owners and occupiers being entered separately on the roll—that was an afterthought. One

Neil McKay put the question as to whether this could be done, and the presiding officer answered, "Yes, providing such person did not give more than three votes." Section 29 does not say that all the property in respect whereof a man votes must be within one and the same curtilage. If a man has three different properties, each worth £10, in a town which is not divided into wards, he can give three votes. There is nothing in section 28 to disqualify him.

[Buchanan, A.C.J.: The roll has been very carelessly made up. The names of owners and of occupiers should not be in separate lists.]

If a man has, say, ten properties, his name must be repeated, and no objection has ever been taken to the owners' and occupiers' lists being separate. If a man is entitled to vote as an owner and also as an occupier, he can vote in both capacities, provided he does not give more than three votes.

Then as to Mrs. Carey. Under section 29 she is entitled to vote in respect of the property held by herself and her husband. Suppose that two male partners own jointly a property, which is rated at £60, they can clearly give six votes between them, and a female partner is on the same footing as a male partner as far as the right of voting is concerned. I base my argument on section 29, and say that if the municipal value of the property is sufficient to cover six votes, each of the spouses is entitled to three. A wife is entitled to her vote, even though the husband has administration of the property. At least, I submit that such is the case, though (as far as I know) the question has never been before the Court. This is a property franchise, and the wife is jointly liable for rates.

[Buchanan, A.C.J.: You could not sue her.]

A mere question of process does not affect substantive law. She is jointly liable. It would be no answer to a claim for a vote to say that a claimant was not rated. The question is, is the claimant liable to be rated? Let us suppose that Mrs. Carey was the owner of the property, why should she be struck off?

[Maasdorp, J.: If she is married she is a minor.]

She is thirty years of age, and if she would not lose her rights by marriage if she were married by ante-nuptial contract, why should she lose them by a marriage in community?

As to the other item, it was a misconception.

[Buchanan, A.C.J.: Yes, that has been corrected.]

As to the next point, the presence of rate-payers at committee meetings. I would observe, *in limine*, that if section 85 is to be construed so that all persons who may be present at a Council meeting may be present at a committee meeting, the application now made is far too narrow. It is contended that the general public can claim to be present at meetings of the Council, but even the applicants do not say that any, save voters, can claim to be present at committee meetings. It would be most absurd to hold that a committee of a Municipal Council should not have the same power of excluding the general public which every board possesses; more especially as the report of every committee must come before the Council.

[Jones, J.: If that is so, the Council can always exclude the public by turning themselves into a committee.]

If they did that the public would turn them out of office.

[Buchanan, A.C.J.: Why should they do so if the Council only act within their own rights?]

To give publicity to all committee meetings would render municipal government practically impossible. Contentious matters, for instance, constantly come before committees. Under sections 95 and 100 any creditor of the Municipality or any ratepayer may see the notes of the agenda, and take extracts. But he may not take notes of the correspondence; were he allowed to do so, such permission would give rise to any number of "fishing" applications. Even a shareholder in a company cannot claim inspection unless a suit is pending—*Moller v. Spence* (4 Juta, 47)—in which case De Villiers, C.J., distinguished clearly between the position of a director and that of an ordinary shareholder. (See also the judgment of Smith, J., at p. 49, quoting *Lindley on Partnership*, and other authorities. And this is an *a fortiori* argument; for if any distinction is to be drawn between a private company and a public body in this respect, such distinction should surely be in favour of the latter. In the case of a private company the rights of even a director are very limited, and those of an ordinary shareholder are much more so. Unless public bodies were safeguarded in the manner for which I contend, any disappointed and dissatisfied candidate might make any number of vexatious applications, and no man of position would consent to

serve on these bodies. In conclusion I would point out that the election must take place on the 7th of this month, and if the roll is disturbed no election can take place, and there will be a deadlock.

Sir H. Juta (in reply): The analogy between a company and a corporation is quite misleading. The meeting of a Board of Company Directors is not a public business, and they do not hold the public purse. *Moller v. Spence* refers to a private company, and if everybody might inspect the books of a company it would be impossible to make them up at all. In the case of a corporation the Legislature has given every ratepayer a right of inspection of all public documents. This right would be nugatory if he could demand to see only meaningless entries in the minutes. Suppose such an entry as this was made: "Communication received re loan from Westminster Bank.—Resolved to record it." Of what use could such an entry be to any creditor of the corporation? I never said that the public could not claim admission to committee meetings, but my instructions did not authorise me to go so far as to insist that they could do so.

With regard to Mrs. Carey's case, if she cannot be sued for rates, it is absurd to say she can be rated. If she can be rated her property can be seized in the event of non-payment of rates, under section 135. So we arrive at the *reductio ad absurdum*, that although she cannot be sued, her property can be seized.

As to the separate lists of owners and occupiers; it is quite clear from the affidavits of Drs. Maberley and Caporn that they raised this objection. My learned friend says we ought to have specified cases. One case is quite enough, and there is *Watson's case*. We cannot, from the roll, identify the Watson in question.

This Court can give us a remedy against this defective roll. The Act says the roll must be made up in a certain way. This has not been done, and this Court can compel the Town Clerk to do his duty. If I, as a ratepayer, prove that a man is on the roll who is not qualified, I can have him struck off. No notice need be given to him to appear in a Revision Court, and this Court is now asked to discharge the functions of a Revision Court. The whole object of specification in a voters' roll is the identification of the voter. It cannot, therefore, be held that these orders are merely directory. As to the question of owner and occupier, it would have been easy to have

distinguished them if the roll had been properly made out. Counsel for respondents has said that this Court has only to deal with the revision of the roll. That is precisely what we ask. The argument of respondents as to impersonal names proceeds in a circle. The polling officer asks (let us say), "In respect of what property do you claim to vote?" "Where is your authority?" "Who gave you that authority?" Respondents have said that in the case of a school which is rated, the principal or the chairman of the Council should vote. But why should they? Then, again, the Act 45 of 1882 provides various penalties for offences committed in connection with municipal elections. But how can these be enforced, as against a body or a commercial firm? I would refer, in conclusion, to *Outram and Another v. Town Council of Cape Town* (2 Juta, 83); *Anderson v. Town Council of Port Elizabeth* (3 E.D.C., 302); and *Armstrong v. Haarhoff* (7 H.C., 136).

In giving judgment, the Acting Chief Justice said that the application raised several important points with reference to municipal government. In the first place applicants applied for an order declaring the Voters' Roll prepared for the Municipality of Woodstock illegal and irregular as a whole. The ground upon which the application was made was that, in the first place, the Clerk of the Municipality had not performed the duty the law imposed on him, and secondly, that the Mayor and Council, sitting as a Revising Court, had not performed the duties imposed upon them by the law with regard to the Voters' Roll. The 31st section required the Clerk of every Municipality before the first day of June of each year, to make out a Voters' Roll, which should show the names in full of the voters, and give a description of the property which gave the title to vote, and certain other descriptions. The Town Clerk of Woodstock had prepared a Voters' Roll, but this did not show the names in full of the voters, nor did it give a description of the property which gave title to vote in every case. In regard to the names, the roll was terribly deficient. Fully nine-tenths of the names were not given in full. In respect to the second requirement, the property was not in some cases even mentioned, and in other cases, only the most general descriptions were given. Then, instead of one list, the roll was made in two parts, and it was admitted that certain of the voters had their names entered twice, once as owners, and again as occupiers. The Town Clerk

had therefore failed in his duty in not having carried out the full directions of the order. He had in all probability put on the roll names intended to indicate every voter in the Municipality, but these entries did not fully comply with the requirements of the Act. Then at the sitting of the Revising Court applicants made certain general objections as well as special objections to names on the roll. The Revising Court here again did not seem to have paid attention to the requirements of the Act. The 34th section gives certain directions to the Court to guide them in their proceedings, and one of these directions was that they should correct any mistake or supply any omission, which may appear to have been made in the Voters' Roll. These omissions were pointed out to them, but they took no steps to rectify them. It had been argued that it was impossible to get the full names, but the Court might have tried to do so to the best of their ability. But when this Court came to consider whether they could declare the whole roll invalid upon this ground, he (the Acting Chief Justice) saw very great difficulty indeed. There was no appeal from the decision of the Revising Court, and that (the Supreme) Court could not now, upon failure to carry out what was clearly only a directory clause, declare the whole of the voters' roll illegal, and set it aside in its entirety. The petition, however, went on to ask the Court to correct it in certain particulars, by omitting certain specific names. To this, again, there were two objections. In the first place, there was no appeal from the Revising Court, which had decided to retain these names; but the stronger reason was to be found in the fact that the persons whom they were asked to deprive of their votes were not before the Court. No notice was given to any of the people affected, and they had not been called upon to justify their claims, and in the absence of such notice, the Court could not strike out their names. Other remedies might be open to the applicants, but the remedies now sought for it was not, for the reasons stated, the function of the Court to grant. It was undesirable to express an opinion as to whether individuals or societies against whom objections were taken were entitled to vote or not, because they had not been heard. The next part of the application was that calling upon respondents to show cause why they should not admit voters to the meetings of the Council, whether or not they were sitting in committee. The 85th

section of the Municipal Act said that all meetings of the Council shall be open to the public. Now this, he (the Acting Chief Justice) thought, was a very useful and very proper provision. The object was that publicity should be given to the proceedings of the Council, and unless this provision was adhered to, it would be in the power of the Council at any of their meetings, merely by resolving itself into committee, wholly to banish the public from the meetings. The words of the section were clear and in the widest terms, and it was not in the power of the Council by a simple expedient to defeat the intention of the Legislature. The Council were also called upon to show cause why they should not be ordered to exhibit to any ratepayer a certain letter referred to in the minutes of the meeting of the Council. The minutes were intended to be a public record, and were by the 94th section made admissible in evidence without proof in all courts; and by the 95th section any ratepayers or person to which the Municipality was indebted was entitled, at all reasonable times, to inspect the minute book. The 100th section also said that the accounts of the Municipality, and all documents and books referring thereto in the possession of the Council, should, at all reasonable times, be open to inspection by the ratepayers and creditors. This letter from Scanlen and Syfret had direct reference to the finances of the Council. It related to a matter of rates on land in Albert-road, and it was clearly a matter upon which every ratepayer was specially entitled by the Act to be informed. Under these circumstances, the Council were wrong in refusing a ratepayer information which the Act entitled him to have access to. The Court would make no order as to the application in regard to the voters' roll, but he (the Acting Chief Justice) thought applicants were entitled to an order compelling the Council to admit them to the Council meetings, and to produce for inspection by applicants as ratepayers the letter received from Scanlen and Syfret. Under ordinary circumstances, had the application for admission been confined only to the meeting which was over, no order might have been made, but the Council contested the right of the applicants to attend future meetings, so that it was necessary that a declaration of right should be given. An order would be made upon the Council in future to admit the public to all meetings of the Council, whether sitting in committee or not, and to produce the letter of Scanlen and

Syfret for inspection by the applicants as ratepayers. Applicants had good grounds for coming into court in view of the manner in which the roll had been made out, and especially in regard to the rights they claimed as members of the public. Consequently the Court considered that respondents should be ordered to pay the costs.

Their lordships concurred.

Mr. Schreiner asked whether the order would include meetings of Select Committees?

The Acting Chief Justice said that that was not before the Court; it was only the question of the admission of the public to meetings of the Council, whether in committee or not.

Applicants' Attorneys. Silberbauer, Wahl, & Fuller.

Respondents, W. E. Moore & Son.

VAN ZYL V. GREEN AND SEA } 1901.
POINT MUNICIPALITY. } Aug. 1st

On the motion of Sir H. Juta, K.C., the award in this matter was made a rule of Court.

VAN ZYL V. CAMP'S BAY TRAMWAY CO.

On the motion of Sir H. Juta, K.C., the interdict restraining the respondent company from cutting down trees on applicant's property was made absolute.

Re ESTATE LATE WARD.

On the motion of Mr. C. W. de Villiers, a rule *nisi* for the cancellation of a certain bond was made absolute.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

SOUTH AFRICAN BREWERIES } 1901.
V. MARTIENSSEN. } Aug. 2nd.

Mr. Schreiner, K.C., applied for a joint commission to take such evidence as might be tendered in London.

Mr. Searle, K.C., who, with Mr. Close, appeared for the respondent, consented, and the application was granted.

DYASON V. LINDENBURG. { 1901.
Aug. 2nd.

Municipal election—Returning officer—Disqualification.

The Mayor of Fraserburg was a candidate in a pending municipal election. As Mayor, he was ex-officio the Returning Officer, and was now called upon to show cause why he should not be restrained from acting in that capacity.

Held: (1) That sections 47 and 48 of Act 45 of 1882, indicate that no candidate may also be Returning Officer; (2) That under such circumstances it is competent for the Governor to appoint a Returning Officer on the petition of twenty-five or more registered voters, should the Town Council have failed to do so.

This case came before the Court on a notice of motion calling on respondent to show cause why he should not be restrained from acting as returning officer in the Municipal elections of Fraserburg to be held on the 7th August, he being a candidate in the election. The petitioner, who was also a candidate, deposed in his affidavit that on the 13th July, after the nominations had been declared by the Mayor, who was respondent, he (petitioner) asked who would be returning officer. Respondent said he would be. Petitioner pointed out that, as the Mayor was a candidate, he could not act as returning officer. Later petitioner wrote to the Council on the matter. Petitioner said that there was no voting by ballot in the election, and the other candidates would be prejudiced by the Mayor acting as returning officer. The petition prayed for an order restraining respondent from being the returning officer, and for the appointment of the Civil Commissioner as returning officer or for other relief.

Mr. Close appeared for the applicant, and Mr. Benjamin for the respondent.

Respondent, in his affidavit, denied that the other candidates would be prejudiced by his acting, and said he was of opinion that Act 36 of 1887 qualified him to act.

The Acting Chief Justice intimated that the Court would hear Mr. Benjamin.

Mr. Benjamin (for respondent): A man may be a candidate and also a returning officer. Under section 24 of Act 45 of 1882, the Mayor is to retain office until a new election has taken place. Under section 47, the Mayor is the returning officer. He is not specially appointed as returning officer, and therefore does not come under section 48. That is why Act 36 of 1887 was passed.

[Buchanan, A.C.J.: Does not that Act imply that a candidate cannot be a returning officer?]

No, the Act merely provides for filling the office by a special appointment should the *ex officio* returning officer be disqualified. Suppose that the Act of 1887 had never been passed. —

[Jones, J.: How do you get over the very first words of the Act? If the Mayor is not disqualified by being a candidate, clearly the Governor cannot appoint anybody else.]

[Buchanan, A.C.J.: Section 47 of Act 45, 1882, allows the Council to appoint a returning officer under these circumstances, and if the Council will not do so, the Governor may.]

This is an appointment under section 47, which appoints the Mayor. Section 48 does not apply to a returning officer *ex officio*. It says: "No person *specially appointed*," and *demonstratio unius est exclusio alterius*.

[Maasdorp, J.: Suppose the Mayor were ill, and twenty-five persons did not apply to the Governor to appoint a returning officer under Act 36 of 1887, what would be the result?]

It may be that in such a case even one application would suffice.

[Jones, J.: No. Is not the conclusion rather that in such a case there could be no election?]

If the Mayor were unable to preside the Council would continue in office, and would at a subsequent meeting appoint a returning officer.

Mr. Close (for respondent), in answer to the Bench, stated that he had no Colonial authorities on the point, and that the English authorities did not apply.

Buchanan, A.C.J.: Under the 47th section of the General Municipal Act the Mayor or Chairman of the Municipality is appointed the returning officer at the annual election of Councillors, and in case such Mayor or Chairman be absent, or is incapable of acting, the Council may appoint a returning officer. Should there be no Council, the Governor may appoint. The 48th section provides that no person

specially appointed to act as returning officer shall be or become a candidate at such election. The 47th and 48th sections of the General Municipal Act indicate, in the opinion of the Court, that the returning officer must not himself be a candidate. It is true that the 47th section does not specifically say that the Mayor, when returning officer, shall not be a candidate, but it says that in case the Mayor is absent or incapable of acting the Council may appoint somebody to act in his place. Reading the section strictly, no doubt, there is some force in Mr. Benjamin's contention that it only prohibits persons specially appointed; but on general principles one would say that a person ought not to occupy a quasi judicial position in his own case, because the returning officer, in the event of ties, has himself to decide the election by drawing lots. I think that there is a clear recognition by the Legislature of the principle that the Mayor or Chairman of a Municipality must not himself be a candidate at the election over which he presides. Act 36 of 1887 consists of only one section, providing that in case the person directed by any Act or Law to fill the office of returning officer at any election shall be a candidate at such election, it shall be lawful for the Governor, on the application of a sufficient number of ratepayers, to appoint some other person to be the returning officer. The Act does not make the disqualification of the returning officer dependent upon the petition to the Governor, but only provides for an omission in the General Municipal Act. If the Council of any Municipality are not willing to appoint some other person than the Mayor, on the Mayor becoming incapable of acting, then twenty-five voters may approach the Governor, who is authorised to appoint a person. This provision does not make the Governor's decision settle the question as to whether the returning officer is disqualified or not. It seems that it is rather intended to provide for the Governor appointing a person in case disqualification should arise, and no action should be taken by the Council. Under these circumstances, I think, on principle, as well as on the Statute, the Court must hold that the Mayor cannot be the returning officer when he is himself a candidate. An order will be granted restraining the respondent from being at the same time the returning officer and a candidate.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Respondent's Attorneys, Messrs. Van Zyl and Buissinné.]

BEEHO V. BEEHO.

This was an action for divorce.

On the application of Mr. De Villiers, the case was ordered to stand over *sine die*.

BULT V. BULT. { 1901.
{ Aug. 2nd.

This was an action for restitution of conjugal rights, or, failing that, to show cause why a decree of divorce should not be granted. The plaintiff was formerly in the Civil Service of the Cape Colony at Kimberley, and was married to defendant on May 31, 1883, at Bloemfontein, Orange Free State. They lived together in Kimberley until 1891, when defendant went to England, where she had remained. The parties corresponded for some time, but eventually defendant ceased to write, and now refused to return to the plaintiff, although he had offered her every facility.

Mr. Searle, K.C. (for plaintiff), called

William Crisp, Archdeacon of Bloemfontein until last March, who deposed that he knew the plaintiff, Mr. Bult. That was his signature to the marriage certificate handed in. He did not marry the parties, but the certificate was a true copy made by him of the register in 1888.

Cyrus M. Bult, the plaintiff, deposed that he was married to his wife, Amy Louisa Bult (born Beauclercq), on May 31, 1883, at Bloemfontein, Orange Free State. The certificate handed in was correct. He was living at Du Toit's Pan at the time. He was in the Civil Service, and only went to Bloemfontein to be married. After the marriage he resided at Beaconsfield. An ante-nuptial contract was drawn up at Bloemfontein by Attorney Abraham Fischer, also a deed of settlement. The furniture mentioned in the deed was sold and his wife got the proceeds. He lived with his wife in Kimberley from 1883 until November, 1891. Then she set out for England for the benefit of her health. They had lived happily together up to that time, and parted on good and affectionate terms. The letter put in showed they were on affectionate terms. They corresponded regularly every week for three or four years, perhaps longer. After that her letters became less frequent and cooler. He supported her while she was in England. He sent her £40 a month regularly. After a time she ceased to write. In 1899 he went to England. He had then retired from the Service, having broken down in health. He did not see his wife in England. He had had no letters from her latterly. A letter from his wife was sent to him by a sister. The letter

was addressed by his wife to Mrs. Kemmis, the sister in question. It was in these terms: "My Dear Maud,—Nothing will ever induce me to live with my husband on any terms. This is my absolute and definite determination, which it is perfectly useless to attempt to alter." The letter was dated February 26, 1901, and had been sent on to witness by Mrs. Kemmis.

By the Court: He did not know what his wife's reason was for determining not to return to him. He tried to find out the reason, but had not succeeded. He might surmise it, but he didn't know it. He had always been quite willing to take his wife back. So far as he knew, he had given her no cause for not desiring to come back to him.

The Acting Chief Justice granted an order for the restitution of conjugal rights, defendant to return to plaintiff before October 12 next, failing that to show cause on November 1 why all the benefits under the antenuptial contract should not be forfeited and a decree of divorce given.

JORDAN V. DREYER. { 1901.
 { Aug. 2nd.

Mr. Gardiner appeared for the plaintiff, and submitted the following intendment:

1. The plaintiff is a farmer, residing at Retreat, in the district of Queen's Town; defendant is a farmer, at present presumed to be resident in the Transvaal Colony, but whose exact residence the plaintiff cannot with particularity describe.

2. The plaintiff is the registered owner of a certain piece of land situate in the district of Maclear, Griqualand East, "being the lot called C." At the time of the matters hereinafter referred to, the plaintiff was, and he is still, indebted to the Colonial Government in the sum of £207 4s., for which amount he has passed a mortgage bond, bearing interest at 4 per cent. per annum, specially hypothecating said land, which bond still forms a charge against the same. The amount of the said bond is referred to as £200 in the agreement "A" hereinafter mentioned, and for the purposes of this suit is taken to be £200 accordingly.

3. On or about the 22nd December, 1898, the plaintiff, through his duly-authorized agent, one Stephanus Petrus Jordaan, entered into a contract of sale in writing with the defendant, whereby the defendant bought from the plaintiff, who sold to him, subject to the matters in the next succeeding paragraph set out, the aforesaid piece of land

for the sum of £103 in cash, it being a further term in the agreement and a portion of the consideration for the said sale that the defendant should take over the said bond (£200). The plaintiff annexes hereto, craving leave to refer thereto, a translation of the said agreement marked "A."

4. In terms of the said agreement the plaintiff had the right, if so minded, to dispose of the said land otherwise than to the said defendant at any time before the 30th December, 1898; but the plaintiff did not exercise such option, and the said defendant became the absolute purchaser of the said land on the terms above set forth on the 30th December, 1898.

5. Thereafter, on or about the 1st January, 1899, the plaintiff gave possession to the defendant of the said land, and the purchase price became due and payable, and the plaintiff has been, and is, ready and willing to perform his part of the contract, and to give transfer to the defendant on payment of the purchase price; but the defendant has neglected and refused, and still neglects and refuses, to pay the said sum of £103, or to take over the said bond for £200, and to perform his part of the contract, though requested so to do.

6. The plaintiff is entitled to claim that the defendant shall pay to him the amount of the price as aforesaid, with interest at 6 per cent. on £103 from 1st January, 1899, and take over the said bond, or pay the further sum of £200 in respect thereof, or otherwise, that the defendant should forthwith give up possession of the said land to the plaintiff, but the defendant refuses to pay the said sum, or to give up possession as aforesaid.

7. For a further claim, the plaintiff says that, by reason of the neglect and default of the defendant to perform his part of the contract, he has suffered damage in the sum of £100. He says, further, with reference thereto, that he has had to pay interest to the Colonial Government at the rate of 4 per cent. per annum on £207 4s., amounting yearly to £8 5s. 9d., for the years 1899, 1900, and 1901 respectively. He has been deprived of the use of the money constituting the purchase price for the said period, and he has had to borrow money at a high rate of interest for his own operations.

Wherefore the plaintiff claims: (a) An order declaring that the defendant shall forthwith pay the said sum of £103, and take over the said bond as and for £200, or pay the further sum of £200 in respect thereof, with interest on the said sum of £103

at the rate of 6 per cent. from 1st January, 1899, the plaintiff tendering hereby to pass transfer upon the said payment; or otherwise, (b) failing such payment and taking over forthwith an order declaring that the said contract of sale is rescinded, and that the defendant shall give up immediate possession of the said land to the plaintiff; (c) judgment in the sum of £100 as and for damages, including therein the amount of £8 5s. 9d. per annum for each of the said three years; (d) alternative relief; (e) costs of suit.

Mr. Gardiner said he would not now press for damages.

The Acting Chief Justice gave judgment for plaintiff as prayed, with costs.

CORNISH V. CORNISH. } 1901.
Aug. 2nd.

This was an action brought by Mary Cornish against her husband, Frederick H. Cornish, for restitution of conjugal rights, and failing that for divorce. The matter had been before the Court on a previous occasion, but owing to certain correspondence which had taken place between plaintiff and defendant it was withdrawn. Fresh proceedings were now instituted. The parties were married in Cape Town on June 15, 1896. The defendant was in the service of the Cape Government Railways at the time. The parties lived together for eighteen months, although not very happily, as he had given way to intemperance. At the end of that time he left her, and they had not lived together since. He was now a telegraphist in the Transvaal service.

Mr. Close appeared for the plaintiff.

Alfred Frederick Ferdinand Scharffenorth, called, produced the register of the marriage, dated June 15, 1896.

Mary Cornish, the plaintiff, called, deposed that she was married on June 15, 1896, at the Church of the Sacred Heart, Cape Town.

By the Court: She was living in Cape Town at the time. She was English born.

By Mr. Close: Her husband was then on the permanent staff of the Cape Civil Service, and remained there for a year and a half. They lived together for that period. They did not live very happily because of his intemperate habits. He did not provide much in the way of funds. She worked for a year after her marriage to keep the home together. She was in business. She contributed most towards keeping the home. During the whole period he only paid for two or three months' expenses. In De-

cember, 1897, he had to leave the Civil Service owing to his intemperate habits. Shortly before then a child was born of the marriage. It died four months later. That was in December, 1897. After the birth of the child defendant left for England, nominally to get assistance from his parents. He knew the child was ailing, but offered no assistance. She never heard from him until December, 1899, when she saw him in Cape Town. He had come out with the troops as a telegraphist. He promised then to make a home for her soon. He had never done so. She had never heard from him during the time he was in England. Since then he had been in the Imperial service in the Transvaal. She had not received any assistance at any time from him, except during the two or three months they were together at Sea Point. He was now in Pretoria. She had some correspondence with him some months ago, but he had heard nothing from him since. She was married in community of property. He had no property that she knew of. She had no property either.

The Acting Chief Justice granted an order for restitution of conjugal rights, the order to be returnable before October 12, failing which plaintiff to take a rule nisi calling up on defendant to show cause on November 1 why a decree of divorce should not be granted.

Mr. Close wished to know if the Court could not fix an earlier return day. Mrs. Cornish was entirely dependent upon her friends. She was hoping to go to India to her brother, and her departure would have to be delayed until the matter was settled.

The Acting Chief Justice said that in view of the state of the country, it was not desirable to make the period too short. The Court must grant a reasonable time.

WILSON V. WILSON. } 1901.
Aug. 2nd.

This was an action brought by Mary Ann Wilson against her husband, Thomas Wilson, for restitution of conjugal rights, or failing that for divorce. The parties were married in Grimsby, Lincolnshire, on December 22, 1895, out of community of property. In May, 1896, they left England to come to this country. They settled in Woodstock, where they resided for some time, defendant working as an engineer. In December, 1898, defendant deserted plaintiff and had not since returned to her.

Mr. Close appeared for the plaintiff.

Mary Ann Wilson deposed that she was married on December 22, 1895, at Grimsby, Lincolnshire, to the defendant. The copy of certificate handed in was correct. She and her husband came to the Cape in May, 1896. They settled at Woodstock. Her husband was an engineer. He had employment for some time on one of the boats owned by Messrs. Stephan Bros., and plying between Table Bay and Hondekliip Bay. Troubles arose after a year. Defendant kept late hours and quarrels resulted. He was of intemperate habits, and drank a good deal. He left her on December 22, 1898. He came in that morning, when she was ill in bed, and said he would be back at three in the afternoon, but she had not seen him since. She had never heard from him, but had been told he was in Port Elizabeth. He had not supported her in any way since. There were no children of the marriage.

By Mr. Justice Jones: They had had a quarrel just before he left. That was what made her ill and why she was in bed.

The Acting Chief Justice granted an order for the restitution of conjugal rights as prayed, the order to be returnable on or before October 12 next, failing compliance with which the defendant to show cause on November 1 why a decree of divorce should not be granted.

BOELK V. GEISSLER. { 1901.
{ Aug. 2nd.

Magistrate's jurisdiction—Unliquidated damages—Counter-claim.

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town.

It appeared that in this case the plaintiff had sued the defendant in the court below for £20, being £10 for work done by the plaintiff for defendant between May 1 and May 31, 1901, as salesman for defendant in the latter's branch shop in Plein-street, and £10 for damages alleged to have been sustained by the plaintiff by reason of his wrongful dismissal by the defendant. The defendant admitted the debt of £10 due to the plaintiff as wages, while plaintiff was acting as manager of the branch and not as salesman, but denied the claim for £10 damages. At the same time defendant put in a counter-claim for £31 19s. 8d. for moneys and stock not accounted for by plaintiff to defendant on May 17 and 18. The attorney for the plaintiff in the court below took ex-

ception to the counter-claim on the ground that it was a claim for unliquidated damages exceeding the jurisdiction of the Court, and could not be set off against the claim in convention. The exception was overruled. The plaintiff denied the counter-claim. The Assistant Resident Magistrate, in giving judgment, found the counter-claim to be a *bona fide* one, and one that could be set-off against the claim in convention, and that therefore it exceeded the jurisdiction of the Court. The case was therefore dismissed with costs.

The plaintiff now appealed.

Mr. Wilkinson (for the appellant) said the question seemed to be whether the counter-claim was of an unliquidated or a liquidated nature. He submitted that it was absolutely of an unliquidated nature, and that therefore it could not be set off in the Magistrate's Court as a counter-claim.

Mr. Russell for the respondent was not heard.

The Acting Chief Justice, in giving judgment, said: This is an appeal from a decision of the Resident Magistrate of Cape Town, in a case in which plaintiff sued the defendant for wages and damages for dismissal without notice. When the case came before the Magistrate the defendant, in whose employ plaintiff was, produced an account, in which he claimed from the plaintiff a sum which exceeded the Magistrate's jurisdiction. The Magistrate took evidence to show that this was a *bona-fide* claim, and one capable of being compensated against the plaintiff's claim. It was objected to on the ground that it was an unliquidated claim, but that was not his test. It was not a claim for unliquidated damages. It was not necessary that the set-off should be an admitted one, but it must be a claim capable of being compensated against plaintiff's claim. The evidence bore out the Magistrate's decision. As the counter-claim was beyond the Magistrate's jurisdiction, he had no option but to dismiss the case, thus following previous decisions. The question of set-off was frequently much confused by magistrates, but in this case the Magistrate has properly interpreted the law. The appeal must be dismissed with costs.

EATON, ROBINS AND CO. V. { 1901.
TAYLOR. { Aug. 8th.

Insolvent Ordinance—Unrehabilitated insolvent—Acquisition of property—Deficiency in estate—Donation—Registration.

The estate of T. had been sequestrated on August 5, 1897. There was a deficiency of about £1,100. He had executed a deed of gift, or of renunciation in favour of his mother to any inheritance coming to him out of his father's estate. An inheritance of £1,400 did so come to him. The money had not been paid over to T.'s mother. Certain of T.'s creditors now sought to have the executors of the estate of T.'s late father restrained from parting with the aforesaid inheritance.

Held, that under the peculiar circumstances of the case, and as execution could not be issued after four years from the date of insolvency, leave must be granted to issue execution for £900 and costs, applicants to give security to T.'s mother de restituendo, as she was not before the Court.

— — —

This was an application under section 127 of the Insolvent Ordinance for the issue of execution against the goods and chattels of Christian John Taylor in satisfaction of the deficiency existing in his insolvent estate, amounting, according to the liquidation account filed by the trustee, to the sum of £1,154 19s. 2d., and the interest, also for the declaring executable the inheritance devolving upon defendant out of the estate of his late father, Allen Chase Taylor, and its attachment in execution in satisfaction of the deficiency mentioned. The defendant's estate had been compulsorily sequestrated as insolvent on August 5, 1897. Petitioners in the present case proved a claim of £1,909 15s. 10d. The first and final account and plan of distribution of the estate showing a deficiency of £1,154 19s. 2d., was confirmed by the Supreme Court on February 1, 1898. In terms of this account the petitioners were awarded £760 16s. 8d., and this amount was duly paid to them. There remained, however, an unsatisfied balance of £1,154 10s. 2d. due to petitioners. Defendant had not been rehabilitated, nor had he obtained his discharge, nor yet had he been granted leave to trade by the trustee of his insolvent estate. The petitioners heard that

he was to be awarded an inheritance from his late father's estate, and believed the amount to be sufficient to satisfy their claim. For these reasons they had applied for an order restraining the executors of the estate of the defendant's late father from parting with the amount of the inheritance devolving upon the defendant. The Court had ordered that notice of the application should be published (failing personal service on defendant) in a paper circulating in Ashburton, New Zealand, where defendant now resided, and that the executors in his late father's estate be restrained from paying over the amount pending further order of the Court.

Mr. Schreiner, K.C., appeared for the plaintiffs, and Mr. Searle, K.C., for the defendants.

Mr. Searle submitted the following affidavit of Isaac Edward Colton, who deposed:

1. I am one of the executors of the estate of the late Allen Chase Taylor and am married without community of property to one of the heirs of the said estate.

2. Christian John Taylor the above-named respondent, departed from this colony in or about the month of May, 1899, and has since remained absent therefrom.

3. In or about the month of May, 1900, I received from the said respondent the deed hereunto annexed marked A, relinquishing his inheritance from his late father's estate in favour of his mother, Maria Dorothea Taylor.

4. Yesterday I received a letter from the said respondent from Ashburton New Zealand, forwarding the notice served upon him in this matter, and intimating me to oppose the said motion, as he had renounced all his right to the said inheritance in favour of his mother.

5. There has not been sufficient time to communicate with the respondent and obtain an affidavit from him.

Mr. Searle also submitted a renunciation of inheritance by the defendant declared at Dunedin, New Zealand, on April 4, 1900, before the Mayor of that place, whereby he relinquished all claim to his share in favour of his widow mother, appointing Isaac Edward Colton, of Cape Town, to act for him in the matter.

Mr. Schreiner read the following affidavit by Antonio Lorenzo Bolleurs Chiappini:

1. That I am the sole trustee of the insolvent estate of Christian John Taylor, the above-named respondent, on the 13th March, 1900, I wrote the letter, copy of which is

hereunto annexed, marked A, and on the 14th March, 1900, received the reply hereunto marked B.

2. No further steps were taken by me until I learnt that a distribution was about to be made of the estate of the late Allen Chase Taylor, the father of the above-named respondent, when I wrote the letter dated 26th April, 1901, copy of which is hereunto annexed marked C, and in reply thereto received the letter dated 26th April, 1901, hereunto annexed marked D.

3. I have to-day perused the affidavit of Isaac Edward Colton, sworn in the above matter, and a copy of the deed of renunciation of inheritance thereto annexed. This is the first intimation that I have ever received of the existence of the aforesaid deed, nor did I previously know that the above-named respondent had in any way attempted to dispossess himself of the inheritance due to him.

4. The above-named applicants have had no notice whatsoever of the existence of the aforesaid deed, although I believe that after these proceedings were commenced the aforesaid Isaac Edward Colton hinted that he possessed some document which would invalidate the applicants' claim.

Mr. Schreiner said that Messrs. Eaton, Robins and Co. were judgment creditors for the sum of £1,100, and they came to the Court for the special statutory relief. Unless the inheritance had been disposed of in some lawful manner they were entitled to that relief. They were clear creditors for £1,100 odd, and were entitled to come to the Court for a writ of attachment.

The Acting Chief Justice: The Court always exercises its discretion as to the amount for which it will give execution.

Mr. Schreiner, K.C. (for applicants): This document of renunciation is really a donation, and as it has never been registered, is void.

[Maasdorp, J.: Is it not good to the extent of £500?]

I submit not, though it has never been specifically decided whether the whole donation is invalid, or only the excess over £500. But see *Slabbert v. Neczer's Executor* (12 S.C.R., 163), *Van Reenan's Trustees v. Versfeld* (9 Juta, 161), and the argument in *Oliphant v. Grootboom* (3 E.D.C., 9); also, *Thorpe's Executor v. Thorpe's Tutor* (4 Juta, 488). Registration is necessary to the validity of a donation exceeding £500, and if it is not registered the whole donation is invalid.

[Maasdorp, J.: What proof is there of acceptance by the donee?]

There is none whatever as far I know. I would suggest that Mrs. Taylor should bring an action to set aside the attachment order.

[Buchanan, A.C.J.: The case of *Smith v. Kotze* (Buch. 1874, 137) was one of the first decided under section 127 of the Insolvent Ordinance, and shows that the amount for which execution issues is in the discretion of the Court.

Mr. Searle, K.C. (for respondent): This is a very special remedy under section 127. The Court must be satisfied before granting execution that the insolvent has assets sufficient to satisfy the writ. As to the document, it is a question whether it is a donation or a deed of renunciation. If it is the latter it cannot be registered. With regard to the question of acceptance, the papers only arrived from New Zealand yesterday, and we have not had time to get Mrs. Taylor's affidavit.

[Jones, J.: At the present moment it seems to me that it would be very difficult to decide anything, as the parties are not before the Court. As to a *donatio inter vivos* up to £500, see *Van As v. Nel* (13 S.C.R., 427).

[Buchanan, A.C.J.: If the money had once been paid to Mrs. Taylor, could it be recovered from her?]

No, that is clear—*Trustees of Ras v. Executors of Klerk* (7 Juta, 113) and *Re Insolvent Estate Boltman* (10 Sheil, p. 36).

Mr. Schreiner (in reply): Colton was served personally with the rule in this case as far back as 11th of May, 1901, so he could not say that he had not had time to communicate with the respondent.

In giving judgment, the Acting Chief Justice said: The estate of Christian John Taylor was sequestrated as insolvent on the 5th August four years ago. On his estate being wound up, the final liquidation accounts showed a deficiency still remaining due to creditors of about £1,100. The whole of the property belonging to Taylor at the time of the sequestration was vested in the trustee, and such property has been realised and distributed by the trustee. By the Insolvent Ordinance, after the confirmation of the liquidation account an unrehabilitated insolvent is entitled to acquire property for himself, but under the 127th section it is open to creditors if a deficiency remains, or to the trustee, to move the Court for leave to issue execution against such property for any amount not

exceeding the amount of the deficiency. Taylor's father recently died intestate, and an inheritance came to insolvent out of his father's estate. This amounted to the sum of £1,400. Last year, after the death of his father, Taylor, who is now in New Zealand, executed a deed of gift or of renunciation in favour of his mother to any inheritance coming to him out of his father's estate. Had this inheritance been realised and paid over to his mother, it is probable that no order of execution could have been granted, as there would then have been no property belonging to the insolvent. But the money has not yet been paid over by the executors. It is against this amount that the creditors now seek to have a writ of execution. Mrs. Taylor is, unfortunately, not before the Court, and she is entitled to be heard on any claim she may wish to set up to the inheritance. Under ordinary circumstances the case would have been postponed until she had received notice. But as execution could not be issued after four years, it is necessary to secure the creditors in this matter by giving a writ at once. In allowing execution to issue, the Court will secure Mrs. Taylor, by ordering the applicants to give security to meet any proceedings which she may be advised to take, such proceedings to be taken before the end of this term. If the deed had been registered as a donation it might be that Mrs. Taylor would be entitled to the benefit sought to be conferred on her, and even if it were not registered, she might still be entitled to the inheritance to the extent of £500. That, however, is a question not now to be settled. Again, by the 127th section, it is in the discretion of the Court to fix the amount for which a writ would be allowed. Looking at all the circumstances, the Court is of opinion that this case will be met by giving leave to issue execution for the amount of £900 and costs. This will very nearly compensate the creditors. The Court will reserve power to Mrs. Taylor to take any proceedings she may choose to take before the end of the term, and to secure Mrs. Taylor, the applicants will enter into security.

Their lordships concurred.

[Plaintiffs' Attorneys, Findlay and Tait; Defendant's Attorneys, Van der Byl and Van der Horst.]

CLEGHORN V. DUNN AND CO.

Mr. Schreiner, K.C., applied for a rule attaching the sum of £700 in the hands of Dunn and Co. pending action being taken.

A rule nisi was granted calling upon respondents to show cause as stated in the prayer. The rule, which was ordered to operate as an interdict, was made returnable on the 12th August.

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

VOGTS V. PIENAAR. } 1901.
} Aug. 2nd.

Sale—Credit—Hotelkeeper—Lien—Vindictory action.

P., at the request of S., gave him a violin to try on approbation, no mention being made at the time as to the price, but P. made an entry in his books debiting S. with £10, the price of the violin.

Thereafter S. made a present of the violin to the landlady's husband at whose hotel he had been staying, and left the hotel without having paid his account, which amounted to £10.

Held on appeal, that P. was entitled to the violin or its value and that as there had been no sale by P. to S. the hotelkeeper was not entitled to retain the violin as against P.

This was an appeal from a decision of the Resident Magistrate of Victoria West in an action in which the present appellant (defendant in the Court below) was sued by the respondent for the recovery of a certain violin or its value (£10).

The summons set forth that the defendant (now appellant) was called upon to appear before the Court of the Resident Magistrate of Victoria West on June 10, 1901, to answer plaintiff (now respondent) in an action in which he claimed the recovery of a certain violin, his property, or its value, the sum of £10 sterling. That the said plaintiff said that on or about April 19, 1901, a certain Stein came to him at his shop in Victoria West and asked to buy a violin; that he gave the said Stein his own violin to try for some time, with the view of selling it to the said Stein; that the said Stein never returned the violin nor bought it from the said Pienaar; that the said Stein left the town for some considerable time, and as he did

not return, the said Pienaar made inquiries about the whereabouts of the said violin, and found it in the possession of the said defendant, who refused to give it up to the said Pienaar after repeated demands. Wherefore the said Pienaar prays that she may be adjudged to restore the said violin to him or pay the value thereof as above stated.

To the above summons defendant (now appellant) pleaded:

1. That the said violin was left at defendant's hotel at a time when Stein was justly indebted to defendant in the sum of £6 sterling for board and lodging, and £4 sterling for cart hire.

2. That the said amount has not been paid. Wherefore defendant is entitled to retain the said violin and to sell the same as property for account of the debtor Stein.

3. That defendant denies any liability to plaintiff, and prays that the case may be dismissed with costs.

The Magistrate gave judgment for the plaintiff with costs.

In his reasons for this judgment, the Resident Magistrate said:

From the evidence it appears:

1. That Stein took the violin on approbation from plaintiff, intending to buy it should it suit him.

2. That no price was agreed upon, and that Stein did not agree to buy it then and there, but was allowed to take it with him to test.

3. That an entry was made in one of the books of the firm of Pienaar and Wernich (of which Pienaar is a partner) debiting Stein with a violin at £10.

4. That Stein gave the violin to defendant's husband as a present, and that he told defendant so at the time.

5. That Pienaar claimed the violin from defendant's husband, after he discovered it was in his possession, and was told that the violin was safe, and that he could call for it later on, and that when he did call afterwards he was informed by defendant that she claimed the violin against certain debts due to her by Stein.

On these facts defendant's attorney argued that the entry made in Pienaar and Wernich's books amounted to a sale on credit, and that the *dominium* in the violin had passed to Stein (vide No. 3 above). From this argument I differed, on the ground that none of the requisites of a contract of sale had been complied with. Stein did not consent to pay £10 for it, and could at any time refuse to pay that sum, and return the violin, when Pienaar would be compelled to

take it back. I therefore held that the sale was incomplete, and that Pienaar retained a *dominium plenum* in the violin.

Defendant's attorney further relied on the fact that the violin having been left on the premises by Stein, defendant had a claim to it, no matter whose it might be, and quoted section 91, Act 28 of 1883, arguing that the words "any property" in the aforesaid section include all property left on the premises by a defaulting boarder, whether his own property or that of strangers.

From this interpretation I differed on the grounds (1) that I am of opinion that the meaning of the section is "any property belonging *bona fide* to the defaulting party, or at least, property not known to belong to anybody else, or unclaimed; for it could, in my opinion, not have been the intention of the Legislature to legalise a system of robbing Peter to pay Paul. For if defendant be right in his contention, then, had the defaulter borrowed the violin from a friend the evening before he decamped, the landlord would have had a claim on the violin just the same, and the lender would be helpless in the face of section 91. (2) Moreover, subsections 4 and 5 of section 91 state the *modus operandi* of selling such property, which shall be precisely as if such property had been property attached by legal process.

Thus the Messenger would have to give notice of seizure, and Pienaar would be allowed to bring an interpleader suit under section 55 of Act 20 of 1856. I also support my opinion by the common law, which gives any *bona fide* owner the right of reclaiming his property from any possessors whatever, and the more so where the party who has possession is a *mala fide* possessor, as I consider the defendant in this case, because plaintiff claimed the violin from Vogts, (defendant's husband) before defendant claimed it. Vogts' refusal to give it up at once when claimed by plaintiff, and his subsequent handing it over to his wife (to whom he is married out of community of property) clearly constitutes collusion between husband and wife to frustrate plaintiff's claim. *Grotius* (2, 5, 14, and 15, Maasdorp's Tr.).

I also find that the violin had not been left on the premises by Stein at all, but had been given to Vogts as a present, and therefore, so far as defendant knew at the time, it was her husband's property, and not Stein's, and it was only after the fraud on Stein's part was discovered and after plaintiff established his claim that defendant possessed herself of it. I am therefore of

opinion that plaintiff had a real action against a *mala fide* possessor, and was entitled to succeed in his action, with costs.

The evidence in the Court below was read. Plaintiff said that the violin was entered on the shop book, with the price. It was customary to do this when goods were sent out on approbation. If the instrument had been returned by Steyn, he (plaintiff) would have accepted it. A partner of the plaintiff said that Steyn was debited on the books with the violin. The price was entered in the same manner as other articles purchased by Steyn on credit at the same time. A clerk in plaintiff's employ confirmed the evidence that Steyn took the violin on approbation, and said that no price was arranged. For the defence, Mrs. Vogts said that Steyn told her that he had bought the violin, and that he would give it to her husband.

Mr. Searle, K.C., for appellant: The point is, was there a sale of the violin by Pienaar to Stein? We say it was sold. The Magistrate held it was not. The sale was on credit. Stein kept the violin, and it was entered on credit.

[Jones, J.: No price was agreed upon.]

Very often people do not ask the price of small articles, but if they are kept by the person who takes them they are understood to have been sold. The procedure prescribed by section 91 of Act 28, 1883, was not followed out. I cannot contend that the hotelkeeper was at liberty to pick up and seize on any property left on the premises. The fact that the Magistrate found that Stein gave the violin to defendant's husband shows that it was a sale on approval. The question is, what is necessary to complete a contract of sale on approval? If you retain the goods taken on approval a reasonable time that is a sale.

[Jones, J.: Cannot the vendor claim the return of the goods?]

No. Suppose the purchaser becomes insolvent in the meantime. As soon as the vendee decides to keep the goods as his own there is a sale on credit. After a reasonable time the vendor cannot claim back his goods should the vendee become insolvent.

[Jones, J.: How do you show that there was a sale on credit?]

A sale on approval becomes a sale on credit as soon as a reasonable time has elapsed. Of course there must be some evidence to show that the purchaser has approved of the goods, and in this case there is plenty of such evidence. The goods are entered as sales on credit. See *Keyter v. Barry's Executor* (Buch., 1879, 175).

Sir Henry Juta, K.C., for respondent: The ground taken in the Court below has been practically abandoned by the appellants, viz., the position that the hotelkeeper might take all he could get. So we have to consider (1) whether there was a sale at all; (2) if so, whether it was a sale on credit. If a man sends out goods on approval it does not follow that he means to give credit. Horses, for instance, are often entrusted for trial to a likely purchaser without the least intention of giving credit. Most shopkeepers, again, would readily send goods to a guest staying at Mount Nelson, but certainly would not give credit unless they knew something of their customers. It is the right of the seller to say whether he will give credit or not. There is really no such thing as a "sale on credit," for there is no offer and no contract unless the parties are at one as to terms. If there is no offer on the part of the seller, the purchaser cannot extort an offer by running away with the goods. Suppose in the case of this violin that it had proved a Stradivarius or an Amari, and the seller had charged 800 guineas for it, would the purchaser have been bound to pay that price? The entry of £10 in the books is quite immaterial. The purchaser knew nothing about that, and therefore could not be bound by it. If a man takes a span of oxen on trial, and then sells them, can he be heard to say that they were his own property, as he bought them on credit?

Mr. Searle (in reply): Perhaps I went too far in saying that if a man who takes goods does not return them within a reasonable time, he has purchased on credit. It is not necessary for the purposes of my case to go as far as this. Respondent now contends there was no sale at all. If a man takes goods, saying, "If they suit me I will keep them," surely that is a sale on credit.

[Maasdorp, J.: For what price?]

In this case for £10.

[Maasdorp, J.: That sum was not mentioned to the purchaser.]

If a man takes articles on credit, the price need not be named, but here the price is not in dispute. If no price is mentioned the vendor can demand the ordinary price.

[Maasdorp, J.: But this was not a shop transaction.]

That makes no difference; it was entered as a shop transaction, and it was dealt with as such. There can be no doubt there was a sale. Stein took the violin, treated it as his own, and weeks after gave it to Vogts.

Mr. Justice Jones, in delivering the judgment of the Court, said: This is an appeal from a decision of the Resident Magistrate of Victoria West. It appears that Mrs. Vogts (the appellant) was sued by the respondent Pienaar for a violin, or its value, £10. The ground on which he based his claim was that on April 19 Steyn came to him in his shop in Victoria West, and asked to buy a violin. Pienaar gave Steyn his own violin to try, with a view to selling it. Steyn, however, never returned the violin, nor did he buy it from Pienaar, but left the town. As he did not return, Pienaar caused inquiries to be made about the violin, and found that it had been left in possession of the appellant, who refused to give it up. The defence set up in the Court below was certainly not that upon which the present appeal is based. Mrs. Vogts said that the violin was left at the hotel at a time when Steyn was owing £6 for board and £4 for cart-hire, and that, therefore, she had a right to sell the violin. The position taken up in the present appeal, however, by Mr. Searle is different. He does not raise the claim that the defendant was entitled to a lien on the instrument. He simply bases his case on the contention that Pienaar actually sold the violin to Steyn, and that Steyn having become the owner of it he transferred the property to Mr. Vogts. The evidence does not support that view. The evidence is to almost the exactly opposite effect. The evidence goes to show that there had been no sale at all by any person, and certainly not on the part of the plaintiff. The defendant, Mrs. Voigt, attempted to prove in the court below that she was entitled to the violin on the ground of lien. That position was abandoned by Mr. Searle on the present occasion. The evidence goes to show that Steyn had given the violin to the defendant's husband as a present, and the Magistrate found that Stein's conduct in this connection was practically fraud. No price was agreed upon. Nothing was definitely arranged as regards whether the transaction should be a cash or a credit sale, or as to what the nature of the sale should be. The Court must therefore hold that there was no sale, and that Pienaar was perfectly justified in vindicating his property wherever he found it, and was therefore entitled to judgment. The appeal must be dismissed with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Respondent's Attorney, Mr. G. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

HARDING V. QUEEN'S TOWN MUNICIPALITY.	1901. Aug. 5th. " 6th. " 7th.
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Water—Irrigation—Upper and lower proprietors—Municipal Regulations.

The plaintiff was an upper, and the defendants lower riparian proprietors on the river Komani, or Bongola.

Section 41 of Act 39 of 1879 declared "the benefit of the servitudes in favour of the Municipal Commissioners of Queen's Town in times of drought and scarcity of water in the aforesaid river, contained in the original grants of plaintiff's farms (and others) shall be vested in the said commissioners."

This "servitude which was registered against plaintiff's, title bound the proprietors of such farms to conform to such regulations in dry seasons, as to the quantity of water to be led from the river for irrigation, as should be framed by the Commissioners."

The Commissioners had claimed under this condition to have the right in times of such scarcity of depriving the said upper proprietor of all use of water for irrigation.

Held, that the said condition (or servitude) did not authorise the Commissioners to deprive plaintiff of his common law rights as an upper proprietor, and hence that while it empowered the Commissioners to regulate the quantity of water he might use for the purposes of irrigation they had no

power to altogether deprive him of the use thereof for such purposes.

Plaintiff's declaration was as follows:

1. The plaintiff is, and at the time of the grievances herein complained of was, the registered owner of the farm Clifton Vale (save that portion transferred to him early in January, 1901) and lessee of the farm Queen's Park and of a portion of the farm Cathcart Place, all situate in the district of Queen's Town. The defendants are the Mayor, Councillors, and townsmen of the Municipality of Queen's Town.

2. A public perennial stream, known as the Komani or Bongola River, flows over and past the aforesaid farms, which are riparian farms, and thence to the town of Queen's Town.

3. The said farms, with others on the said river, were granted subject to the following registered servitude: That in dry seasons and scarcity of water in the river at Queen's Town (meaning thereby the aforesaid river), the proprietor or proprietors for the time being of the said farms shall conform with such regulations as to the quantity of water to be led from out of the river for the purpose of irrigation as shall be laid down by the Commissioners of the Municipality of Queen's Town for the time being, and there was at the times hereinafter mentioned and there is still in existence a regulation of the said Municipality to the following effect: "All owners or occupiers of the farms abutting on the Komani River shall in times of drought and scarcity of water in the said river at Queen's Town receive notice that the water of the said river must be allowed to flow uninterruptedly past the lands of the said farms during such days as the Council may determine, and which days shall be set forth in such notice."

4. The plaintiff contends that he is entitled to a reasonable use of the water in the said river for drinking and domestic purposes, and for watering stock at all times and seasons, that the aforesaid servitude does not purport to restrict or affect his said right, and that, in so far as the said regulation purports to restrict or affect the same, the said regulation is *ultra vires* and illegal.

5. He further contends that with regard to irrigation in dry seasons and scarcity of water in the river at Queen's Town, the defendants are entitled, by virtue of the

servitude, but only by lawful regulations, to determine the quantity of water which the plaintiff may for that purpose lead out of the river, and such regulations must be such as to allow the plaintiff at all times a reasonable use, having regard to the quantity of water in the river.

6. The defendants deny the aforesaid contentions of the plaintiff, and wrongfully and unlawfully claim and allege the right to compel the plaintiff during long periods of time determined by them at will to use no water at all from the said river either for drinking, domestic purposes, and watering stock, or for irrigation, and they have from time to time and at will wrongfully and unlawfully enforced such alleged right against the plaintiff as such owner and lessee as aforesaid, even without compliance with the terms of the aforesaid regulation as to notice.

7. The town of Queen's Town is supplied with water by means of two furrows leading out of the said river, of which one conducts water into a reservoir above the town, and the other conducts water into open furrows through the streets of Queen's Town.

8. At various times since November, 1899, and more particularly in the year 1900 and in the year 1901, up to the present time, the defendants have wrongfully and unlawfully compelled the plaintiff to allow all the water to flow down continuously in the river for periods of months, during which periods the defendants were allowing the inhabitants of Queen's Town to water trees and irrigate gardens out of the said open furrows, and were selling and supplying from the said river large quantities of water to the military troops stationed at Queen's Town, and to the Railway Department of the Colonial Government, and to a brewery in Queen's Town, and to other large consumers for manufacturing and other purposes.

9. From time to time during the said periods, and more particularly between the 1st October, 1900, and beginning of March, 1901, the defendants moreover wrongfully and unlawfully, and by their servants and agents, including members of the Town Guard, employed at their instance and request, did trespass upon the said farms, and did by force prevent the plaintiff from making any use whatever of the water of the said river, and did divert the water and block up his furrows when he lawfully attempted to make any use of the said water.

10. By reason of the wrongful and unlawful claims and acts of the defendants as aforesaid the plaintiff was deprived of his lawful use of water from the said river, and thereby lost his crops and farm produce and many trees, which perished on the said farms, and in these and other ways he suffered loss and damage to the extent in all of £500, owing to the said wrongful and unlawful claims and acts of the defendants.

Wherefore the plaintiff claims: (a) A declaration that the said regulation is illegal and *ultra vires*; (b) a declaration that he is entitled, as such owner and lessee as aforesaid of the said riparian farms, to make a reasonable use of the water of the river Komani or Bongolo for drinking, domestic purposes, and watering stock, and that such use is not affected by the aforesaid servitude; (c) a declaration of rights as to the user of the water of the said river in dry seasons and times of scarcity of water in the said river, including a declaration that he is entitled at all times to a reasonable quantity of water for irrigation upon the said farms, as defined by reasonable regulations to be lawfully made by the defendants; (d) a perpetual interdict restraining the defendants from trespassing upon the said farms and depriving the plaintiff of or interfering with his lawful use of the said water; (e) judgment for the sum of £500, as and for damages; (f) alternative relief; (g) costs of suit.

The defendants' plea was as follows:

1. Defendants admit the allegations in paragraph 1 of the declaration, save that they say that plaintiff became the registered owner of Clifton Vale in January, 1901, and save that they say that by this admission, they do not intend to acknowledge the plaintiff in his capacity as lessee of the farm Queen's Park, and of a portion of the farm Cathcart, has any *locus standi* to claim the relief prayed in paragraphs a, b, c, and d, or to acknowledge that he has in any case joined herein all the parties essential in an application for such relief.

2. They admit the allegations in paragraphs 2 and 3, save that in respect to the exact terms of the servitude and for the regulation of the Municipality they crave leave to refer to the proof thereof adduced at the trial.

3. They admit that plaintiff is entitled to the user claimed in paragraph 4, but they say they have never denied or interfered with the same, and, further, the said regulation was never intended, nor does it purport, to restrict or affect the said rights.

4. They do not admit the construction of the servitude contended for by plaintiff in paragraph 5, and, further, say that the regulation in reference to the said servitude was framed by them under and by virtue of the provisions of section 41 of Act No. 39 of 1879, and that it is law and *intra vires*.

5. In reference to plaintiff's allegations in paragraph 6, in so far as the same relate to the user of the water for drinking, domestic purposes, and watering stock, they crave leave to refer to the allegations in paragraph 3 hereof; but in so far as the same relate to irrigation, they crave leave to refer to their allegations in paragraph 4, and, further, say that their actions at all times in reference thereto were lawful and within the powers vested in them, and upon due and sufficient notice.

6. They admit the allegations in paragraph 7.

7. They deny the allegations in paragraph 8, save that they admit that during periods of great drought and scarcity of water, from November, 1899, to the commencement of February, 1901, they gave notice to plaintiff, as they were lawfully entitled to do under the regulation aforesaid, not to use any water for irrigation purposes, and endeavoured to enforce the said notice; and save that they admit that during portion of the period mentioned in paragraph 8 of the declaration, water was supplied for some of the purposes mentioned in the said paragraph, but say that it was supplied by them from a reservoir where it had been previously stored by them.

8. They say that at certain times when plaintiff attempted wrongfully and unlawfully to take water for irrigation contrary to the regulation above referred to, their servants lawfully prevented plaintiff from so doing, but otherwise they deny the allegations in paragraph 10.

9. They say they know nothing of plaintiff's loss of crops and farm produce and trees, but they deny that he has suffered damage to the extent of £500, or any other amount, by reason of any wrongful or unlawful claims and acts for which they are liable.

10. Wherefore, save in so far as prayer "B" is herein admitted, and has never been denied, they pray dismissal of plaintiff's claim, with costs.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), appeared for plaintiff; Mr. Searle, K.C. (with him Mr. Benjamin), for defendant.

On the motion of Mr. Schreiner, the executors of the estate of the late Steven Harding were, by consent, joined as plaintiffs with Seymour Collins Harding.

Mr. Schreiner put in copies of the regulation in question, and also extracts from the minutes of the Municipality, containing all references to the water from 1862 up to the present time. The books, Mr. Schreiner said, had been searched from 1854, but the first reference was found in 1862. Mr. Schreiner also put in copies of notices served on plaintiff, newspaper reports of Council meetings, and data showing the considerable revenue derived by the Council from the sale of water, to which plaintiffs claimed they had some right.

Seymour Collins Harding, the plaintiff in the case, said he was a farmer and field-cornet for Bongola. His residence was on the farm Queen's Park, of which he was the lessee. That farm was a property in his father's estate, and as the executors in that estate had signed a power, he appeared both as owner and lessee. So far as Clifton Vale was concerned, he was the owner. That farm was leased by witness to a Mr. Mitchell up to last year, when Mr. Mitchell died. With regard to that farm, witness was not claiming damages for himself, except in relation to the trees, but he claimed a declaration of rights. Witness had been acquainted with the country at Bongola since boyhood, his father, Stephen Harding, having been the owner of Queen's Park. Witness was now 33 years of age, and had grown up on that farm. He had farmed Queen's Park for about fourteen years. Before his father's death he had farmed it on the half-share system, but since then the executors had leased the farm to him. He had been lessee for about four years. He had kept records of his farm profits during that time. He had his brother William with him on the farm Queen's Park. His brother William worked the irrigation, and witness received half the profits. There were three homesteads on the farm. The plan produced showed the area under cultivation. The crops cultivated were wheat, mealies, oats, and winter food for witness's stock, including mangel-wurzel, and turnips to a considerable extent. Witness went in for milk and had cows. At present he had 40 cows, but the years before this grievance commenced he had 20 cows. He had also some sheep. The books would show his transactions in past years. Before the receipt of the notice that all the water was to be taken away, witness had never been re-

stricted so as to get less than three days' water per week, however scarce the water had been. The water for Queen's Park was taken out from the intake above the intake of the Municipality by the furrow shown upon the plan. He had four dams at Queen's Park. Besides the water that came down the furrow to those dams, there was a small fountain on Queen's Park. There was a small stream crossing Queen's Park lower down, but he could not from that get sufficient water to irrigate the farm. Since the supply of water had been stopped from the furrow, witness had irrigated some wheat land from the fountain, and had raised 11 bags of wheat. The water that came down the furrow to the homestead had always been used for domestic purposes. It was good and clean water. Now they had to take their water from the river for this purpose. Before the supply of water was stopped they always took the water for their stock from the dam and furrow. It was very inconvenient to have to water their stock at the river, more so on Clifton Vale than on Queen's Park, because on the former farm the stock had to be taken through two gates, and when they got to the river there was cultivated land on the other side not belonging to witness with the result that constant supervision had to be exercised. On Clifton Vale also the domestic water supply had always been taken from the dams and not from the river, but ever since the Municipality had taken the action complained of, it had been necessary to get water for domestic use from the river. At Clifton Vale the distance from the house to the river was about 700 yards. Witness had been away from time to time since the end of November on transport services connected with the war, but the longest period he was absent from his farm was five weeks. On Clifton Vale he had planted about 3,000 trees, and for these he previously used the water from the dams. The trees were good and healthy. They were of the same sort as those put in by Mr. Wighill, whose land was immediately opposite on the other side of the river. The water supply there was not dependent on the Komani or Bongola River. Witness's trees were dependent solely for water on the Komani. Witness's trees all died with the exception of about 40, which were saved by being in a hollow. Other pines on the farm were doing well, but young pines would never grow unless watered at the outset. Witness had considerable expense in putting trees there. He put his loss at

£150. Witness had the notice from the Municipality in November. The wheat harvest would be in December or January. In that year witness got a fair crop. He had been able to water the land after the sowing in that year. Witness could not grow wheat without having water for sowing, and after that the land must be irrigated to get a crop. A good farm would have to be irrigated four times a week ordinarily. In the following year (1900) witness had the use of the water allowed by the Municipality in May. He then used it two days a week. In February he did not receive notice that he could use it. Two days' water out of seven would not be of any use, as the furrow was dry, and it would take two days for the water to reach the land. Witness could manage with three days, but could not do anything with two days' water. The water was stopped again at the end of May. Again on the 6th August he had two days out of seven, and in September this was stopped. Except on these two occasions witness was allowed no water at all by the Municipality. Witness took action in February. Before that, in January, there had been a fair amount of rain, and there was a strong flow in the river. The fountains were good even in dry weather, and brought up a good amount of water. On the 3rd January, 1900, witness went up to his intake for Queen's Park at Clifton Vale. It was then raining. Witness turned on the water, but it was immediately turned off. The river was running so as to provide sufficient water for the Municipality and the farm. A bailiff was put at the place to prevent farmers turning on the water. This man lived in a tent. On the 4th January witness went there again in company with Mr. Price. He found a good flow of water down the river. Witness's furrow had then been cut off. On the 10th January, at six o'clock in the morning, witness went up to take water, but at breakfast time it had been turned off. On the 18th January witness again turned the water into his furrow. Some couple of hours afterwards he saw a water bailiff, named Maasbergh, who was in the employ of the Municipality. Maasbergh said he had taken the water off. On the 23rd January this happened again. On all these occasions there was plenty of water flowing, and all he tried to take was surplus water. On the 5th February, in company with Mr. Price, witness, who had taken the water in the morning, went up to see whether it was coming down his furrow. He found it had

been cut off. The river was then swollen. On that day they saw Bailiff Crane, who said that he had turned the water off, acting according to his instructions. On six dates in February similar occurrences took place. Witness took out summons in February. Eleven bags of wheat was all witness raised that year. In the year before they started, taking all the water, witness raised 164 bags. The next year, when they commenced taking all the water, he raised 150 bags. This year he only got eleven bags. That was at the harvest in December. The average value per bag was about 28s. This year no oathay was sold; in 1900 the oathay sold amounted to 14,000 bundles, and in 1899 the amount was 16,000 bundles. This year he had to buy oathay. He had put in the same amount of seed during each year. Before the water was cut off he got £225 for milk sold. He then doubled the number of cows, but after the water was cut off he only made £205. He could not raise winter feeding for the cows. Before the water was cut off he sold 129 lambs; after that he only disposed of 84. He lost 140 lambs, worth 10s. each, through not having feeding for them. He sent them to the best grazing farms in the district, but they died notwithstanding. This was bound to happen, unless they had proper feeding for them. Witness had water a fortnight ago. The last time he turned it on it was turned off. It had since been turned on, and had been allowed to run. Witness had been obliged to send down a flow of water much larger than the Municipal furrows could take.

Cross-examined: The river always had water cropping out along its course. Witness did not remember a notice being served upon him in February, 1900, going back to the four days and three days. The year 1900 was not a time of great drought in the district. The water was not very weak in the Komani. Crops were fairly good in that year. Witness did not by any means agree that it was the most severe drought they had experienced for the last twelve years. There was a slight drought. Witness did not hear that trees perished in the Queen's Town streets. There were a few locusts about, but they did not interfere with crops. in witness's ward. Witness bought a portion of the Clifton Vale trees from the Queen's Town Botanical Gardens. He paid from 4d to 1s. 3d. each for them. He bought 20 more cows at the end of 1899. There was then a great demand for milk. Witness attributed the decrease in the milk sales to the lack

of proper food, consequent on his not having water. On the 4th January witness was prevented from taking water which the upper Municipal furrow could not take. This occurred on the 5th February again. There had been rain before both dates. Unless the river was very strong witness's furrow could take all the water from it. Under ordinary circumstances the Municipal furrow would also do this. A number of times in January witness took the water from the stream into his furrow. This happened quite half a dozen times. There were troops and horses at Queen's Town.

Re-examined: On no occasion when witness turned the water into his furrow was it allowed to run down to the farm. It was turned off at once. In 1897 the drought was as bad, and witness then had good results.

William Clifton Bowle Price, auctioneer and law agent at Queen's Town, examined by Sir Henry Juta, said he owned property in Queen's Town, and had done so for the last 11 years. Witness had a flower, vegetable, and fruit garden in the town. This was supplied by four taps from the reservoir, two for domestic and two for irrigation. Witness had always been able to irrigate during the day, and for the greater part of the time at night also. Since November, 1899, he had been stopped at night. Though there had been an order to stop irrigation at night, the Council had not employed bailiffs to see that this was carried out until January this year. There was no supervision during the day. In 1897 there was in witness's opinion a very much greater drought than last year. Last year witness had not seen any gardens suffering in the town from want of water, nor had he seen any trees dying. Witness had not known of a dearth of water at any of the small farms of the town. He had seen water running from gardens. This came from the reservoir. In November, 1900, witness complained of not having sufficient water, and he was told it was due to a defective pipe. He had never had occasion to complain of not having water at any other time. Witness had no meter, and there was no bailiff going about during the day. Witness could let the water run all day. To his knowledge there was no scarcity of water in Queen's Town last year. The witness deposed to having gone to Harding's intake in company with plaintiff on occasions mentioned by the last witness, whose evidence he confirmed in regard to what then occurred, and to the state of the river and the furrows. Witness had always seen plenty of water in the lower furrow in dry seasons.

Witness believed this was the original furrow. The water therein was in witness's opinion better than the one in the upper furrow. The water in the lower furrow was used for watering trees and streets, and for the Botanical Gardens. A large number of people now using the reservoir water could be served with the water in the lower furrow for domestic and irrigation purposes. There was a large amount of leakage from the lower furrow into the river. Witness estimated the population at about 7,000, including natives. The capacity of the reservoir was, he thought, about 80 or 90 million gallons. Witness had last year noticed a number of vacant erven with taps upon them. From what he had seen, witness would say that there was certainly a great waste of water.

Cross-examined by Mr. Searle: Mr. Visser was the local attorney in this case. This gentleman was in the same office as witness. Witness was interested in this case. Witness's garden was about 100 by 150. People had recently been fined for taking water at night. Witness had no knowledge of a regulation prohibiting people from taking water for irrigation between one o'clock in the afternoon and seven in the morning. Witness had never seen the lower furrow dry. He would not say that it was never dry. To put taps and use the water in the lower furrow regularly, a reservoir would have to be built. There had been a considerable increase in the population of Queen's Town during the war. He would not deny that there had been 1,000 horses in Queen's Town on an average during the war. There were numbers of troops there. He had not noticed a large number of trees dying on the streets of Queen's Town. Witness did not think there was a greater dearth of water last year in Queen's Town than there had been for a number of years. There was a drought, but it was not so severe as the drought of 1897.

Re-examined: If a reservoir were made in connection with the lower furrow, that would be able to supply a large part of the town.

John Crause Bailey said he was 63 years of age, and was a retired farmer. Witness knew the place when there was no reservoir, and when the town only had the lower furrow. The upper furrow was made in about 1880. Witness quite agreed that the water in the lower furrow might be pumped, and used to supplement the reservoir supply. There was a great waste of water from the Bongola River. Witness had noticed taps flowing freely in the town during 1900. He

had seen taps running on vacant erven in September and October last. Witness attended the market regularly, and knew what the vegetable supply was. Witness did not think that it was as dry last year as in 1897. Witness knew of no difficulty in raising vegetables in the town last year. Had this been so, witness would most probably have heard of it. Witness considered that there had been a considerable waste of water in the town. He had never heard of a meter system having been established in the town, though the Engineer had recommended it. Witness had taken steps to compare the quantity of water in the two furrows by tests with a 6-inch pipe at the intakes. The flow from the upper furrow was 5 inches, and from the lower 6 inches.

Cross-examined by Mr. Searle: Last year was a bad season among the farmers. The first part of the season was dry. It was not an unusual season. He did not know that a number of people used the water in the lower furrow. He lived above, and did not use the water in the lower furrow.

William Henry Harding, brother of the plaintiff, said he had resided on Queen's Park from his boyhood until 1889. He then went away and returned in 1894. In 1898 he went to Clifton Vale. Up to the time of the notice stopping the use of the water in November, 1899, they had had good land, good gardens, and stock. At Clifton Vale they were entirely dependent on the water coming down the furrow. The witness corroborated the first witness's evidence as to the amount of the crops, etc., for the last three years. The trees were planted at Clifton Vale in August, 1899, and in November were flourishing. They afterwards died away, with the exception of a few in the hollow. Witness presumed that they died through want of water. When he saw them they were suffering from want of water. Witness could get no water for them. He knew of no reason why they should have died except through want of water.

Cross-examined by Mr. Searle: Witness had never had experience in the growing of pine-trees. Judging by the trees which lived, witness would say that it was a good place for pine-trees.

Johannes Adams Coetzee, farmer, living in the district, said that from 1889 until November, 1899, the Municipality had never prevented the farmers from taking the water. During that time the crops had been good. It was quite as dry in 1897 as it was last year. They had good crops in 1897. The

crops since the harvest immediately following November, 1899, had been bad.

Martinus Jacobus Botha deposed that he was a farmer and was the owner of Groenfontein Farm, on the Bongola, opposite Mr. Coetzee's farm. He had lived there since April, 1899. He depended on the river for water, which he took out by a furrow on his ground. The first year witness raised 100 bags of wheat and a couple of thousand oat sheaves. Witness had ploughed in April and May. He got a notice in November, telling him he must take no water. At this time the crop was sufficiently advanced to be good. The harvest was in December. He got two days' water in May. After receiving the notice witness did not put in as much seed as he did the year before, as he had no water. Water was necessary for ploughing. In August there was another couple of days' water. For last year he got nine bags of wheat. With two days' water he could not cultivate lands properly. Three days would be a little better. The furrow was somewhat long. Witness had written letters of complaint. He was not suing, as he was short of money at the time. Witness thought that if he had had water in 1900, he could have raised the same crops as he raised the previous year, when he had water. They had to carry the water from the river for domestic purposes and for watering stock. In April this year witness went with Mr. Coetzee and complained. Since then water had been running in the furrow. Witness had not had his crops destroyed by locusts or flies, nor had he heard of their having destroyed crops on the Bongola farms. Two pounds would be a fair price for a hundred bundles of forage.

Cross-examined by Mr. Searle: Witness got no water from November, 1899, until May, 1900. In March last he instructed Mr. Visser to write to the Municipality. In this letter it was stated that he had had no water from November until the middle of February. He had no recollection of having had water in February. Witness had not applied for water before Mr. Visser wrote on his behalf in March.

There was much more rain in 1899 than in 1900.

Mr. Searle: Well, I see, according to the return, there was just double the amount in the dry season of 1899.

Re-examined by Mr. Schreiner: In 1900 witness sowed eight bags and reaped 100 bags of wheat. In 1900 he sowed four bags and reaped nine.

Arthur James Wiggle, a farmer, residing at Rockwood, on the other side of the river at Clifton Vale, said he had lived on the farm from the time when he was ten years of age until he was thirty. He went back to the farm in 1896, and had lived there since. His lands were not dependent for irrigation on the Bongola River. He had a permanent spring, which had no connection with the river, and from that he irrigated his lands. He had very good crops last year. Witness lost none of his crops through locusts or flies or through drought. Last year was a dry year, but it was not an exceptional one. It was not so bad as 1897. Up to November, 1899, the trees at Clifton Vale were doing well, but six months after they were planted he saw them dying from want of water. Witness did not think the locality was an unsuitable one for pine trees. Witness's trees had done well. They were planted about a week after Harding planted his. The nature of witness's soil and Harding's was about the same. Witness did not think that young trees could be planted and reared without irrigation. Witness had not had his stream cut off by the Municipality. It was very inconvenient for people at Clifton Vale to take the stock down to the river to water. There were strong springs all the way down the Bongola River.

Cross-examined by Mr. Searle: Witness always saw a good flow of water in the Bongola. He saw the river about once a week. Witness planted forty pine trees. He had them from the Botanical Gardens, the same place as Harding had his from.

L. W. E. Wallace, a Government Land Surveyor practising at Middelburg, said that he had had fourteen years' practice in his profession. He deposed as to the correctness of the plans of the Bongola farms, etc., prepared by him, and now before the Court. On Clifton Vale there were two dams, one of which was indicated as a rain-water dam, and when he made his survey it was full. It would do to irrigate the trees in question if there was continual rain-water. When he surveyed he only saw a very few trees, not as many as forty, in a flourishing condition. The others were all dead. The upper furrow, which he had also surveyed, was a very wasteful furrow. At the narrowest part it was about four feet wide, and as the bottom was of the same width, there would be a large amount of evaporation. As to the lower furrow, it was not in good condition, and there was a large leakage. The water that leaked

would go back into the river. Apparently many erven in Queen's Town had been laid out lately. That was when he surveyed in June.

Cross-examined: He did not carefully inspect the trees on Clifton Vale for the purposes of this case.

[The Acting Chief Justice said that he took it that the witness had only been called to depose to the correctness of the plan, as he had not been on the farm before June last.]

After Mr. Schreiner had put in correspondence and documents connected with the case, the case for the plaintiff was closed.

For the defence, Mr. Searle called

Sir William Bisset Berry, the Speaker of the House of Assembly, who said that he lived in Queen's Town, where he had taken up his residence in 1864. He was chairman of the Commissioners of Queen's Town from 1877 up to the time of the Act of Incorporation being passed in 1879. Then, in 1880, he was the first Mayor. He retired from the Council in 1881, but was re-elected, and again Mayor from 1884 to 1886. He then retired, but had been living in Queen's Town since then. Queen's Town was dependent for its water supply upon the Bongola River. During the time witness was a Commissioner the supply of water to farmers on the Bongola River was restricted from time to time. The practice was that notice or information had to be given to those farmers every year. There was no municipal regulation in the legal sense. A resolution of the Council was not always taken on the point. Use and wont crept up after the original notice was given on the beginning of the town, and the practice was that the chairman of the Board would instruct the Town Clerk for the time being to send a bailiff out to inform the farmers that they had to let the water come down.

[Mr. Justice Jones: The whole of it?]

Witness: Yes, or such quantity as the Commissioners wanted. The rule was to share the water with the Bongola water at the beginning of a drought.

[Mr. Schreiner said he did not want to take any technical objection, but he held that the minutes of the Municipality came before the recollections of witness.]

[The Acting Chief Justice said he wanted to get from the witness what led up to the letter of 1868 and the interdict against Van der Linde.]

[Mr. Schreiner: What Van der Linde really tried to get was the water for three consecutive days, and he was interdicted from so taking the water.]

Mr. Searle said that it would be seen from the order that it also applied to such regulations as might be passed for the distribution of the water.

Continuing, witness said that in the time he had anything to do with Municipal matters they certainly in several years, not every year, claimed the whole of the water, and took it. But what he wanted to say was that that was an extreme measure, and was not resorted to except in extreme drought. Then they would begin by allowing the farmers only two or three days, and would then take the whole. He could quite understand how the matter was not referred to on the minutes, because the Mayor or chairman for the time being would take the matter as being within his functions, and would instruct the Town Clerk to send a notice verbally without any formal resolution of the Council. He was strictly within his rights in doing so.

[The Acting Chief Justice: The only resolutions we can find give them three days, sometimes four.]

Witness said that another way in which he could easily understand there being no resolutions on the matter was that these matters about water were dealt with by a committee of the Commissioners. This committee would bring in a report to the Council weekly, and all that would generally appear upon the minutes would be words to the effect that the report had been adopted.

[Mr. Schreiner again said that the Council's minutes must be taken as the evidence but not the witness's recollections, valuable and historically interesting as they might be.]

Mr. Searle said the minutes might be evidence, but there was nothing to prevent a person who was there giving evidence also.

[Mr. Schreiner said the evidence was quite *ex parte*, and it affected the titles of other people, and not only Mr. Harding.]

[The Acting Chief Justice: It is *ex parte* just the same as the resolutions of Council are *ex parte* until proof of notice.]

Proceeding, witness said the Council's practice was never contested. The reservoir was built in 1880, and finished in 1884. Witness was not sure whether there was a drought in 1899, but in 1900 there was a very severe drought throughout the district. Witness remembered Queen's Town 25 years ago, when he thought there would be more irrigation now than then, although more

water was taken now for the reservoir. The population of the town had doubled, if not trebled. The reservoir cost about £20,000.

Cross-examined by Mr. Schreiner: The upper furrow was not used for taking the water prior to 1884. Witness did not send out notices to the farmers himself. The resolutions of the Council would be recorded except in the special cases he had mentioned. The reports of the committee showed that there were four days for the town and three days for the farmers. At times, however, the committee would report to the Council claiming the whole of the water, and the Council would pass a resolution adopting the report. He would not go so far as to say that every such resolution would be recorded in the minutes. The chairman might give instructions without it coming before the Council. The ordinary practice was for the bailiff to go up and carry out the instructions. Witness was at Queen's Town in 1897, but would not say whether the drought was very severe in that year. Trees which had survived the drought of 1897 had died in 1900. Witness took a great deal of interest in these matters. The town furrow could not put the whole town in possession of sufficient water even for domestic purposes, and the upper furrow was absolutely necessary to the town. The lower furrow was, prior to 1884, connected with a service reservoir, and ran in open furrows. There was no flushing sanitation there. There was a little irrigation at Queen's Town, as most people liked to have roses and lilies in their gardens.

Mr. Schreiner: And is that your idea of irrigation at Queen's Town, Sir William? Has there been any waste of water?—Well, there have been burglaries in Cape Town. There has been no wanton waste.

Frederick Beswick, examined by Mr. Searle, said he had lived in Queen's Town for 34 years, and had acted as Mayor for four months in the previous year. He had been a member of the Council for 14 years. Witness could not remember the Council taking the whole of the water before 1899. As far back as 1886, the water had at times been cut down to two days' supply. No notice was ever given to the farmers that the resolutions would be withdrawn. It was an understood thing that, as soon as rain came, they could use the water as much as they liked, without reference to the Municipality. Witness had kept a record of the rainfall in Queen's Town since 1872, showing the rainfall each month. The statements had been published in Parliamentary Blue-

books. The year 1900 was an exceptionally dry year, and Queen's Town had suffered a good deal. The most exceptional year on record was 1883, when there were only 12 inches. Other dry years were 1878, 1883, 1884, 1885. In 1897, during the months of May to October, only 2.6 inches of rain fell, most of which fell in May, when the evaporation was small, and farmers wished to plough. In the same months of 1900 the rainfall was 3.1, and most of this fell in October, so that it really did not benefit them very much, owing to the heat. In 1897, too, the river was running strong, which it was in 1900. The object of the Council in taking the whole of the water in 1899 was to see the water in the reservoir increase, as it did from 13 feet to 14 feet. In the two months at the end of 1899 the farmers had not so much need of the water. At the same time that the farmers were restricted, certain restrictions were placed on the townspeople. In 1900 the water supply was cut down by half. There was an exceptionally large number of people in the town, owing to the presence of refugees and a number of military. There was also a large number of horses, which required a special water supply. The trees in Queen's Town suffered a great deal from want of water, a large number of matured trees dying in the streets from want of water. The Botanical Gardens also suffered. There was not sufficient water in the town towards the end of 1900 to adequately water the erven. The supply was very inadequate, and in one part of the town, after nine o'clock, there was no water. This was the highest part of the town, and was due to the reservoir being low. On one occasion the water was cut off at one o'clock in the day. Witness had superintended the planting of pine-trees in the town, but knew nothing about Mr. Harding's pines.

Cross-examined by Sir H. Juta: The years 1883, 1884, and 1885 were very dry.

So the river would be very bad after the third year?—Yes, it was a bad time. Prior to the new reservoir being constructed, there were one or two storage reservoirs, which had now fallen into disuse. The Municipality made between £900 and £1,000 out of the Botanic Gardens and Nursery. That was about the average amount. Before bailiffs were put on, people in town let their taps run all night. In 1899 and part of 1900 the inhabitants were using their taps night and day. A number of erven had been sold last year—ten in all. In September, 1900, the water bailiff was appointed, and up to that

time there was no one to see that the taps were turned off at night.

So that a good many people used it at night? Even the Councillors? Were you one?—No. They didn't do it wilfully.

There was a great deal of waste in the town in that year?—No, I don't think there was any great waste of water. There may have been in individual cases. There was no complaint made against the Botanical Gardens. Witness never heard of enormous waste in the plantation. Witness knew the plantation in Livingston-street.

Now the Engineer reports on May 29, 1900, that he had frequently found water spouting out 15 inches high, and running to waste?—Oh, I remember that. At another place witness admitted that 150,000 gallons had run to waste; but as soon as the Council heard of it, they took steps to remedy it.

Then the Engineer reported that several Council members had broken the regulations. Were they sued?—Yes, one Councillor was sued.

Why were not the others?—I never heard of any others.

What is the lower furrow used for now?—For the trees in the town and about 27 large gardens in the lower part of the town.

By Mr. Justice Jones: No water could be led from the lower furrow to parts of the town east of the railway.

Robert Charles Farquharson, Acting Town Clerk of Queen's Town, put in some notices that had been served on the Queen's Town people during 1900. Witness was in Queen's Town in 1900, and he knew there were a number of prosecutions for using water during prohibited hours. Witness knew of no completed agreement with the Railway Department as to a supply of water. The Railway Department took water from time to time. There was an agreement with the brewery, but that was not yet in force. The people had their water by a domestic leading and an irrigation leading. If people used water from the former for irrigation they were prosecuted. More was paid for irrigation water. A new tariff had been made in January last. There was a scarcity of water last year. In the low part of the town, no water could be got for baths up to eight o'clock. This was a common complaint. Witness had never known of this happening before. Since November, 1899, there had been a large increase in the population. The military were there, and witness had seen as many as 1,500 troops in the town at one time. At the end of 1899, and the beginning of 1900, the population

was largely increased by refugees from Wodehouse and Aliwal North. There was a remount depot in the showyard until seven months ago. There were 1,000 horses continuously there, and at times there were as many as 2,000. The Municipality had strictly enforced the water regulations, and had instituted a number of prosecutions. Three Councillors had been fined.

Cross-examined by Mr. Schreiner: Witness had been in Queen's Town for the last three and a half years. The Councillors fined were Messrs. Wainwright, Stilwell, and Barraball. Other Councillors had also been prosecuted, but the cases were dismissed on exceptions taken by witness, who defended them. Witness was Acting Town Clerk for six months, Mr. Wright having to go Home on account of a serious illness. A regulation was made in October, 1862; no regulations were made anterior to this. The railway had been using 14,000 gallons a day by special resolution of the Council.

Wm. Arthur Palliser, Town and Waterworks Engineer at East London, said he was Town Engineer at Queen's Town from September, 1899, until January this year. He put in a return showing the height of the water in the reservoir at various times. He made a fortnightly return. Restrictions were made by witness from time to time in consequence of the reports he received. The water in the river was not capable of division in dry times. Since November, 1899, the water had not been sufficient for the domestic use of Queen's Town. Between 200,000 and 250,000 gallons would be required by the town, and when he had taken measurements he found that the flow was under this. The present population was about 10,000; last year it would be considerably more, counting refugees, natives, and military. The military would use from 60,000 to 100,000 gallons a day since the outbreak of the war. Witness had found plaintiff's furrow carrying off water at the time of prohibition. During the restricted period witness would estimate that the town took about 500,000 gallons a day, including that used by the military. In November, 1899, the height of the reservoir averaged 10 feet 6 inches. This represented from about 27 to 30 million gallons. That was before any restriction was imposed. The height in December was 11 feet. In June, 1900, witness measured the flow and found that only about half the water entered the reservoir. The distance to the reservoir was about three miles. He found the bulk

of the water disappeared through fissures in the furrow. Action was taken to remedy this, and it was afterwards found that a very much greater amount went into the reservoir. For a long distance Harding's Queen's Park furrow passed over ground of the same nature. The town suffered in 1900 by the drought. The Town Clerk's office was inundated with complaints about the lack of water. A number of trees died through want of water. During 1900 it would have been, witness thought, of very little service to have given the farmers two or three days' water. The farm furrows were very long, and it took considerable water to reach the dams. The depth of the reservoir was about 18 feet. It required depth of 11 or 12 feet in the reservoir to get water to the part of the town above the railway. The people living above would not get water when the reservoir was lower, unless they were allowed to take it at night. Up to the time witness left, the Railway Department had only been supplied with water for six days. This was in December. After this the Municipality found they could not supply the department. The brewery had been supplied with from 10,000 to 15,000 gallons a day. In May witness reported to the Council that there was a waste of water. This referred to outlying parts, and the reason for the report was that he desired to get a meter system. The water supply was not equitable. Some people used more than they should. A meter system would be expensive. Immediately after that report, a restriction was imposed. Bailiffs were appointed towards the end of 1900, though witness occasionally sent a man to examine the furrows, and also went round himself before this. Locusts took the whole of two crops cultivated by the Municipality immediately below the reservoir in 1900. They got no return whatever from the oats, green barley, and mealies put in on this ground.

Cross-examined by Mr. Schreiner: Witness averaged a native's domestic use of water at 15 gallons a day. This was based on the consumption at the location. There were 2,000 refugees in Queen's Town. The place was absolutely crowded, and they were living in all the outhouses and stables they could crowd into. For a couple of months there were 3,000 military in Queen's Town. The water would have been of no use to the farmers if they had it.

Mr. Schreiner: The returns show that there were 1.12 inches of water less in 1897 than in 1900, excluding December. With December, there were 5 inches less.

In further cross-examination, witness said that in December the reservoir stood at 7 feet 9 inches, the lowest it had ever reached. He had not gone over the 1895 statistics.

Mr. Schreiner pointed out that on occasions in 1895 it was lower; once as low as 6 feet 9 inches.

[The Acting Chief Justice: There was not such a demand in 1895.]

Witness said he made the statement that it was lowest in December, because this was remarked at the Council meeting. He qualified this statement by saying he believed this to be so.

Cross-examination continued: Witness was not aware that two Councillors favoured a restriction for the town as well as for the farmers, but he believed the feeling of the Council was that they had entire control of the whole of the water, and could do just what they liked with it. There were not more than ten houses in Queen's Town with taps inside. The domestic tap and the irrigation tap were one and the same. Domestic leadings and irrigation leadings were charged for separately.

Mr. Schreiner referred to a report by a Municipal inspector that there were 234 domestic leadings and 285 irrigation leadings.

Witness said the leadings were the same.

Re-examined by Mr. Searle: A person was supplied with a leading for domestic use; if he used it for irrigation he must pay double. He merely got a right to irrigate by paying the higher fee; he was not supplied with an additional leading if he wished to irrigate. He could have an extra leading by paying separately for it.

[By Mr. Justice Maasdorp: All the leadings were three-quarter inch. There was no restrictions on the 285 leadings for irrigation for twelve hours.]

George Augustus Fernley, present engineer at Queen's Town, said that for a year he was assistant to the last witness at Queen's Town. Witness prepared some gaugings of the depth of the reservoir from January 8 to February 7. The list put in was correct. During this period the water got less. There was very little water coming into the furrow during January, and witness did not think the amount would be of much value to the farmers. They took it all the same. In witness's opinion it was necessary in January to keep all the supply for the town. He estimated that from 200,000 to 250,000 gallons of water would be required in Queen's Town for domestic purposes. During 1900 gardens and trees suffered in the town, and a number of trees died. During last year the Railway Department only had reservoir water

from December 1 until December 6. This year they were supplied at the rate of about 14,000 gallons a day from January 26 until February 26.

Cross-examined by Sir Henry Juta: The water running into the intake in January was so small that witness did not gauge it. About 300,000 gallons of water were used in 24 hours in Queen's Town in January, 1901. At 9 feet 6 inches there would be about twenty million gallons in the reservoir. In the early part of February water was short. It rained on the 5th February. Witness did not know how many days farmers would require the water during January.

Albert Morgan Stilwell, retired farmer of Queen's Town, and a member of the Queen's Town Council since April last, said that in 1879 he had been on the Council for about five years. In those days there was no reservoir. The drought at Queen's Town was very severe—the severest, witness thought, for some years. He thought the fountains were stronger, and there was more water in the river in 1897 than during last year. The drought last year affected the farmers seriously. Witness had had bad results, the corn having failed entirely. This was the first time witness had had his corn fail. Other farms were similarly affected. Locusts destroyed part of the crops, and damage was also done to the oat crops by flies. Queen's Town had never been so restricted in its water service as during last year. Witness had been prosecuted for using water during prohibited hours in the day time. They had never been restricted in the day time before at Queen's Town.

Cross-examined by Mr. Schreiner: Witness's farm where locusts were prevalent, was about twelve miles from the Bongola. He had seen locusts going in the direction of the Bongola. He had never farmed on the Bongola. The restriction in the day time did not last a month. People were complaining that it was a trap, and that they were in the hands of their servants and other people's servants, who might turn on the water in the prohibited hours of the day. Witness had a tap in his kitchen and in his bathroom. People could have more than one sub-pipe in the leading from the reservoir. They could also have a second leading by paying for it.

Charles Gebhardt said he was in the employ of the Municipality, and looked after the trees and the lighting. Towards the end of last year a large number of mature

trees died. Witness cut down more than 150 trees in the streets. He had lived in Queen's Town for 14 years, during which time he did not remember a more serious drought than that which prevailed last year. A number of young trees planted by witness in the plantation died last year through want of water. There were now about 20 open leadings from the lower furrow. Last year there were about 32. From July there was very little water in the furrow, with the exception of December. In January the water in the lower furrow did not reach the west end of the town. Since witness had been in the place he had never seen the water in the lower furrow so low as it was last year.

Cross-examined by Mr. Schreiner: The lower furrow was kept in good order, and was regularly looked after, leakage being attended to. A number of the trees which perished were black-woods; about half were gum trees. The trees which died were served with water from the lower furrow, not from the reservoir. Witness never knew the water to be so scarce as in 1900. He referred to the water in both furrows, and especially in the lower one.

Jacobus Simons, a native employed by the defendant Municipality, said that during the time he had been in Queen's Town he had never known water to be so scarce as it was last year. During the month of January witness watched plaintiff's furrow, and he found that on six occasions Harding took water into his own furrow. Witness stopped the flow into plaintiff's furrow. Witness saw plaintiff's cattle constantly between the river and his (Harding's) furrow.

Mr. Searle closed his case.

Mr. Schreiner, K.C.: The first point to be considered is, is the servitude imposed by the grant of plaintiff's farm. The river in question is a really perennial stream, and not perennial merely in the technical sense. The plaintiff, and other farmers, are upper riparian proprietors, and therefore have prior claims to the water.

[Buchanan, A.C.J.: To what extent?]

The upper riparian proprietor has the preference as regards domestic uses. It is not easy for the lower proprietor to show that the upper proprietor has done anything unreasonable. The onus of proving that is always on the lower proprietor. *Van Schaalkryk v. Hauman* (14 S.C., 214). In this case the servitude was imposed by the original grant of these Bongola farms. No

subsequent regulation made by the Municipality could, therefore, interfere with the rights enjoyed by these farms under this original grant. As far as user of the water for domestic purposes and watering of stock are concerned, these original rights have not been called in question. But what do these rights amount to? It cannot be said that we are sufficiently provided if defendants allow us 700 or 1,000 gallons, and make us send our stock through gates and along roads in charge of herds to some point or other on the river, where our cattle may easily cross and trespass on lands on the further side. It must not be forgotten that we are upper proprietors. It is useless for defendants to say that they do not dispute our right as to the domestic use of the water and for stock when they are attempting to convert these rights into a mere skipping right. In the grant of these farms Government had attempted to limit the rights of user of the water to domestic purposes and for cattle, but it made no provision for the exercise of these rights. In most cases in this country water rights have to be exercised by means of a furrow. It is not to be presumed that this user by means of a furrow is an unreasonable one, because the furrow is long; and this is just the position the Municipality has taken up. As to irrigation, all riparian proprietors are entitled to a reasonable share of the water; but the onus of showing that the upper proprietor is taking an unreasonable share rests on the lower proprietor. In this case the rights of the lower proprietor were to be ruled by certain regulations made by the lower proprietor himself. But surely such regulations must be reasonable, and can it be said that a regulation giving all the water to such lower proprietor is reasonable? That is not a regulation at all, it is a prohibition, which is quite a different thing.

[Buchanan, A.C.J.: Does not the grant make the Town Council the judge as to what is reasonable?]

No, they must exercise their rights reasonably. A delegation of any such power as that in question granted by the Executive is in the nature of a trust, and must be exercised for the public good, and this Court can always determine whether such powers as these have been reasonably exercised. In this case it was for the farmer, and not for the Municipality, to determine what was a reasonable quantity of water for purposes of irrigation. In this case the quantity could be determined only by time. And this was what was done under the old rules. Thus, under the regulations of 1862, three days'

use of the water was given to the farmers and four to the town. That rule held until 1869, and the fact that these rules of 1862 remained in operation seven years shows that the town in those days brought forward no such claim as they advance now. The rule of 1862 was found to lead to waste of water, because a user limited to one day at a time was no good; all the water soaked into the soil of the furrows. So in 1869 a new rule gave three *consecutive* days to the farmer and four to the town. *Van der Linden* (3, 1, 1, 7) has denied to towns the right to interfere at all in matters affecting water, but in this he was wrong. We have not been able to ascertain whether the regulation of 1869 had ever been submitted to a meeting of householders, as was then required by law; but it was observed until 1899. Plaintiff's farm was an exception. He had the use of the water four days and the town had it three. In November, 1894, the Council notified him that he would thenceforth have the use of the water only three days in the week. In this case there was a clear user of thirty years.

[Jones, J.: The owner of the farm could not have claimed prescription if the use was only on sufferance.]

If a man has exercised a certain definite user for thirty years he must have some rights thereunder, even if there is no servitude. If under Common Law a lower proprietor may insist that some water must come down to his farm, does it follow that a lower proprietor can take away all the water from the upper proprietor?

[Buchanan, A.C.J.: Can the upper proprietor use the water for irrigation even if he deprive the lower proprietor of water for domestic purposes?]

I do not say that.

[Maasdorp, J.: If the population of the town increases, do you admit that the town could take more water. Suppose troops or refugees arrive?]

There is no right in the Council, save on behalf of citizens and *bona fide* inhabitants. It cannot be generous at our expense.

[Buchanan, A.C.J.: Suppose that the population should be increased by extraordinary growth?]

Our rights would not be affected by that. A natural growth of population is one thing, an invasion of refugees and military quite another. We may be bound to allow water to flow down for the domestic consumption of townspeople, but the case of the two latter classes has never yet been discussed.

[Jones, J.: If we rule against the Municipality, shall we not be taking away the very power which the Legislature has given?]

No, this Court can in every case decide on the reasonableness of rules; but we ask your lordships for a decision which shall stop further litigation in this matter. I ask also for a perpetual interdict from trespassing on the farm. We do not wish to exclude them altogether from coming on the farm, but they must come in proper time and season. I would not have asked for this were it not in evidence that the trespasses have been most unreasonable. Again, the recent notices are quite different in tone from those issued in 1896. At that time there were 6 feet 9 inches of water in the reservoir. In 1900 they changed their policy entirely. No change had been made under the regulations of 1891, but the tone and terms of the notice were quite changed. In December, 1900, and February, 1901, when there were good rains, plaintiffs tried to turn on the water, and it was immediately turned off by defendants. Plaintiffs and Wm. Harding lost over £100 on wheat, and about £317 10s. on forage and oats. That was a loss in hard cash, and then plaintiff had lost money by not having been able to sell his milk. That was a loss of £220. He had also lost on his winter lambs. All this was loss on Queen's Park farm. Then there was the loss of 3,000 pines, owing to want of water. The medium cost of these was £75. That made the damages for that farm £250.

Mr. Searle (for defendants): I will take plaintiff's claims in order:

1. That the regulation of the Municipality is *ultra vires*.
2. That plaintiff had at all times a right to water for domestic purposes and for cattle.
3. Whether defendants are entitled to all the water.
4. The question of damages.

First, as to the regulation being *ultra vires*. If we compare the terms of the grant of these farms with the regulation, we find the terms of the grant are more stringent than the regulation. The Town Council might have gone further.

[Maasdorp, J.: If they must regulate by regulation, can you say that they may do as they please?]

No, but this legislation by regulation is very convenient; we cannot go to Government every day.

[Jones, J.: The regulations of the Queen's Town Act are very stringent. See section 37 of Act 39 of 1879.]

Yes, but this Act did not exist when this grant was made. Under Ordinance 9 of 1836 proposed rules had to be submitted to the householders, but in 1862 Bell, J., in *Van der Lingen's Case*, on Circuit, ruled that the farmers must conform to such rules as the Town Council had laid down, or might subsequently lay down. Since then they had gone further in getting the Governor's approval of such regulations as the Commissioners might make from time to time.

As to the second point. We admit that plaintiff is at all times entitled to water for domestic use and for stock; but we say that he must not take such water by means of a furrow a mile long, and after losing a considerable quantity of water by means of percolation, claim to have his full supply at all times at his own end of it. His evidence does not bear out paragraph 6 of the declaration. Plaintiff's counsel abandoned this contention before coming to court and before he had led his evidence I thought that his case was that they could get no water from the river. A man cannot take water from a river to keep a dam going. *Gale on Easements* (page 215). If a man likes to build a homestead at a long distance from a river, he does so at his own peril.

[Maasdorp, J.: If there is only enough water for domestic purposes you cannot interfere with the upper proprietor?]

Clearly not; but that is not the case here. The river has a false bottom, and there is domestic water enough for all entitled to use it, but their right is to come to the river and get water, and not to bring the water to their homesteads. Nearly all the water in the lower furrow rises on Queen's Park, so that it is idle to say that Queen's Park is not sufficiently supplied.

3. And now I come to the main question as to whether the Municipality can cut off all the water from the farmers in times of scarcity. The town was laid out long before 1858, the year in which the Bongola farms were first granted, and the Legislature in very strong terms gave the Municipality the right to judge how much water was to be used.

[Jones, J.: Yes, but they could exercise this right only by formal regulation?]

They could not be expected to go to Government each time they found it necessary to frame a new regulation. They could regulate the supply by a mere public notice.

To tie them down to give the farmers so many days a week might work injustice to these farmers: they might get too much one year and too little another. It was in the interest of all parties concerned that the rules as to water should be very elastic. In the Circuit Court case referred to, that of *Van der Lingen*, the question as to whether these regulations were *ultra vires* was expressly raised on the affidavit of the respondent.

[Maasdorp, J.: Under Ordinance 9 of 1836 the regulations were made by the householders; now you make them by Commissioners?]

Yes, no doubt, and for twenty-four years they went on without any regulations sanctioned by the Governor. But as to the powers of the Town Council. The plaintiffs say it was never dreamt of that they could take all the water, but what were *supposed* to be their rights really has nothing to do with their true legal position. The notices of 1868 and 1869 show, however, that the Municipality claimed this right. The necessity for its exercise did not arise till 1899.

[Buchanan, A.C.J.: Suppose the Civil Commissioner of Queen's Town had made rules as to the distribution of water, would it have been necessary that they should have been made under the Common Law?]

No, our servitude would be useless if it gave us only what Common Law gives.

[Buchanan, A.C.J.: Then does this servitude deprive the upper proprietor of his Common Law rights?]

Yes, by giving us more than Common Law rights.

[Jones, J.: You must look to the history of water rights in this country. Commissioners were appointed to regulate the distribution of water, and the Council has taken their place in this instance.]

Then section 41 of Act 39 of 1879 is quite misleading. If that were so, the Municipality would have had no servitude at all.

[Buchanan, A.C.J.: What is the nature of this servitude?]

Like every other servitude, is a *pars dominii*—a *jus in re aliena*. See *Tulbagh Municipality v. Morris* (2 Sheil, 184). And then priority in point of time is very necessary to be considered. Queen's Town was established long before these Bongola farms were granted.

[Jones, J.: Do you go so far as to say that in times of scarcity the Commissioners can say to the farmers: "You shall have no water at all for irrigation, although we will irrigate?"]

Yes, the Council did not merely take the place of the Landdrost and Heemraaden, which had to exercise a judicial discretion. The Council has much wider rights than they had.

[Jones, J.: If the Council is to decide on the quantity of water to be given to the farmers, does not that show that some must be given?]

Yes, but it does not show that the distribution must be equitable. The upper proprietor has no preference over the lower as far as water for extraordinary purposes is concerned. *Hough v. Van der Merwe* (Buch., 1874, 148). See especially p. 153 of the report.

[Buchanan, A.C.J.: If you restrict your whole contention to domestic use, I am disposed to agree with you.]

Then our servitude would be of no use. *Tulbagh Municipality v. Morrees* (2 Sheil, 184).

[Buchanan, A.C.J.: It would be an advantage to the Municipality to be able to decide questions affecting water rights without going to any other court.]

That would not be a servitude.

[Buchanan, A.C.J.: But what precisely is your servitude?]

That of regulating the use of the water on the farms above the town, and of taking all the water in case of necessity. We did require all the water in 1899 and 1900. It is true we have stored our water, but defendant cannot complain of that. He could have done the same. During 1899 and 1900 the population was very much increased. The military and their horses took from 60,000 to 100,000 gallons a day. The gaugings showed that at this time very little water was coming into the reservoir. It decreased gradually. Plaintiff apparently wishes this Court to order some definite division of the water. If it did so, it would do exactly what the Legislature has left to the Town Council. This Court may hold that the Municipality has not kept within the terms of its servitude, but it cannot take into its hands the functions of the Municipality. If this Court finds that the Municipality is a Court, it will not interfere, unless there has been some irregularity in the proceedings of the inferior Court. As to trespass, the Municipality has only come upon plaintiff's ground in accordance with what they believed to be their rights, and there is certainly no ground for an interdict. As to damages, a farmer's profits afford a wide field for speculation. The year 1900 was a very bad year—the drought was

severe, the locusts were about, and also a very destructive fly. Plaintiff's losses that year could not, therefore, be attributed to the action of the Municipality, even if they had exceeded their rights. As to the lambs, there is no evidence as to what was done with them, or how they were looked after; so with the pines; there is no evidence what care, if any, was taken of them. The loss of milk was a damage too remote. Plaintiff himself has said that two days' water would not have been of much use to him. If he has sustained loss he sustained it in 1900, when there was very little water in the river. In fact, the loss was due to general drought, and for that surely the defendants could not be held responsible.

Mr. Schreiner (in reply): As to the right of appeal to the Supreme Court in this case, see section 2 of Ordinance 5 of 1848.

[Buchanan, A.C.J.: Is not that rather against you, as showing that the Municipality had no judicial powers?]

No, we do not claim that the Municipality was a Water Court, but that they had power to make regulations.

[Buchanan, A.C.J.: No, the regulation had to be submitted to the householders.]

See section 35 of Ordinance 9, 1836.

[Buchanan, A.C.J.: That refers to regulations which have been passed.]

In any case the regulations must be reasonable. The Council cannot say, "You must cease to use water whenever we forbid you to use it." Defendants have not shown an adverse user of 30 years, so now they say that the Act of 1879 gives them what is virtually a servitude. The regulation is not covered by any of the Municipal Acts. If the Commissioners are (as they contend) a judicial body, they must proceed in a judicial manner, and it is of the very essence of all judicial proceedings that both parties should be heard. If they neglect to conform to this elementary rule, there must be some remedy against them.

[Jones, J.: You have been assuming that the Resident Magistrates' Courts took the place of the Heemraaden. That was not the case; they existed simultaneously.]

See section 2 of Ordinance 5 of 1848. After the abolition of Landdrosts and Heemraaden the only jurisdiction our law recognises for these purposes is that of the Resident Magistrate's Court. As to the loss of crops, no farmer on the Bongola lost through flies or locusts in 1899 and 1900. As to the lambs, everything was done to save them, and the same might be said of the trees. With regard to the milk, it is a fallacy to assume that the expense of keeping and feeding

cows increases in direct proportion to the number of cows kept. Whether or not the damage arising under this head is too remote, is a matter for the Court to decide.

In giving judgment, the Acting Chief Justice said that some time prior to the year 1858, Queen's Town was formed into a municipality. The water supply for Queen's Town was obtained from the Bongola River. In the year 1858 certain farms on the Bongola River, situated above Queen's Town, were granted to military settlers. Plaintiffs in this case represented the owners of two of these farms, and a portion of a third, and defendants were the Mayor and Councillors of Queen's Town. The relationship which existed at common law between the grantees and the Municipality was that of upper and lower riparian proprietors. By common law, as had been clearly laid down in numerous decisions of the Court, the rights existing between upper and lower proprietors on a perennial stream were these. The upper proprietor was entitled to take such water as he might require for domestic and other primary or necessary purposes. If in using the stream for such primary uses, he deprived the lower proprietor of the use of the water, the lower proprietor had to suffer. But if there were more water than was required by the upper proprietor for domestic or primary use, the lower proprietor became entitled to take water for similar use. When it came to water for irrigation or similar secondary uses, water not necessary for the sustenance of the life of persons and animals, then the rights of the upper proprietor were more restricted. He could only take so much of the water as was consistent with the user of the lower proprietor for similar purposes. Therefore, in this river, which was admittedly a perennial stream, by common law plaintiffs in this case would be entitled to take such water as they required for domestic use, and if there were surplus water beyond what was required for domestic purposes, they were entitled to take a reasonable portion for irrigation or for other secondary purposes. When the farms were granted a condition was inserted in the title which had been called a servitude in the Act of Parliament incorporating the Municipality, passed in the year 1879. This condition was that in dry seasons and scarcity of water in the river, the proprietor or proprietors for the time being of the farms should conform with such regulations as to the quantity of water to be led from out of the river for the purpose of irrigation as should be laid

down by the Commissioners of the Municipality of Queen's Town for the time being. This clause left the rights of the parties as to the primary user for domestic purposes untouched. It only referred to the uses for secondary purposes, such as irrigation. At the date of these grants the Municipality had similar powers entrusted to them in regard to the use of water for irrigation by the inhabitants of the town of Queen's Town. At that time the statute regulating Municipalities in this and other matters was the Ordinance of 1836, and by that Ordinance general municipal regulations could be proposed, made, and passed by the ratepayers of the Municipality, and after confirmation by the Governor, became law. The Ordinance also gave the Municipal Commissioners power to make regulations, especially in reference to water and in reference to many other matters, which regulations did not require to be passed by ratepayers or confirmed by the Governor. By the 38th section among other things which the Commissioners were empowered to do, was to make regulations touching the quantity of water to be supplied to the inhabitants, and the time or times at which such water should be received. Looking at the state of the law at the time, and at the words in this grant, he (the Acting Chief Justice) thought that the conclusion to be drawn from the grant was that it was intended to place these farmers outside the Municipality in regard to the use of the river water for irrigation in the same position as the ratepayers within the Municipality. As the Commissioners had power to regulate the distribution of water within the Municipality, so, by this grant, it was intended that they should also have the power to make regulations for the distribution of the water above the Municipality, where these farms were situated. In 1862, in the exercise of these powers, the then Municipal Commissioners passed regulations by which in times of scarcity and dry seasons the farms on the Bongola River could take water for irrigation only during certain days of the week, and at certain fixed and stated times. These were not always the same, but they might briefly be stated to be to this effect: That the water should be available for three days to the farms, and four days to the Municipality. Sometimes the reverse was provided for, and four days a week given to the farms, and three days to the Municipality. This was the way in which the parties, from 1862, interpreted this condition in the grant;

and it was only in 1899 that it was attempted to deprive the farmers altogether of water for irrigation. In 1899 the Commissioners, for the first time as far as could be judged from the records, gave notice to the farmers that they would take all the water during the dry season. One ex-Mayor of the Municipality stated that he used, of his own motion, in former times from time to time, to give notice to the farmers that they were required to allow the water to run down. There was no power vested in any individual to do such a thing, and there was no record on the minutes that the Council had ever ordered such a thing to be done. The question they had to decide was, first, whether in 1899 the Commissioners had any authority to deprive the farmers on the Bongola River of all the water during the dry season for the purposes of irrigation. There was a prayer in the declaration asking the Court to declare that the owners of the Bongola farms were entitled to water for domestic or primary purposes. But in the plea the defendants stated they had never denied the claim of the farmers that they were entitled to water for domestic purposes, and that they consented to a declaration as prayed on this point. The plaintiffs went on to ask the Court to give a declaration of rights as to the user of the water during the dry season for the purposes of irrigation. Looking at the common law and looking at that restriction in the deed, his lordship was of opinion that that restriction in the deed did not authorise the Commissioners of the Municipality to deprive the upper owners of their common law rights, and specially of water for irrigation purposes, and consequently the action of the Municipal Commissioners was illegal, it being proved by the evidence that there was more than enough water for domestic purposes, and that at this very time the water had been used for irrigation in the town below. According to the plea, it was said that the Municipality stored water, and that this was used for irrigation in the town during the dry season. There was no doubt that water stored in dams in times of plenty became private property, whether it was stored by the Municipality below or by the farmers above, and that such water could be used as they pleased. But his lordship was convinced from the evidence that water was taken from the river during the dry season and used in the town of Queen's Town for irrigation at a time when the upper proprietors were deprived of

their water. There was nothing in the common law or in this grant which obliged the upper proprietors to be thus deprived of water in favour of the lower proprietors. In consequence of having been so deprived, the plaintiffs alleged that they had suffered damages. But in this case the Court was not of opinion that the full amount of the claim should be granted. It was clearly proved that from 1899, during the time that the damage was being suffered, the period was one of drought. Water was granted from time to time by the Municipality to the upper proprietors, but this water was not all that the farmers required. But his lordship was not convinced that there was a sufficient quantity of water to give all that the farmers needed, and on the evidence he found that they would have suffered loss even had there been no interference with their rights. He thought that a great portion of the loss sustained was due to the drought at the time. It was, in his lordship's opinion, also partly due to the increased demand for water by the farmers themselves and to some extent to the fact that the water was taken for long distances through open furrows in porous soil. Nor was it right for a person to lie by year after year and allow damages to accumulate. If he had a right he should have asserted that right within a reasonable period. Notice of the deprivation of the water was given in 1899, yet two years had been allowed to elapse before the case was brought into court. There were also other causes than those alleged by the plaintiffs responsible for the failure of the crops in the district: the locusts for instance. Then some of the damages alleged to have been suffered were what might be called prospective profits and not actual damages. Under these conditions the Court did not consider that the plaintiffs were entitled to the amount of damages claimed, though at the same time they were entitled to substantial damages, not only because they had sustained damage, but also to show that they had been deprived of their rights. As to the prayer that the regulation passed by the Municipality should be declared *ultra vires*, the Court would leave that question open. As regards the claim for a declaration that plaintiff was entitled, as owner and lessee of the riparian farms, to make a reasonable use of the water of the river Komani or Bongola for drinking, domestic purposes, and watering stock, and that such use was not affected by the aforesaid servi-

tude, the Court would give judgment for the plaintiff in terms of the prayer. As regards clause (c) claiming a declaration of rights as to the user of the water of the said river in dry seasons and times of scarcity of water in the said river, including a declaration that plaintiff was entitled at all times to a reasonable quantity of water for irrigation upon the said farms, as defined by reasonable regulations to be lawfully made by the defendants, the Court would give judgment for the plaintiff for a declaration that in dry seasons and times of scarcity of water in the said river, provided that the water in the river was not all required for domestic and other purposes of primary user, the plaintiff was entitled, subject to such regulation as to the quantity as might be laid down by the Council of the Municipality, to lead out water from the said river for the purposes of irrigation. As to the quantity of water to be taken, in the first place the Commissioners of the Municipality must make regulations, but they could not ignore, as they had done in the past, the rights of these parties to water altogether. The plaintiff was entitled to water subject to regulations to be passed by the Municipality. To make it clear that what the Municipality had done was illegal, these words would be added to the judgment: Further, judgment is given for plaintiffs for the sum of £100 as and for damages sustained by reason of the action of the defendants in depriving the plaintiff of all water during portions of the years 1900 and 1901 at times when there was water available for irrigation purposes. This judgment of the Court would carry with it costs for the plaintiff.

[Plaintiffs' Attorneys, Messrs. Walker and Jacobsen; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1901.
Aug. 8th.

On the motion of Mr. Percy Jones, Egbert Maurice Garcia was admitted as an attorney

and notary. Leave was given applicant to take the necessary oaths before the Resident Magistrate at Bloemfontein.

PROVISIONAL ROLL.

LE ROUX V. GROENEWALD.

Mr. C. de Villiers moved for provisional sentence for the sum of £250, with interest, due on a mortgage bond, and for specially hypothecated property to be declared executable.

Granted.

BELLEVLIE PROPRIETARY V. COHEN.

Mr. De Waal, for plaintiff, asked that this matter might stand over until the 15th instant.

Granted.

ILLIQUID CASE.

LOUW V. MAAS.

On the motion of Mr. Upington, judgment was given under Rule 329d for the sum of £167 2s., the purchase price of certain stock, with interest and costs.

GENERAL MOTIONS.

HASSELUND (ALIAS WILLIAMS) V. HASSELUND (ALIAS WILLIAMS).

Mr. Close moved for an interdict restraining defendant from disposing of certain property, and for an order on defendant to pay certain money (1) for bringing an action, and (2) as alimony *pendente lite*. The applicant was the wife and respondent the husband. They were married over twenty years ago at King William's Town, and, according to the wife's statement, lived happily for nine years. Thereafter, she alleged that defendant became addicted to drink, and had used violence towards her. She was instituting an action for separation.

The Acting Chief Justice said that the Court could not make an order on defendant to pay money without proof of the service of notice upon him. The interdict asked for would be granted, with leave to defendant to move to set it aside.

WEBNER V. HARTUNG. { 1901.
Aug. 8th.

Brokerage — Unlicensed broker —

Privity of contract.

H. had leased certain premises to one McCord, with option of pur-

chase. McL. agreed to purchase on condition that transfer should be given to himself or to his nominee, H. accepted these terms. McL. nominated one Kendrick and transfer was given to her. Plaintiff (who was not then a licensed broker) had purchased from McL. on behalf of Kendrick without disclosing the name of his principal in the contract of purchase. He, however, received brokerage from McL. in consideration of his having arranged the sale of the property to McL. or his nominee. He now claimed brokerage from defendant, alleging that he had been employed by defendant's agents to sell the property.

The Court found as facts (1) that the so-called agents held no power of attorney from defendant. (2) That the sale to McL. was not negotiated through defendant. Held, that the aforesaid claim could not be sustained: (1) Because at the dates of the transactions in question plaintiff was not a licensed broker. (2) Because he had been paid brokerage on the contract between McLeod and Kendrick, and there was no proof that he had ever effected the sale to McL., or had been commissioned to act as defendant's agent.

— — —
This was an action for £300 brokerage. The plaintiff's declaration was as follows:

1. Plaintiff was and is a broker, carrying on business in Cape Town. Defendant also resides in Cape Town.

2. In or about September, 1900, the defendant was the registered owner of the Hotel Metropole, in Cape Town. Defendant was in the said month absent from this colony, and the firm of Vom Dorp, Scharfscheer and Co., of Cape Town, were authorised by the said defendant to sell the said hotel.

3. Plaintiff, acting as broker and upon instructions of the said firm of Vom Dorp, Scharfscheer and Co. to sell the said hotel, upon the usual and ordinary brokerage on

sales of landed property in Cape Town, introduced one Winifred Henrietta Kendrick as a purchaser of the said hotel, and through the exertions, work, and labour and services of the said plaintiff the said W. H. Kendrick offered to buy the said hotel for the sum of £16,000, which said offer was accepted, and the said firm thereupon paid plaintiff on account of the said usual and customary brokerage the sum of £100.

4. Defendant approved of and confirmed the said sale for the said price to the said W. H. Kendrick, and the declarations of purchaser and seller of the said hotel were executed as between the defendant and the said W. H. Kendrick, and defendant has passed transfer from himself as vendor of the said property to the said W. H. Kendrick as purchaser thereof.

5. The usual and ordinary brokerage on sales of landed property in Cape Town is 2½ per cent. on the purchase price, and there became due to plaintiff for his introduction, work, and labour and services as broker the sum of £400—£100 of which has been paid to him.

6. Defendant, though requested to do so, refuses to pay plaintiff the balance of £300.

The plaintiff claims:

(a) The sum of £300 with interest *a tempore morae*.

(b) Alternative relief.

(c) Costs of suit.

To this declaration defendant pleaded as follows:

1. Defendant admits paragraph 1 of the declaration.

2. In September, 1900, defendant was the registered owner of the Hotel Metropole in Cape Town, whereof one McLeod was the lessee by written lease, including, *inter alia*, an option of purchase, and the said McLeod had theretofore purchased from defendant the goodwill and furniture in the premises of the said hotel.

3. In the said month the following cable messages passed to and from defendant (then at Wiesbaden, in Germany) from and to the said McLeod:

(a) McLeod to Hartung, September 15: "Prepared buy hotel £5,000 cash; £10,000 first mortgage, 5 per cent. Reply if satisfactory, and send power first mail give transfer."

(b) Hartung to McLeod, September 16: "£6,000 cash, £10,000 first mortgage lowest."

(c) McLeod to Hartung, September 18: "Accept terms. Instruct your agent give transfer me or any other person I name. Please confirm."

(d) Hartung to McLeod, September 20: "Accepted."

4. In terms of the said cables the sale of the said hotel was duly completed between plaintiff and the said McLeod, transfer to be passed to the said McLeod or his nominee; and thereafter, on or about September 24, 1900, defendant executed and transmitted power of attorney in general form for the purpose of enabling one Vom Dorp to give transfer on his behalf to the said McLeod or his nominee.

5. Defendant subsequently returned to this colony, and Winifred Henrietta Kendrick was named by the said McLeod as the person to whom transfer should be passed. Pursuant to the contract completed by the said cables, declarations of purchaser and seller were duly made, and the transfer to her was duly passed accordingly.

6. Defendant at no time engaged the services of plaintiff as broker on his behalf in connection with the said transaction, nor authorised any person whatsoever so to engage him, nor did plaintiff render to defendant any services entitling him to claim any sum by way of commission as by him claimed in this suit, nor did plaintiff at any time receive from defendant or anyone on his behalf the sum of £100, or any other sum, though defendant has been informed that plaintiff has received the sums of £100 and £500 from the firm of Vom Dorp, Scharfscheer and Co. and the said McLeod respectively in connection with procuring the said Kendrick to be the nominee of the said McLeod, with which payment defendant has no concern.

7. Save as aforesaid, and save that defendant admits that he has refused and refuses to pay any sum to plaintiff by way of usual and ordinary brokerage or otherwise, he denies all allegations in paragraphs 2, 3, 4, 5, and 6 of the declaration.

Plaintiff's replication was as follows:

1. Plaintiff admits paragraphs 1 and 2 of the plea.

2. Plaintiff is not aware of the allegations in paragraph 3 of the plea, and does not admit them. He says that after he had by his services as alleged in the declaration induced the said W. H. Kendrick to become the purchaser of the said hotel, he interviewed the said McLeod. The latter thereupon communicated with the defendant, but plaintiff says that all such communications were in consequence and the result of his having previously procured the said Kendrick as a purchaser of the said hotel.

3. The sum of £500 was not received from the firm of Vom Dorp, Scharfscheer and Co. for the purposes alleged, but was paid in connection with the sale of the goodwill, furniture, and stock by the said McLeod, and the sum of £100 was not received for the purposes alleged, but was paid on account of brokerage for procuring said Kendrick as a purchaser.

4. Save as aforesaid, and save for admissions, plaintiff's replication to paragraphs 4, 5, 6, and 7 of the plea was general.

Sir H. Juta, K.C. (with him Mr. Benjamin), for plaintiff.

Mr. Schreiner, K.C., and Mr. C. W. de Villiers for the defendant.

Isadore Frederick Webner, plaintiff, said he was a broker, carrying on business in Cape Town. Witness was, in 1899, acquainted with Mr. Kendrick and his wife. In August, 1900, witness visited Mr. Kendrick's house as a friend. He told Kendrick he had heard that he (Kendrick) wanted to buy an hotel. Kendrick had previously kept an hotel. Witness was then staying at the Metropole Hotel. This was the old Hamburg Hotel, and was situated on the corner of Castle and Long streets. Witness made inquiries about the hotel the same day, and was referred to Messrs. Vom Dorp and Scharfscheer. Witness saw Mr. Vom Dorp next day, and asked if he was the agent for Mr. Hartung. He said that he was, and witness told him that he had a likely buyer for the hotel. Vom Dorp said it was for sale. The same afternoon Mr. Vom Dorp told witness the price was £16,000. Witness asked what commission he would be paid, and he agreed to give witness 2½ per cent. on the purchase price. Witness saw Kendrick, and afterwards went to Mr. Vom Dorp, and asked for a copy of the lease to show Kendrick. Mr. Vom Dorp could not find it, but he said he would cable. He afterwards said that the lease was in a box belonging to Hartung at the Standard Bank, but it was not found. Kendrick pressed for an immediate copy of the lease, and ultimately Mr. Vom Dorp referred witness to McLeod. The latter wanted to sell the property and the lease for £25,000. Witness told him that this was too much, and that he was not authorised to go above £20,000. Witness did not see the lease, but he knew McLeod had the option of purchase. Witness afterwards offered to give £16,000 for the property, and £6,000 for the goodwill and furniture. This happened in September, in which month witness agreed with McLeod to buy at the price last

named, and a document giving witness the option of purchasing before September 30 was drawn up. Witness reported the sale and transactions to Mr. Vom Dorp. He made reports to the latter every day. The same day as the option was given, witness saw McLeod with the object of getting the stock of liquor included in the purchase price. McLeod made a reduction of £500, and signed a document agreeing to give witness or his friend £500 on the hotel being taken over and the conditions of sale complied with, or to allow witness or his friends to deduct this amount from the purchase money. Witness was obliged to have the document in this form, because he could not disclose the name of the purchaser. McLeod said he could not give the stock of liquor, as it was too large, but consented to give the £500 reduction. Witness did not report this to Mr. Vom Dorp. He received from Mr. Vom Dorp £100 on account of his brokerage. Vom Dorp congratulated witness on "doing this work very nicely." Meetings afterwards took place with the attorneys, and at the final meeting Kendrick was present. Defendant returned to the Colony in December, and declarations of purchaser and seller were then drawn up.

Sir Henry Juta here put in the agreement of sale, dated September 24, and also read certain correspondence which had passed between the plaintiff and defendant, in which defendant repudiated the claim for brokerage.

Witness (proceeding) said he has passed no broker's note; he had not had the opportunity.

Cross-examined by Mr. Schreiner: Witness took out a broker's licence on October 13. Witness first saw Vom Dorp one Monday during August. A Mr. Kuhr told witness that Vom Dorp was the agent for the seller of the hotel. Witness stated in a letter to defendant that one man who had negotiated for the purchase of the hotel had gone away disgusted because the lease could not be found. He did not now remember the person's name. He was a refugee, and witness met him in the street. Witness first spoke to McLeod between the 5th and 8th September. McLeod never said a word about the cables he sent to Hartung. Witness never knew the cables were sent until McLeod came to draw the deposit of £1,000. The deposit was made on the 28th September, in Mr. Silberbauer's office. It was not made on the 28th October.

Mr. Schreiner said that the receipt showed the 28th October as the date.

Witness said this was another £1,000. He did not know that McLeod was negotiating with a Mr. Attridge or any other person. He did not know that these negotiations fell through on the 19th September. Witness only knew of the purchase of the hotel by McLeod on the 28th September. Witness admitted writing that on the 5th September, when told to do so by Mr. Vom Dorp, he had called on McLeod "to close the deal." He only made this call to close the deal because directed to do so by Vom Dorp. After the 28th September, Vom Dorp knew that the purchase was completed.

Mr. Schreiner referred to Mr. Vom Dorp's evidence, taken on commission. Therein, Vom Dorp said it astonished him to learn that Webner had completed the purchase.

Calcott M. Stevens, chief clerk in the Civil Commissioner's office, put in record of the declaration of sale between the parties dated December 4.

Arthur Scharfscheer, of the firm of Vom Dorp, Scharfscheer and Co., said that he had been acting for many years for Mr. Hartung, but had no written authority from him. Hartung wanted him to sell the Hotel Metropole, and on November 6 he received a letter from Hartung in regard to the selling of the Hotel Metropole. Hartung, before he left, told witness that if he could find a buyer he could try to sell. Witness did find a buyer for £15,000. The letter produced agreeing to sell for £15,000 was received by witness and shown to his parties. Witness left Cape Town in October of 1899, and did not return until December, 1900. While he was away his partner cabled to him in regard to the lease of the Metropole. He was in Paris when he got the cable. The cable was from Vom Dorp. Witness came back on December 11, 1900. He had nothing to do with the transaction. Witness was not here when the cheque was paid to Webner. Hartung had been willing to sell for £15,000. The actual sale took place for £16,000. Eventually witness made an agreement with Hartung by which he received £200 for past services. That had nothing to do with the brokerage. Witness contended that Webner was entitled to £200 brokerage. Hartung would never acknowledge this.

By Mr. Schreiner: He got a cable from Vom Dorp inquiring where the key of the box containing the lease was. He could not give the precise date of the cable. It was when he was in Paris. He was in Paris about the 17th or 22nd. The cable would be sent between the 17th and the 18th. When he got the letter in July about the sale of the

hotel the man who was expected to buy the place went to Natal. In November he told Hartung that the transaction had fallen through. In February he did not ask Hartung to place the matter in his hands for disposal. Witness said to Hartung, "I have a letter from you authorising me to sell the hotel, but you had better send a similar letter of authority to Vom Dorp." Witness did this because he was going away, and thought it advisable for Vom Dorp to have an authority in black and white in case a buyer turned up. Hartung never wrote that letter. On the 27th September witness saw Hartung at Wiesbaden, and cabled to Vom Dorp in Cape Town that the sale of the Metropole had gone through.

By Sir H. Juta: He could not know whether the words "as a gratuity" in the receipt he gave for the £200 for past services were struck out. He only saw Hartung once about the Metropole transaction; that was at Wiesbaden.

Mr. Benjamin read the evidence of Peter Herman Vom Dorp, taken on commission, as follows:

I am a member of the firm of Vom Dorp, Scharfscheer and Co., carrying on business as merchants in Cape Town. I have known the defendant for eight or nine years, and have had business relations with him during those years. I did business for him whilst he was in the Free State and Germany as regards his Cape Town business. The defendant bought the Hamburg Hotel on my partner's advice. He subsequently built the Metropole upon the site, and my firm acted for him in the building. I paid the contractor once for him. Subsequently defendant let the hotel to McLeod, and went to Germany. I continued to receive letters from him. Towards the end of August, 1897, I met defendant at Cassel, in Germany. As I was leaving him, he said, "Oh, I have been in communication with your partner about selling the Metropole, but the sale fell through. I want £15,000 for the hotel; if you can get a buyer, do so" (or something like it), "and if you can get more it will be yours." I laughed at this. He said, "Don't forget it; if anyone should come, do your best," or something like it. The conversation was in German, and Mrs. Hartung was present. I returned to the Colony in October, 1899. I did not see plaintiff for a whole year afterwards—it was not a whole year; ten or eleven months. I spoke to Webner in July or August, 1900, about the sale of the Metropole. I told him it was for sale. I

did not tell him the price at once. Before I had seen Webner I had seen the letter produced (marked A) from Hartung to Scharfscheer. Some time after Webner came to me and said he had a buyer. I then told him the price was £16,000. I said £16,000 because I wanted to make some profit. Then he wanted to see the lease, and as I could not find the lease in our safe, I cabled to my partner. Mr. Hartung had a box in the Standard Bank, Cape Town, and my firm held the key; it contained documents. I looked there before I cabled. After I left the bank I went to Mr. Attorney Trollip, who had drawn the lease, and I then referred Webner to McLeod for the lease. A day or two before I received the £1,000 from Mrs. Kendrick, Webner disclosed Mrs. Kendrick, wife of J. F. Kendrick, as his principal, who was prepared to purchase for £16,000. This was at Messrs. Silberbauer, Wahl and Fuller's office; they are my attorneys. I took with me all papers of Hartung's, and also the power of attorney given me by Hartung. (Put in, marked B.) Up to this I had heard nothing of a sale by Webner to McLeod. I did not know of his being connected with the transaction. The power of attorney was not given to me for the purpose of giving transfer to McLeod. At this meeting the sale to Mrs. Kendrick was settled, and I was ready to give transfer. I was advised that the power of attorney was not sufficient to pass transfer, and I thereupon forwarded to Hartung a form of power of attorney with a letter from my attorneys (letter put in marked C). The power of attorney produced is a copy of the original power forwarded to Hartung. (Mr. Schreiner objects to the copy being put in on the ground that the absence of the original is not explained. Put in marked D). On the 3rd November, 1900, I received £100 from Mrs. Kendrick, for which I gave a receipt. I paid the plaintiff £100 as part of his commission. He was to get 2½ per cent. Mr. Hartung returned from Germany in the middle of December, 1900. Between October and December, 1900, I had no communication with or from him. After he arrived he refused to recognise the sale.

Cross-examined by Mr. Schreiner: The letter of the 26th September, 1900, which covered the power of attorney I have put in, I last saw in the office of my attorney. I don't know when this was. I gave it over to my attorney with envelope and everything on the day of sale. I gave it to Mr. Wahl,

I have seen the letter since, I do not know when, in Mr. Wahl's office. I do not know where the letter is now. Mr. Wahl is now present at this commission. Mr. Le Sueur was the conveyancer for this sale. I handed the documents, including the letter, to Le Sueur. I afterwards saw it in Mr. Wahl's office. I don't know without referring to my books whether the £1,000 was paid on 1st, 2nd, or 3rd of November. To the best of my knowledge it was only a few days before that Webner told me that he had a purchaser. I can't say to a few days, but it was within a few days before I got the money. The money was paid by cheque. I know McLeod had the option of purchase under his lease. I did not go to McLeod at any time about the sale. I consider myself the partner who represented Mr. Hartung. I told Scharfscheer at the time that I had an agreement with Hartung that I was to get anything over £15,000. Scharfscheer left the matter to me. He was not here. I had no trouble with McLeod. Scharfscheer was in Germany. I did not communicate to Hartung that I had employed Webner as a broker. I could not, because I did not know his address at the time. I did not know it in July, August, or September. When Hartung left Cassel I ceased to know his address, not before. I did not at once write and say I had engaged Webner as a broker, nor at any time. I don't know whether I wrote to Hartung on the 31st October. (Mr. Schreiner submits letter dated 31st October to witness). The signature to letter produced is mine. I had no trouble with McLeod directly. The trouble was between Webner and McLeod. I think that the first occasion on which I spoke to McLeod was when I was told that Mrs. Kendrick was a buyer. I did not offer the option to Mr. McLeod. I told Mr. Webner that he must arrange the optional lease. I don't know who the other buyer was referred to in letter E. I do not know whether Attridge was ever after the place. I can't swear that the statements in that letter are true. It was my impression that McLeod got the £6,000 referred to in letter E. "We" in the place "we took stock" means Webner, because Webner told me. I think Kendrick had deposited £1,000 when I wrote letter E. I don't remember in whose favour cheque referred to in letter E was drawn. I don't know why I did not mention Webner in letter E. Webner was entitled to commission as broker for the sale. I can't say whether there was a broker's note. There

was nothing in writing from me to him appointing him broker or agent for Hartung. I can't say where the lease was found. I do not know that that lease was ceded. I do not know anything about the cession. (Mr. Schreiner asks witness, "Have you any recollection of signing any cession?" Witness answers, "I have no recollection." Sir Henry Juta, K.C., objects to this question on the ground that the lease should be put in the witness's hand.) The signature to the cession of the lease dated November 13 is mine. (Lease put in, marked F.) I signed as Hartung's general agent, because I was representing him here. I don't know that anyone induced me to sign the cession. Webner did not communicate to me that he had personally purchased from McLeod, his contract of purchase with Hartung was completed upon the cables. It astonishes me to learn that Webner did complete such purchase. Webner did not show me any cables or copies of such cables which had passed between Hartung and McLeod, or his nominee. There was one cable left on my desk by either Webner or McLeod, which was the last one I think that passed from Hartung to McLeod. I think it was after the Kendrick contract was completed, and also shortly after the cable was received. I think I can produce that cable. I think it was a cable of inquiry whether matters were all right. I will endeavour to produce that cable to the commission. McLeod did not show me any other cables or copies. This is the only cable I saw. I paid £100 by cheque to Webner. I will produce the cheque or counterfoil. The £1,000 was taken into my account. Eventually my firm deducted a sum of £200, and paid over £800 to Hartung. There was a good deal of negotiation. There was an interview at which Hartung, Scharfscheer, and McLeod were present, with the attorneys of the parties, and my services in the past to Hartung were mentioned. I know that the letter of January 11, 1901, was received by my attorneys. (Sir H. Juta objects to a copy of this letter being put in.) I know nothing of the letter of January 14, 1901. (Put in, marked G.) The receipt produced is signed by Scharfscheer, my partner. (Marked H, and put in.) I will undertake to produce the receipt for £800. "Services rendered in the past" in the former receipt does not mean services for which there was to be payment. I have not got any money out of Webner; my partner asked him, and he said he would not pay it. I only heard lately that Webner got £500 from McLeod

in respect of the same transaction. We had the key of the box belonging to Hartung in our safe. He left it with us. Hartung is away in Europe, and I am leaving to-morrow, perhaps for a year. Scharfscheer is here, and will probably be present at the trial.

Re-examined: I have no personal knowledge of the £500 paid by McLeod. I have no personal knowledge of the receipts given at the settlement with Hartung. Everything was done by my attorneys and partner. My partner managed all the dealings with Webner. He is always in the office, and I am in the distillery. Before Webner disclosed Kendrick as a buyer, Webner had told me that he had another buyer. This explains the statement in the letter of October 31 as to two buyers. The reference to trouble which McLeod refers to is Webner's trouble with him. I signed some documents in my conveyancer's office for the purposes of the sale to Kendrick. I can say that the cession of the lease was signed in the office of the attorney.

Mr. Schreiner called

Gustave Trollip, who deposed that he was an attorney in Cape Town. He had a letter from Mr. Attridge from London, dated August 17, and received here on September 4. He negotiated for the Hotel Metropole on behalf of Attridge, but eventually recommended that the transaction be not proceeded with.

The Court held that this evidence was hardly relevant to the case.

Mr. Schreiner said he merely wished to fix the date.

By Mr. Schreiner: Witness (proceeding) saw Webner in St. George's-street. Webner spoke about the Hotel Metropole. The date was September 9.

Andries Friedrick Hartung deposed that he was the proprietor of the Metropole. He built the hotel on the site of the Hamburg Hotel, which he acquired in 1892. Then he got to know Vom Dorp and Scharfscheer. He went to the Orange Free State, and came back in 1894 to conduct the hotel, which he did until 1898. Then he went to Germany. His wife helped him in the business. Witness went to live at Cassel. He left McLeod in the hotel. McLeod had a lease. He purchased the stock and fixtures. According to the lease, the monthly rental was £70. In 1899 Scharfscheer was in England. In November Scharfscheer told him that the sale of the Metropole had fallen through. Witness denied Vom Dorp's statement that he (witness) told

Vom Dorp to do his best to get a purchaser, and Vom Dorp's other statements in this connection. Witness said to Scharfscheer when he saw him at Wiesbaden that he did not want to sell, and that he was quite satisfied with the rental. Between August, 1899, and September, 1900, Vom Dorp never communicated with him in regard to the Metropole. The cable he received in September was the first intimation he had of the transaction. The letter of October 29 from Scharfscheer was the first intimation he had of Webner being connected with the transaction. He never heard from Vom Dorp on the subject. He never gave either Scharfscheer or Vom Dorp authority to engage a broker. Eventually he came out to South Africa himself, and passed transfer direct to Kendrick. He refused to recognise the payment of the £100 by Scharfscheer to Webner as broker on any account. He had come out to this country from Germany specially for this case.

By Sir H. Juta: Up to the end of October he had confidence in Scharfscheer and Vom Dorp. When he left Cape Town he was not willing to sell the hotel. He left on May 14, 1898. He would not have sold on any account. He gave McLeod the option to purchase. He did not speak a word to Scharfscheer about the sale before he went away. Witness did not hear through Miss Lange that Scharfscheer wanted to get a buyer for the hotel. He never said a word to Scharfscheer about selling this property before he left Cape Town. He said nothing to a soul about it. Witness landed back in the Cape on December 17. He did not tell his attorneys that he was surprised that Kendrick was the purchaser. He had no doubts in his mind as to whether brokerage was due on the transaction. He owed no one brokerage.

Rebecca Hartung, wife of defendant, said she was present at the interview referred to by Vom Dorp. She did not hear anything said about the sale of the hotel, nor did she hear her husband say that the sale he had authorised had fallen through, or that Vom Dorp could sell at £15,000, and could have anything above. She was present during the whole conversation, which referred to the bad management of the hotel. She was certain that no such statements as Vom Dorp alleged to have been made were made.

Andrew McLeod, the lessee of the hotel in 1900, said he had a pre-emption of purchase without a price being named. Before

the cables were sent, witness was not interviewed by Webner, as alleged. He first saw Webner after the sale with Attridge had fallen through. Webner did not see witness between the 5th and 8th September. Witness believed that Webner first came to him on the matter on the same day as the document of the 26th September, giving Webner or his friends the option of purchase. At any rate, it could not have been more than a day or two before. Witness never knew Vom Dorp before this. Witness had bought the hotel for himself or his nominee on the 18th September, as shown by the cable. On the 19th September, the negotiation with Attridge fell through. Witness got £6,000 for the stock, and he gave the £500 to Webner in respect to the whole transaction, and not in regard to the stock.

By Sir Henry Juta: It was in view of his negotiations with Attridge that witness bought the hotel. Witness was prepared to go in for it himself if Attridge failed to buy, and Kendrick had not come in. Witness knew Webner was acting for someone else. Witness gave Webner the £500 in consideration of his completing the whole transaction. Witness agreed in the document to allow Webner or his friends to deduct £500 because Webner told him he wanted to help his friends.

This concluded the evidence, and certain correspondence was then put in by Mr. Schreiner.

After argument,

The Acting Chief Justice, in giving judgment, said the defendant in this case was a Mr. Hartung, who had been proprietor of the Hotel Metropole. Hartung left the Colony in 1898, having leased the hotel to one McLeod, the lease containing a right of pre-emption. After Hartung had gone to Europe he received a cablegram from McLeod offering to buy the hotel. Hartung replied stating his terms, which McLeod accepted, and became the purchaser. The cablegram by which the sale was effected was dated September 18, and the confirmation on September 20. Afterwards the seller, Hartung, was called upon to give transfer under this contract effected by cable. In the cable accepting the contract, McLeod stipulated that the defendant should instruct his agent to give transfer to himself or to his nominee. In consequence defendant's attorneys accepted Mrs. Kendrick as the person named as purchaser by McLeod, and transfer was made to her. It was very ques-

tionable whether the transaction should have gone through in this form, and whether the revenue had not been deprived of what was due to it. So far as Hartung was concerned there could be no intention to defraud, because in any case he had not to pay the transfer. But his lordship thought that the attorneys on both sides concerned in the matter, who were fully cognisant of all the facts, owed it to their high reputation to see that the transaction was put right with the Government. The plaintiff now came forward and said that he was entitled to commission as broker on this transaction between Hartung and McLeod. He alleged in his declaration that at the time he was a broker, and that while the defendant was absent from the Colony he was instructed by the defendant's agents, Messrs. Vom Dorp and Scharfscheer, to sell the hotel. Von Dorp stated on commission that he had followed defendant's instructions to dispose of the hotel. Defendant denied having given any such instructions. Vom Dorp held no power of attorney from defendant, and the correspondence before the Court certainly seemed to amply support defendant's denial. There was a letter written by defendant in which he said he had heard that Vom Dorp had an offer for the premises for £15,000, which defendant was prepared to accept, but the letter specifically mentioned the fact that McLeod had a lease and a right of pre-emption, and that the hotel before being sold to anyone else would have to be offered to McLeod *pro forma*. The offer was said to have been made by a person whose name did not appear, and who afterwards went to Natal. Vom Dorp or Scharfscheer then told Hartung that this transaction had fallen through, and there the matter ended. There was no further attempt to get a purchaser until the plaintiff appeared in the matter. Plaintiff said Vom Dorp had referred him to McLeod. Plaintiff never again approached Vom Dorp and Scharfscheer on the subject, but he went to McLeod, and entered into negotiations with McLeod. Plaintiff at that time was not a licensed broker, and did not take out a licence until the month after, nor had he been a broker before that. Therefore he could not claim brokerage on a private contract for employment under the usual custom of the profession. Plaintiff, after negotiations with McLeod, entered into a written contract with him, and in this contract he described himself as purchaser and McLeod as seller. After referring

to the requirements of the Act, which provided that in cases where agents entered into contracts in writing for the sale of landed property the name of the principal must be disclosed, his lordship said that it was true that in all negotiations persons were not bound to disclose their principals; but when it came to an absolute contract, when it was reduced to writing, the principal's name must be disclosed at the time, or the property must be considered to be sold to the person named as purchaser, and that an auctioneer or broker selling "q.q." rendered himself liable to a fine for so doing. However, at the time the contract was entered into between plaintiff and McLeod, McLeod had, by his telegrams, already purchased the property from Hartung. After the purchase from defendant and two days before the contract McLeod gave plaintiff the option for himself or his friends on certain terms. The day after this option was given, McLeod, as he said the plaintiff represented to him that he was not a broker, and wanted to have some commission, promised to give him £500 on the day when the hotel was turned over to him or his friends. The sale was completed, and after its being completed, the seller (McLeod) actually paid to the plaintiff the sum of £500. Now if there was one contract of sale, the plaintiff had been paid his commission, even if he was considered to have acted as a broker for this sale. If there were two contracts of sale, he certainly never effected the contract of sale between Hartung and McLeod, and could not claim on that. In any way they looked at the case, even assuming that plaintiff was a broker, which he was not, he had been paid for having effected the sale of this property. There was further the authority cited from *Bonstead on Contracts* to show that a person not licensed could not claim brokerage, but that need not now be considered. As to the question of the credibility of evidence, his lordship thought that that of Vom Dorp and Scharfscheer was not very material. At the same time, he was inclined to accept the evidence of Mr. Hartung, as this was borne out by the correspondence. The evidence of the correspondence, he (the Acting Chief Justice) thought, was so conclusively in support of Mr. Hartung's statements that the Court was totally unable to say that Scharfscheer was entitled to engage a broker in this matter. Plaintiff in this case

must fail altogether in his action, and judgment must be given for defendant, with costs.

Mr. Schreiner applied for the expenses of defendant and his wife, but the Court made no order.

[Plaintiff's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

VAN DYK V. VAN DYK. { 1901.
Aug. 9th.

This was an action for judicial separation instituted by Maria Elizabeth Olivina van Dyk against her husband Frederick S. van Dyk, of Worcester.

The parties were married in community of property on July 12, 1875. There were ten children of the marriage, of whom eight—six girls and two boys—were minors. Plaintiff alleged that during the last six years the conduct and habits of the defendant became intolerable owing to his intemperance and insobriety. He had threatened, assaulted, and publicly insulted her, and caused her to go in fear of her life or of serious bodily harm. Plaintiff prayed for a decree of separation, for the custody of the minor children, for the division of the joint estate, and for an order upon defendant that he contribute towards the support of the children a reasonable sum. The plea denied the allegation as to intemperance, abuse, and threats, and specially denied the allegation of intemperance, or that plaintiff was in danger of her life or of serious bodily harm. Defendant said that conjugal differences had arisen for which plaintiff was greatly to blame. He denied that his conduct to plaintiff was such as to entitle her to make the claim she was making in this case.

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for plaintiff, and Sir H. Juta, K.C. (with him Mr. C. W. de Villiers), for defendant.

Maria Elizabeth Olivina van Dyk said she was plaintiff in this case, and was now living at Church-street, Worcester. Her husband was not living with her, but stayed with her uncle at Worcester, where he had been since May, when he was bound over to keep the

peace. After marriage, witness and her husband went to keep a large store at Calvinia. They started with little capital, but succeeded, and the joint estate now amounted to about £16,000. Up to 1886 they lived at Calvinia, and thence, until 1899, they had lived at a farm about five miles away from Calvinia. Since then they had been living at Worcester. There were ten children of the marriage. Eight children, of whom the youngest was eight, were at present living with witness. For the last five or six years witness and her husband had lived unpleasantly. On the twentieth anniversary of the wedding, defendant created unpleasantness. He commenced, in the summer of 1889, quarrels over trifles. When defendant took brandy he became excited, and made rows with witness and the servants about trifles. While at the farm he was not violent, though, when he had brandy, he made an exhibition of himself. At the sale of the farm effects, defendant had taken drink and was excited. He quarrelled with the eldest son. After the sale witness went to Calvinia, and defendant came after her four or five days afterwards. When they left the farm, defendant was cross, and would not say good-bye, but on his coming to Calvinia, they made it up. They remained in Calvinia from October, when the sale occurred, until March. During this period defendant did not work. While at Calvinia, defendant suggested, through his attorney, that they should get a separation. His attorney told him that he could not get a separation, but that witness could. His attorney saw witness, and told her to send him instructions. She was doing this when she was told her husband had decided to have the matter done by arbitration. A separation deed was thereupon drawn up, the D.R. minister at Calvinia being appointed umpire. The custody of the minor children was given to witness. After this they separated by mutual consent. The deed of separation was dated December 20, 1899, and on December 30 defendant came to witness's bedroom, and gave her a letter asking her to take him back. She refused, but subsequently he asked her to take him again. He appeared to be very penitent, and witness consented. Once he threatened witness with a riding-whip. He used to drink a good deal, and one day witness noticed that he took seven glasses of brandy before 10.20 in the morning. Brandy always made defendant excitable. After the voluntary separation witness consulted an attorney about a judicial separ-

ation, but on defendant promising to amend she did not take the proceedings further. In January, 1900, witness and her children went to live at Worcester. Defendant, who bought and furnished a house, followed them in May. In June witness and defendant went to Calvinia. Here he used abusive language after he had been drinking. On the 30th July they returned to Worcester, and early in July defendant was again abusive towards her. He had often threatened to strike her with his fist in the year 1900. He had a gun, and one day, while the family were sitting at dinner, defendant brought the gun out of one of the other rooms. He held it very clumsily, and was very unsteady. Witness did not know what he wanted the gun for. He did not point the weapon towards witness and the family, but held it towards them, and witness was frightened. On several occasions during 1900 witness had to leave the house and go to neighbours, in consequence of defendant's behaviour. He was screaming and talking loudly, stamping about the house, and using bad and abusive language. A Mr. Rattray went on one occasion and spoke to defendant. Between October and December defendant went to Calvinia, and stayed there. In January this year witness, after leaving the house, returned at night with neighbours. When they got up to the house witness heard defendant coming stealthily along the passage without his boots on. He made a rush, caught hold of a Mrs. Smeeton, who was with witness, and dragged her along for a short distance. Mrs. Smeeton asked what he was doing to her, and he said he was sorry. He also said they had frightened him. On one occasion in January defendant followed witness to Mrs. Smeeton's house, and struck her in the face. Then she instructed an attorney to take action to get a separation, but defendant got a relative to intercede, and she withdrew the proceedings. Ten days or so afterwards defendant commenced to act in the same abusive manner. In April witness again consulted a lawyer. Previous to this, in March, Van Dyk consulted an attorney, and it was agreed to have a judicial separation, on the same terms as those decided by the deed of voluntary separation. The day following this arrangement, however, Van Dyk asked her to forgive him. She did, and the agreement was not carried out. The April proceedings taken by witness were stayed by her on defendant promising to become a Good Templar. Afterwards Van Dyk was in the house in the company of a Mr. Quinn,

On Quinn leaving, defendant asked him to kiss him, and he and Quinn thereupon kissed each other four times. On the night of the 9th May defendant followed her out of the house on to the side-walk. He came out with his shirt on backwards and threw her to the ground. This was at eight or nine o'clock at night. On the next day, when defendant insisted that it was later than it was, witness asked him if he was so drunk that he did not know the time, and he then knocked her down. She still bore a scar as the result of the assault. Police-Sergeant Milner came on the scene, and witness made a request that defendant should be stopped from getting drink. For the next twelve days witness remained away, and on the 22nd May, the Magistrate bound defendant over to keep the peace for six months. Witness made a statement to the Magistrate in his private office. Then defendant went to live with witness's uncle. Witness could not live with her husband again. Defendant once struck one of his daughters in the face because she did not say "good morning" to him twice. If witness had half the property she could support all the children, paying school fees, etc., if she also had about £15 or £20 a month.

Cross-examined by Sir Henry Juta: Witness would say that on the night of the 9th of May defendant was drunk. Witness had not that night called Mr. Smeeton in. She did not on one occasion, in the presence of Mr. Smeeton, rush at defendant and shove a lighted candle in his mouth without his having done anything to her. The cook told witness that she left on account of defendant's conduct. Witness was not aware that the cook left because she could not live with witness. Witness had never, in the presence of Mr. Quinn, insulted her husband. Defendant was never drunk outside. He came home irritable and excited and took some more in the house. He had only been drunk on a couple of occasions. Witness did not object to having a farm. A little evidence was taken at the arbitration. She was not asked many questions. The arbitrators who drew up the deed of separation inquired nothing about witness and her husband's assaulting tions. The arbitrators inquired nothing about witness and her husband assaulting one another. She never assaulted him. She was first struck by her husband in January in this year at Mrs. Smeeton's boarding-house. He also threatened to horse-whip her in the presence of Moolman. As regards

the gun episode, defendant did not absolutely point the gun at her. He held the gun in a clumsy fashion. She asked him to put down the gun and he put it down. He might have done something wrong with it. She never knew her husband was put in gaol. She understood he was put in "a place of security." She did not go to the Magistrate and ask him to put her husband in gaol. They told her he was put in the guard-room. She wanted him locked up with the parole prisoners. She did not think that he "would come to heel" after that, or that they would live together more amicably. Witness admitted that defendant offered her £25 a month, the house and furniture, and the custody of the children, with a separation, but she refused the offer because there was no guarantee that the £25 would be paid monthly. Defendant certainly offered security, but witness wanted security for the capital, not for the interest. The offer was too loose. She refused a later offer of £30 a month for the same reason.

Re-examined by Mr. Searle: Her husband was very unsteady on several occasions. When he created the disturbances as complained of he was under the influence of liquor. This had gone on for four or five years. At first he was not so bad, but as time went on his periods of unsteadiness became more frequent. She had never on any occasion attempted to assault him. He had never made any charge against her, and had time after time expressed his penitence, and asked her forgiveness. She had assisted largely to amass the money that was in his name in the bank. She worked in the shop, and kept his books. He did his best, and she did her best, and the money made was the result of their joint efforts. It was untrue that the farm was sold because of her wish to have it sold. She had never expressed such a wish. Defendant often threatened to sell it, and seemed to have eventually disposed of it on the impulse of the moment.

At this stage counsel asked the permission of the Court to consult with a view to a settlement without further proceeding with the case.

After consultation,

Sir H. Juta said he regretted to have to inform the Court that the parties had been unable to arrive at a settlement. Defendant proposed that the property should not be divided now, but that plaintiff should have

the use of the house and furniture, which was valued at £2,000, and that £5,000 cash in the bank should be so secured that defendant could not touch it, and that plaintiff should then draw the interest which the bank would pay on that sum. This would secure an income of £200 a year, and as the house could be put down as representing another £100, that meant £300 a year. Further, that it should always remain open to the plaintiff to move at any time for a division of the estate were it thought, for example, that the defendant was not administering it as he should, and that plaintiff should have the custody of the children. Counsel submitted that the proposal was a fair one, and that the only alternative was a division of the estate.

Mr. Searle said his client had no objection to a division of the estate. It should be placed in the hands of a receiver.

Sir H. Juta said his client would not agree to the control of the estate passing out of his own hands. He was not a child nor a lunatic, and was entitled to regulate his own affairs.

Mr. Searle said he would not object to the estate being placed in the hands of a receiver, to be realised with a view to a division. That was all plaintiff asked for in her declaration. But she did object to accepting an offer of £200 a year upon which she would have to support eight children.

Parties having consented to judgment being given,

Mr. Justice Jones, in giving judgment, said: A decree of separation will be granted *a mensa et thoro*, the joint estate to be divided equally between the spouses by the receivers (Mr. Home and Mr. Oliff), plaintiff to have custody of the minor children, the question of the amount of alimony to stand over until after the receivers' report was sent in, costs to come out of the joint estate, and the witness' expenses of both plaintiff and defendant to be paid out of the estate.

CHRIST V. CHRIST. { 1901.
} Aug. 9th

This was an application for an order compelling respondent to pay £50 to applicant, to enable her to proceed with an action against her husband for judicial separation.

Petitioner was married to respondent in Cape Town on October 31, 1877, out of community of property. Ten children were born of the marriage, five boys and five girls.

Mr. Benjamin (for respondent) remarked that as the affidavits were very lengthy it might simplify matters if he stated that the only objection respondent had was to paying an alimony. Respondent had no objection to contributing a small amount to cover the costs of the action.

Mr. Wilkinson (for applicant) said he must press very strongly for the alimony. Mrs. Christ had no money. Respondent paid her hotel expenses each month, on condition that she stayed at a certain hotel in town, but she objected to stay at the hotel under such a condition, holding that she should be free to live where she choose. Moreover, it was desirable that, pending this action, applicant should be allowed to stay at some private residence. Therefore applicant asked for the payment of £20 monthly, as from July.

The Court granted an order on respondent to pay plaintiff £30, in order to institute her action, and £20 a month from July 12, on which date the application was made, the case to come to trial this term, and costs to be costs in the cause.

KANNEMEYER V. HAVINGA. { 1901.
} Aug. 9th.
Attachment *ad fundamam jurisdictionem*—Property of alleged rebel—Service of process.

This was an application for leave to attach certain property, to found jurisdiction, and to sue by citation.

Mr. Searle, K.C., appeared for the applicant, and submitted an affidavit by Constantine Alexander Schweizer, agent and representative of Daniel Victor Kannemeyer, of Burghersdorp. It was to the effect that the applicant was temporarily absent from the Colony. Applicant was the registered owner of 27-40ths of a certain piece of perpetual quitrent land situated in the division of Albert, the remainder of the farm Witkop. The remaining portions of this farm were held by five others. Applicant was about to institute an action against Coenraad Adolf Havinga and others, the owners of the remaining portions of the farm, to have the farm Witkop partitioned and divided so that applicant and each of the other co-proprietors might have a distinct and separate portion with properly defined boundaries of their respective portions of the farms. It was alleged that Simon Lodewyk Riekert Havinga,

one of these proprietors, had left the Colony, accompanied by his wife and children, and proceeded to the Orange River Colony, in March, 1900, and had not since returned to the Colony. When respondent left the Colony he left no known agent or representative, and therefore it had become necessary to arrest and attach the property, *ad fundam jurisdictionem*, of the Supreme Court, to abide by the action about to be instituted by applicant. It was therefore prayed that the Court would grant an order for the arrest of the 1-10th share in the farm Witkop, held by the respondent, and an order authorising applicant to sue respondent by edictal citation for declaration of rights. In conclusion, Mr. Searle said it was believed that the respondent was with one of the Boer commandoes in the Orange River Colony.

The Court granted leave to attach the property named, and also to sue by edict, service to be personal if possible, but failing that by one publication in the "Bloemfontein Post" and one in the "Government Gazette" of this colony, the return day to be September 13.

BALLANCE V. SOUTH AFRICAN ADVERTISING CO.

Mr. De Villiers applied on behalf of the South African Advertising Company for judgment for £54 13s.

Mr. Benjamin, on behalf of J. D. Ballance and Co., applied for the removal of bar in the case.

The Court ordered that the application for judgment should stand over until Monday next. Defendant would have leave to purge his default, and the bar would be removed upon his filing an application on the merits before noon on the following day.

REHABILITATIONS.

On the motion of Mr. C. de Villiers, the Court granted an order for the rehabilitation of William Alexander Kuhn.

Mr. Percy S. Jones moved for the rehabilitation of Hessel Leo. Baumgarten.

Granted.

IN THE ESTATE OF THE LATE BOOY MATHALA.

Mr. Searle, K.C., moved that a rule *nisi* authorising the executor to pay over a certain sum of money be made absolute.

Granted.

GOULD V. BENNETT. } 1901. Aug. 9th.

This was an application for leave to sign judgment against plaintiff by reason of default.

Mr. Wilkinson: Summons in the case was issued on the 7th January. Appearance was entered on the 14th January. From that time no proceedings whatever were taken by plaintiff in reference to the action. On the 5th inst. the plaintiff was barred, and notice thereof was given to plaintiff's attorney.

Sir Henry Juta: Plaintiff sued for an account. The defendant rendered the account, and there was thus no reason for pursuing the proceedings. There is nothing to withdraw. Defendant complied with what plaintiff asked, and that was an end of the thing.

Mr. Justice Jones said: The course adopted by defendant was one that was wholly unnecessary. The Court will refuse the application, and order defendant (present applicant) to pay the costs.

Re ESTATE LATE LACOCK. } 1901. Aug. 9th.

This was an application for leave to the executors to sell and transfer certain landed property.

The petition of Myndert Lacock and Jacobus Lacock showed *inter alia*:

1. That the late Hendrina Cecilia Lacock (born Stiglingh), widow of the late Jan Christian Lacock, is the registered owner of a certain piece of ground at Salt River, which is valued for Divisional Council purposes for £150 and for Municipal Council purposes at £500.

2. That the said H. C. Lacock died on or about March 15, 1882.

3. That letters of administration were granted to petitioners in the estate of the late H. C. Lacock by the Master of this Court.

4. That by the last will of the said H. C. Lacock the said landed property referred to in paragraph 1 was bequeathed to the children of her son Myndert Lacock, and of her daughter Magdalena H. F. Lambrechts (born Lacock), married in community of property to M. A. Lambrechts, subject to a life interest in favour of the testator's said son and daughter, who are both living.

5. The Colonial Government has offered to purchase the said landed property for £1,332 10s.

6. The said usufructuaries and the major usufructuary heirs are willing and anxious to sell the said landed property to the said Colonial Government for the above amount, but owing to there being three minor children of the said M. F. Lambrechts, and six minor children of the said M. Lacock, one of whom died on or about the year 1884, your petitioners have to approach this Hon. Court for authority to sell and transfer the said landed property, and for leave to invest the proceeds of the sale at the highest possible rate of interest obtainable.

7. The major usufructuary heirs, with the exception of M. A. Lambrechts, have executed a deed of consent, annexed.

8. That the said M. A. Lambrechts is at present on active service under the Imperial authorities, having left Swellendam, where he was employed as engine-driver, for this purpose in the month of February, 1901, and his present whereabouts are unknown to your petitioners.

9. That your petitioners have caused inquiries to be made concerning his whereabouts, and have thereon inquired from the Imperial authorities in Cape Town, but with no effect.

10. That the said M. A. Lambrechts, prior to his departure from Swellendam, verbally consented to the sale of the said landed property.

Wherefore your petitioners pray for leave of this Hon. Court to sell and transfer the aforesaid landed property to the said Colonial Government for the sum of £1,332 10s.

The Master's report stated that the price offered by the Government was so far above the Municipal valuation, and apparently above the real value of the property, that it would be to the advantage of the heirs if the executors were authorised to accept the offer; but in view of paragraph 6 of the petition, he thought there should be some supervision as regards the safe investment of the proceeds, and that he would suggest that the capital should be deposited with one of the trust companies in Cape Town at the highest rate of interest obtainable until the heirs become entitled thereto.

Mr. Close for applicant.

The Court granted an order in terms of the Master's report.

LOUW V. LOUW. { 1901.
Aug. 9th.

The petition of applicant stated that (1) she had been married in community of property to W. J. Louw, of the Paarl, on February 16, 1874, and that the marriage

still subsisted; (2) that there were five children of the marriage, two of them being majors; (3) that in 1887 respondent deserted petitioner and went to Zeerust (Transvaal); (4) that after his desertion of petitioner respondent had lived in adultery with two several women; (5) petitioner had not since been able to gain any information as to respondent's address; (6) petitioner wished to sue her aforesaid husband by edictal citation for divorce by reason of his adultery, also for the custody of the minor children of the marriage, and for forfeiture of his share in the community of property; (7) that petitioner prayed for leave to sue her husband by edictal citation by reason of his adultery as aforesaid, and for custody of the minor children.

Mr. De Villiers appeared for applicant.

Leave was granted, personal service to be made if possible; failing this, publication to be made once each in the "Government Gazette," the "Cape Times," and the "Transvaal Gazette." The order was made returnable on the 12th October.

Ex parte WINTER. { 1901.
Aug. 9th.

The petition of applicant showed that she was formerly the widow of the late G. C. A. Harmuth, and is at present married to Carl Winter, of East London, without community of property.

2. There are three children issue of the marriage, the eldest wherof is a major.

3. During his lifetime the said G. C. A. Harmuth passed transfer to her on May 22, 1891, of certain property situate within the division of King William's Town, in trust for the following purposes: (a) That the said Emilie Harmuth should enjoy the use and occupation of the said piece of ground, and the buildings thereon, subject to the proviso that the said E. Harmuth should pay all rates, taxes, etc., now or hereafter levied or imposed on the said property, and should maintain it in a tenable state of repair, and should insure the buildings against loss by fire. (b) On the decease of the said Emilie Harmuth the said Julius Hilner or any future trustee was to realise the said trust property, and pay the proceeds thereof over to the children issue of the marriage of the said G. C. A. Harmuth in equal shares.

4. That the house upon the said land is one of the oldest houses in King William's Town, and was at the time of the said transfer to petitioner in a bad state of repair, and fast becoming untenable.

5. That since the date of petitioner's marriage with the said Carl Winter in April, 1894, the said property had been let whenever possible at a monthly rent of £1 10s. to £2 per month, which, however, had been insufficient to pay all the rates and taxes and costs of urgent repairs, which had been borne by petitioner, who had not only derived no benefit therefrom, but had been burdened thereby.

6. That petitioner was willing and anxious in the interests of her said children with her said late husband to forego her rights and interest in and to the said property, and to consent to the sale thereof.

7. The petitioner was of opinion that it would be to the interest and advantage of the children to sell the said property by public auction for their benefit, to pay his share to the said major child, and the shares of the said minors into the hands of the Master of the Court.

8. The said property is valued for Divisional Council purposes at £200, but despite the outlays made from time to time in repairs, it is, owing to old age, fast depreciating in value and becoming untenable and uninhabitable.

Wherefore petitioner prayed for an order authorising the sale of the said property by public auction, and the transfer of the same to the purchaser or purchasers thereof.

Mr. Benjamin appeared for applicant, and an order was granted in terms of the Master's report; costs to be paid out of the estate.

Ex parte DEANS. { 1901.
Aug. 9th

The petition of applicant stated (1) that she was the eldest daughter of Margaret Francis, and was married out of community to Geo. A. Deans, and that the said Margaret Francis had two daughters and a son (all minors) in addition to petitioner; (2) that the said Margaret Francis had for a long time carried on business as a chemist and druggist at Somerset Strand; (3) that on or about July 6, 1901, the said Margaret Francis was removed to the lunatic asylum at Graham's Town, and is still therein detained; (4) that the assets of the said Margaret Francis consist of the stock-in-trade of the chemist's shop (worth £200), household furniture (value £75), and cash in Standard Bank (amount, £500); (5) that since the removal of petitioner's mother, petitioner's husband, the said Geo. Deans, took charge of the chemist's business aforesaid,

and appointed a duly qualified manager thereto; (6) that the liabilities of petitioner's mother amount to £200, which will shortly become due, as will also school fees for the children, and for these and other necessary expenses it was necessary that provision should be made without delay; (7) that it was necessary that a *curator bonis* should be appointed in respect of the business and property of petitioner's mother with power to carry on the same; (8) petitioner submits that her husband, the said Geo. Augustus Deans, is a fit and proper person to be appointed as *curator bonis*.

Mr. De Villiers moved.

Mr. George Augustus Deans was appointed *curator bonis*, pending proceedings to have a declaration of lunacy, with power to carry on the business named in the petition.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

In re THE PETITION OF JAR- } 1901.
TIES GREGGANS, MASTER } Aug. 12th.
OF THE STEAMSHIP "BEIRA."

Mr. Searle said that that was the return day for a rule *nisi* granted by the honourable Court on August 2. The order called upon the firm of Dunn and Co., of East London, as agents for the owners, to show cause why they should not be restrained from parting with the sum of £700 pending an action against the owners for £900.

The Court ordered the matter to stand over until Thursday, to permit of the production of a certain letter in the case.

Ex parte THE MASTER OF "THE } 1901.
ANDES," IN THE MATTER OF } Aug. 12th.
THE UNION CASTLE COM-
PANY AND THE EAST LON-
DON HARBOUR BOARD V.
THE MASTER OF "THE
ANDES."

Salvage—Consolidation of actions.

Where two salvors who had rendered aid to defendant's ship on the same occasion had each brought an action for salvage against the

applicant, the Court ordered the actions to be consolidated after the pleadings should be closed.

This was an application for the consolidation of two actions, brought by the Union-Castle Company and the East London Harbour Board respectively against the applicant, in his capacity of master of the "Andes," for salvage services rendered by them to the said vessel.

Sir H. Juta, K.C., appeared for the petitioner; Mr. Searle, K.C., for the Union-Castle Company, and Mr. Benjamin for the East London Harbour Board.

Mr. Benjamin read the affidavit of Mr. Montgomery Walker, of Messrs. Walker and Jacobs, attorneys, to the effect that the East London Harbour Board claimed a sum of £2,500 for salvage services rendered by the tug Buffalo. The Harbour Board were agreeable to a consolidation of the actions and had approached the second plaintiffs, the Union-Castle S.S. Company, in order to secure that consolidation, but without success.

Sir H. Juta: An action is about to be instituted for salvage against us. Both of the plaintiffs claim salvage for services rendered under the same set of circumstances. It is the usual custom in England to consolidate actions of this kind. See *The Strathgarry* (1 Probate, 1895, p. 264), and decision of Bruce, J., in that case. We think that it ought to be sufficient to file one plea.

Mr. Benjamin: I certainly oppose, only one firm of attorneys representing the salvors.

Mr. Searle: Two pleas should certainly be filed. In England there is a rule of Court which orders only one plea; we have no such rule here. Besides, in this case, the plaintiffs are hostile to each other. No case has ever before come before this Court in which there were two plaintiffs separately suing the same defendant, the interests of these plaintiffs being opposed to each other. In this case our interests are decidedly opposed. We say that we rendered salvage services, and that the Harbour Board merely towed the ship for a short distance. We really dealt with the ship, and if we do not pay the other party for their services they may have their action against us. But even should the actions be consolidated, two pleas must be filed.

[Buchanan, A.C.J.: How far had the case of *The Strathgarry* gone before consolidation was ordered?]

Sir H. Juta: The declaration had been filed; I doubt if the plea had.

[Jones, J.: Suppose the "Andes" has one defence against one plaintiff and another against another?]

That is not so in this case. If you consolidate you need only have one set of attorneys. How absurd it would be not to sanction this arrangement. Suppose there were ten salvors, would it be necessary to employ ten separate firms of attorneys? In England salvage cases are very common, and they are constantly consolidated, and there as everywhere else the interests of salvors are always hostile. Each claims to have done all the work.

Mr. Searle: I have no objection to consolidate the actions, provided there are two sets of pleadings.

The Acting Chief Justice said: Two actions have been instituted, one by the Union-Castle Steamship Company and one by the Harbour Board of East London, against the defendant Herst, master of the Andes, in which salvage was claimed by both. A dispute has evidently arisen between the plaintiffs as to their respective claims, and consequently they do not wish to fight the case together. In a case such as this it is most desirable, if not absolutely necessary, to hear the two actions at one and the same time. Declarations have been filed, but the pleas have not been filed. The application was to have the actions consolidated. The order of the Court will be that on pleadings being closed the actions should be consolidated; costs to be costs in the cause.

Mr. Benjamin asked that a day might be fixed for trial, as the vessel was under arrest. He asked for a day in September.

The Acting Chief Justice said the Court could not fix a day until the pleadings were closed.

KOCK V. HENDRICKS.

1901.
Aug. 12th.
" 13th.
" 14th.

Water — Natural and accustomed flow.

Plaintiff and defendant were owners of adjoining pieces of land which were formerly one farm, and which were divided in 1894.

Plaintiff had received certain surface water on to his ground, from higher ground thereunto adjoining

and the plaintiff discharged that aforesaid water, together with his own surface water, on to the land of defendant. Plaintiff admits he was bound to receive the surface water from defendant's own land, but with respect to the water from the other higher ground aforesaid, claimed (1) that he was not bound to receive it, (2) a perpetual interdict restraining defendant from discharging water on to plaintiff's land, (3) £500 damages, and (4) costs of suit.

Held, (1) that as the natural flow of the water was from the upper farm to defendant's ground and thence to plaintiff's and that (2) as the water had not been directly contaminated by defendant, no damage had been sustained by the aforesaid plaintiff, and that the judgment must be absolute from the instance with costs.

This was an action brought by Adolf H. W. Koch against David F. Hendricks, for a declaration of rights, an interdict, and damages. The declaration set forth:

1. The plaintiff is the registered owner of certain lands situated at Retreat, in the Cape Division, being the remainder of the farm Rape Kraal, now called Frogmoor.

2. The defendant is the registered owner of a sub-divided portion of the said farm, adjoining the said lands of the plaintiff.

3. In or about the year 1897, the defendant, wrongfully and unlawfully, and for his own use and benefit, led, and still leads, a certain stream of water over and across his said property into a certain furrow situated upon the said land of the plaintiff. Portion of the said water rises upon the defendant's said property, but by far the greater portion is water which the defendant allows to flow on to his property from the farm adjoining his on the opposite side to that of plaintiff's lands, and called Pollsmoor.

4. By reason of the premises large quantities of water were caused and permitted to flow, and did flow, from off the said property of the defendant and other lands into and upon the said lands of the plaintiff, and

the volume of the said water has increased recently, and is a serious nuisance to the plaintiff, and threatens to flood the said lands of the plaintiff and render them valueless.

5. The defendant contends that the plaintiff is bound to receive the said water thus discharged from the defendant's property, including the Pollsmoor water.

6. The defendant, on or about the 26th day of April, 1901, and on divers occasions before and since, wrongfully, unlawfully, and negligently caused or permitted manure and other filth to accumulate in certain furrows along which surface water is drained from the lands of the defendant, into certain furrows upon the lands of the plaintiff.

7. By reason of the matter in the last preceding paragraph set forth, a nuisance, dangerous to health, has been caused to the plaintiff, the plaintiff's drinking water has become foul, noxious, and unfit for use, and the plaintiff has sustained great loss and damage, and been put to serious inconvenience.

8. The plaintiff has frequently requested the defendant to divert the said stream of water, so that it shall not flow into plaintiff's said furrow, and to refrain from the wrongful and unlawful acts in paragraph six set forth, but the defendant wrongfully and unlawfully refuses to do so.

9. By reason of the foregoing, the plaintiff has suffered great loss and damage in his farming operations and otherwise, and has in all sustained damage in the sum of £500.

Wherefore plaintiff claims (a) a declaration, as between plaintiff and defendant, that the plaintiff, as owner of the farm Rape Kraal, now Frogmoor, is not bound to receive water other than the surface overflow from the defendant's land; (b) a perpetual interdict restraining defendant from discharging water other than such surface overflow arising or collected on defendant's land on to plaintiff's land, and especially from discharging the Pollsmoor water on to plaintiff's land; (c) £500 damages; (d) alternative relief; (e) costs of suit.

Defendant's plea in abatement was as follows:

For a plea in abatement defendant says that the owner of Pollsmoor claims a legal right to send down the water complained of on to the defendant's property, and thence downwards, and that therefore the prayer of the declaration cannot be granted without the said owner of Pollsmoor being made a party to this action, and the defendant fur-

ther says that the prayers of the declaration are inconsistent and embarrassing.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The plea to the declaration was as follows:

For a plea to the declaration the defendant says:

1. He admits paragraphs 1 and 2.

2. He says that for more than thirty years prior to the diversion hereinafter mentioned, all water coming on to the defendant's property, drained into a channel or furrow which skirted the plaintiff's land on the boundary between the plaintiff's and defendant's land, and thence down to the main road and across it down to the sea. That such water was thus drained by defendant and his predecessors in title as of right and without let or hindrance for the aforementioned period, and that the channel or furrow had become the natural watercourse for the flow of the said water at the time of the diversion hereinafter mentioned. He denies that he allows water to flow on to his property from the adjoining farm of Pollsmoor, and says that the said owner claims a legal right to send the said water on to defendant's land, and does so under a claim of right, and the defendant says that the water which is thus coming on to his land has been drained off in the manner and for the period aforesaid.

3. The defendant says that in or about the year 1897 or 1898, the plaintiff, or his predecessor in title, diverted the said channel or furrow from the original watercourse across the plaintiff's land, whereby the water which used to flow down the said watercourse was directed across the plaintiff's land. The defendant denies the allegations in paragraph 4, and says that if the plaintiff's land is threatened as alleged, it is owing to no act of the defendant, but to the plaintiff's own act in diverting the watercourse and water as aforesaid.

4. Defendant denies paragraph 5, and says that he contends that all water coming on to his land as heretofore should run down the aforesaid watercourse.

5. The defendant denies paragraph 6, and says that the surface water is drained from the land which he cultivates, and that the certain furrows on the plaintiff's land mentioned in the declaration constituted the diversion in paragraph 3 of the plea mentioned. The defendant denies that he has caused a nuisance, or that the plaintiff's drinking water has become foul, noxious, and unfit for use through any act of his.

6. Save as aforesaid, defendant denies the allegations in paragraphs 3, 4, 5, 6, 7, 8, and 9 of the declaration, wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was as follows: The plaintiff joins issue with the defendant upon the plea in abatement, and prays that it may be overruled, and that he may be declared entitled to judgment, with costs. And for a replication to the defendant's plea, the plaintiff says that, save in so far as the said plea admits any of the allegations in the declaration, he denies all and singular the allegations of fact and conclusions of law in the said plea, and joins issue thereupon, and again prays for judgment, with costs.

Mr. Searle, K.C., and Mr. B. U'pington appeared for the plaintiff.

Sir H. Juta, K.C., and Mr. Benjamin for the defendant.

The facts appear from the judgment.

Mr. Searle, K.C.: The natural flow of the water was towards the main road.

[Buchanan, A.C.J.: Water must flow in its natural direction, and the evidence shows it did not flow towards the main road.]

You can make water flow in any direction you please if you only cut your furrows deep enough. There is a natural fall from point marked B to W on the plan. No doubt the furrow has been deepened, and when Polsmore found that Mr. Messow had deepened the furrow they thought it would be very convenient to connect with it. This they could not legally do. Now, Hendricks says that this was a disadvantage to him. That this should have been so is simply incredible. The soil in vlei ground is always damp, and this was an advantage to Hendricks in summer, and then having reaped this advantage he insists on sending all this water down on to our land in winter. The fact of sluice gates having become necessary shows that the water was a growing nuisance to the lower proprietors. As Polsmore vlei was gradually drained a lot of water came down the furrow. (See photos put in.) The sale plan of Frogmore did not show water coming from Polsmore. The artificial channel would have been shown if it had been there. All that defendants could prove was that the water (including the Polsmore water) was discharged on to plaintiff's ground on a certain day, but that does not prove a servitude.

[Maasdorp, J.: What is this permanent stream marked on the plan?]

It is not the watercourse spoken of in the pleadings. If the defendant claims a right to discharge water by an artificial channel he must show either a servitude or immemorial user. Hendricks shows only that the water thus flowed on the day of the sale. No man is allowed to make an artificial channel to the injury of a lower proprietor. See *Myburgh v. Van der Byl* (1 Juta, 360). The only two ways by which the right to use an artificial channel can be established is either by adverse user for 30 years or by a servitude. Hence the fact that water flowed down this channel in 1894 is quite immaterial. Messow would never have undertaken to take the Polsmore water. Eckstein had known the property from 1869 to 1886, and he says there was an elevation between Polsmore and Frogmore. This rise was of a permanent character. Beacons had been planted on it. Lake's evidence showed that the natural flow of the water was towards the road. In fact, the evidence of all the witnesses who know the locality and had worked on the property shows that the Polsmore water did not flow on to Frogmore, but on to the main road. The banks at the side of the road were to prevent the water in the sluice from flowing on to the main road. In a question of this kind, should there be any conflict of evidence, we ought to rely on the levels as taken by experts. These show a natural flow in the direction of T.U. on the plan. The ground has been gradually raised (as Hendricks deposed) owing to cottages being erected thereon. It has not been shown that the natural flow from Polsmore is on to our ground. An embankment has existed for many years. We do not know whether it is natural or artificial. Some 12 or 13 years ago channels were cut through this *clum aut precario*, and now defendants wish to found a servitude on this basis. We cannot now cultivate our land at all. During the last two years we have sought an amicable arrangement. In their letter of October 11, 1899, defendants took up the position that the sluice gates were improperly constructed. Defendants have not shown a user of the artificial channel for 30 years. *Ludolph v. Wegner* (6 Juta, 193.) See particularly the judgment of *De Villiers, C.J.* (pp. 197 and 198). The only way in which Hendricks can have the right which he claims is either by getting his title rectified or by proof of 30 years' user. If he claims a servitude he should show it on his title.

[Buchanan, A.C.J.: The defendants plead prescription.]

No such plea has been raised. The mere fact that a channel was marked on a plan would not justify the defendants in sending down other people's water there-through. Then the water was always being concentrated, and the fact that £150 was spent on channels to mitigate this nuisance shows that there was a substantial and an increasing nuisance.

[Jones, J.: Why do you not let your water run down to the private road?]

We do not object to its coming down the private road.

[Jones, J.: Why do you not shut off the water by the sluice of which you have control. If you do the water must come through the pipes?]

That is immaterial; we object to the water coming on our ground in any case. We are not bound to receive anything save surface water at F. We say that, if Polsmore sends water on to defendant's land, defendant must keep it there. The fact that we receive defendant's water will not justify him in sending Polsmore water down to us unless he can prove prescription for his channel. Defendant has no right to put Polsmore water in this channel. We do not object to take the surface overflow of defendant, but we deny that we are bound to receive Polsmore water. We ask therefore for a declaration of rights, and an interdict restraining defendant from discharging water on to our land other than his own water.

[Buchanan, A.C.J.: I do not understand why you did not sue Polsmore and join Frogmore as a co-plaintiff?]

Frogmore would not consent to this course. As to the application for an interdict, no man has a right to discharge water on to another's land save by a natural channel. With regard to damages, we have not been able to cultivate any crops owing to the land being swamped. Again, Dr. Marloth deposed that the worst sample of water was taken at point S, and that it was highly polluted with animal refuse. If this be so, we are surely entitled to an interdict. We are not bound to receive defendant's drainage. The Divisional Council Inspector has complained of the nuisance.

Sir Henry Juta was commencing his argument when the Acting Chief Justice pointed out that there could be no prescription between plaintiff and defendant, seeing that their ground formed one property until 1894. He did not see that the plea really stated what the defence was.

Sir Henry Juta: The plea sufficiently covers the declaration.

[The Acting Chief Justice: The only thing in the plea is a denial.]

Sir Henry Juta: That is so. Proceeding, he said that the declaration was absolutely incorrect, because it alleged that in or about the year 1897, the defendant, wrongfully and unlawfully, and for his own use and benefit, led, and still leads, a certain stream of water over and across his said property into a certain furrow situated upon the said land of the plaintiff. The evidence showed that they did not lead the stream, and he could not understand on what legal grounds the plaintiff had come into court. The defendant did not send the water down from Polsmore, and did not permit the sending of the water down, and he could not see what illegal act the defendant had done. As a matter of fact, what he had done was to decline to be made a cat's-paw of by Mr. Poppe. The defendant did not permit the water to flow down from Polsmore, but as it did not injure him he did not come and sue. The defendant had not polluted any water, and it was difficult to see on what principle the plaintiff wanted to hold the defendant liable.

The Acting Chief Justice: If you permit it?

Sir Henry Juta said the defendant did not do it. When he bought the property it was there. The furthest back they could go was some twenty-two years, and then it was there, but as for the defendant, he had never even put a spade in the ground in connection with works to allow this water to flow down.

In giving judgment, the Acting Chief Justice said: The plaintiff and defendant in this case are the owners of two adjoining pieces of ground which were formerly one farm, known as Frogmore. On the north side of this ground was situated the farm called Pollsmoor. The owner of Pollsmoor has not been joined in this action, and consequently no declaration can be made against him. The complaint of the plaintiff is that the defendant received certain water from Polsmore, which, added to the surface water which falls naturally on his own ground, he discharged on plaintiff's property in such a way as to do damage. The plaintiff's and defendant's lots of ground were formerly owned by one person, and while they were so owned by one person—Dr. Messow—he (Dr. Messow) cultivated for the first time defendant's portion of the ground, and for the purposes of cultivation, he cut at regular intervals across the ground from the direction of Polsmore to plaintiff's ground some half-

dozen furrows, which collected the water, and carried it down towards what was now the boundary between the two properties. At this time, a watercourse, described on the plan as the main stream, rising higher up in the mountains, came from above defendant's property down alongside the private road which now formed the division between plaintiff's and defendant's properties, into which stream the water collected by the previous owner found its way. From the evidence led in this case, I think it is clear that the natural flow for surface water would be from Polsmore across defendant's portion of the ground to plaintiff's portion, so that the previous owner, in collecting this water and discharging it into the watercourse, did not divert or change the direction of the natural drainage or flow of the water, but only collected it and discharged it into this stream at three distinct points. Formerly there were culverts or bridges going under this road, through which the water found its way to the stream. These have been removed, and at the upper furrow a 9-inch pipe has been placed, at the middle furrow a 15-inch pipe, and at the lower furrow a 6-inch pipe, all of which are of smaller capacity than the former culverts, so that the alteration could not do the plaintiff any harm. In answer to plaintiff's complaint that defendant has discharged water upon his ground, defendant has pleaded that he did so by right of prescription. Now there can be no prescription in this case, because, up to 1894 defendant's and plaintiff's properties were owned by one person, and, in fact, were one property. No prescription by lapse of time can be created by one portion of the property against the other, seeing that they were only separated into two properties as recently as 1894. But defendant goes on also to plead that the plaintiff, or his predecessor, in title diverted the water from the original watercourse, and diverted it across plaintiff's land, and that it was this diversion that caused the damage. Now, the evidence here again does not support this part of the plea. The main watercourse came down alongside the private road at the point X. According to the evidence of the diagrams and plans prepared for the sale in 1894, the water flowed from this point X in a southerly direction behind the chicory factory on plaintiff's property. The plaintiff did not direct the water in this direction, for that seemed to be the old course for it to follow. Since then the present plaintiff has placed a sluice

gate at this point, dammed back the water and raised it so as to enable him to make it continue to flow in a direct line down to the main road, but this diversion is not the diversion complained of by defendants. The diversion across plaintiff's property to which as far as one can ascertain, the plea refers, is certainly not a new thing, and is not the cause of the damage. If anything, the placing of the sluice gate on this furrow and the damming back of the water in the main watercourse has caused the damage, if any, of which defendant complains. The plaintiff admitted that he is bound to receive the surface drainage from defendant's property, and the question we have to decide is whether the defendant has done anything to give plaintiff a right of action by allowing the water which comes down from Polsmore to flow through his property. Now, there is no doubt that while a person is entitled to improve his property by cultivation, and, in fact, should be encouraged to do so, still, as laid down in the case of *Krohne v. Harris*, every person should so use his own property that it does not injure his neighbour's. People should not, in order to make their own property more valuable, make their neighbour's less valuable. According to the authorities cited by Mr. Searle, although a person may be bound to receive drainage water, the upper proprietor cannot collect that drainage into one spot and make an artificial channel for it, and force the lower proprietor to receive it there to his detriment. Polsmore does send down water by an artificial channel on to defendant's ground, and the water so sent down runs along the furrow made by the previous proprietor into this main stream. The right to have an artificial furrow, unless created by grant or agreement, can as a rule only be established by usage for a sufficient length of time, as the books say, by immemorial usage. This water-furrow which runs down from Polsmore on to defendant's land has been in existence a considerable period, but when it was first placed there is uncertain. No witnesses have been called who remembered its first construction. In finding out whether it has existed sufficiently long to create an accustomed flow of water, we must look at the evidence before us. If a claim to this channel had been set up as a right by the owner of Polsmore, or defendant, probably the Court would have put the onus upon them of showing that they had established this channel for a

sufficiently long period of time. But in this case it is the plaintiff who complains of a channel which was there before either of the parties in this suit became possessors of the properties, and which the evidence of all the witnesses went to show was there when they first knew the property. There was a strong presumption in this case that the furrow had been in existence for a sufficiently long time to justify the Court in saying that it is the accustomed way in which the drainage water from the upper ground has been sent down to the lower ground. Along the boundary between Polsmore and defendant's present property there was formerly a small sluit, which one witness described as being a sort of boundary ditch, but this witness states that notwithstanding this ditch the water from Polsmore crossed over to defendant's property at or near the same spot at which it now crossed. This witness saw it twenty-five years ago. This same witness says that the watercourse which now brings the water down from Polsmore was then in existence. No witness has been called who could give evidence of what existed before that time. This watercourse from Polsmore certainly was in existence when defendant's land was cultivated for the first time. It is clear, under these circumstances, the Court cannot hold, on the evidence led in this case, that defendant has done anything wrong in allowing the water to flow in what appears to have become its accustomed natural course. From the evidence, I am further inclined to say that the water naturally drains down to the locality of the Polsmore furrow, and that this furrow therefore does nothing more than assist the natural flow. This water in crossing defendant's property into the main stream does not injure defendant in any way. It is only that this surface or drainage water meets the watercourse at three distinct spots, instead of being spread over the whole surface. It has not been shown that the placing of the pipes has caused any damage. The mere fact of collecting water into this channel, and discharging it at these particular points into the watercourse does not bring any more water into the watercourse, but simply discharges the same natural drainage which find its way under any circumstances into the watercourse. The declaration shows that defendant has done absolutely nothing, but let the state of affairs which he found there when he first came into possession continue up to the present time. It must not be forgotten that the previous proprietor

of the whole property was the person who himself collected the water into the three drains, and he was the person who, for his own benefit, discharged it at the particular spots into the watercourse. This shows that the previous owner considered that this mode of sending the water into the watercourse was not one which would injure his property. There is a further claim in the case for damages for polluting the drainage water which finds its way down to plaintiff, but all that has been shown in evidence is that this land required manure for cultivation, and that manure has been used. Now, all drainage from land manured to some extent necessarily contaminates the water more or less. Defendant has no right to contaminate water and send it down to plaintiff's property, but the evidence shows that there has not been more than a customary user, and that there has been no contamination in a direct way. We have the evidence of the doctors called on both sides, and of the inspector, and one doctor and the inspector say there is nothing to complain of. It is impossible for the Court to hold on the evidence which has been led that there has been any damage proved to have been suffered by plaintiff through any act of the defendant in this case. At the same time, to prevent any misconception on this point, and to prevent any idea that defendant has a right to contaminate water or collect water so as to injure plaintiff in any way, the proper judgment in this case will be one of absolution from the instance on all claims, the claim for an interdict, the claim for damages, and the claim for a declaration of rights. Judgment will be for defendant for absolution from the instance, with costs.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Moore and Son.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

Ex parte THE COLONIAL GOVERNMENT. IN THE MATTER OF ACKERMAN V. THE COLONIAL GOVERNMENT. } 1901
Aug. 13th.

This was an application for a commission to take the evidence of Sir James Sivewright and of Mr. C. B. Elliott, formerly General Manager of the C.G.R. Railways, both of whom were in England, and whose evidence was material to the case. Messrs. Ackerman and Adamson were bringing an action for £20,000 against the Commissioner of Public Works, and the evidence of the two gentlemen named was necessary for the defence.

Mr. Searle, K.C., appeared for the applicants, and Sir H. Juta, K.C., for the respondents.

Mr. Searle read the affidavit of Mr. John Andrew Reid, attorney to the Government, who stated that the gentlemen named were necessary and material witnesses for the defence, and that it would not be safe to go to trial without having their evidence.

Sir Henry Juta read the affidavit of Mr. Adamson. Therein it was stated that summons was issued in April, 1901, at which time Mr. Elliott was in the Colony, and was well aware of the action of plaintiffs. All the accounts in connection with the suit were rendered before November, 1899. The Government had had time to apply for a commission before, if they had been so minded. Deponent stated that he verily believed that the two gentlemen named were not necessary or material witnesses, and that the application for a commission would delay plaintiffs in their claim.

In his replying affidavit, Mr. Reid referred to correspondence in connection with the case.

Mr. Searle said that there was an allegation in the declaration that the work was done on the instructions of Sir James Sivewright, who was the Commissioner of Public Works at the time.

Sir Henry Juta argued that the Government had not shown how the evidence of Sir James Sivewright and Mr. Elliott was

necessary or material. The correspondence, he argued, showed that they did not know that the evidence would be material.

The Acting Chief Justice: The application is made in connection with an action to recover £20,000 odd, less £5,000 paid on account for work done. The Commissioner at the time the work was alleged to have been done was Sir James Sivewright, and the head of the Railway Department was Mr. Elliott. Both of these witnesses are now in Europe, and defendants' attorney has been advised by counsel that they are material witnesses, and that it would not be safe to go to trial without them, or without having their evidence taken on commission. They, therefore, applied for this commission. The only answer to this is that the action has been pending a long time, that Mr. Elliott was in the Colony when the case was commenced, and that the evidence is not material. It is impossible for the Court to decide whether it is material or not. The case has been pending for some considerable time, and in face of the statement that the defendants could not safely go to trial without this evidence, the Court must grant the application. Mr. McLean, or, in the alternative, Mr. Mossop, will be appointed Commissioner to take the evidence of Sir James Sivewright and Mr. Elliot, and the defendants must be prepared to go to trial next term. Costs of the application were ordered to be costs in the cause.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP]

HENDRICKS V. HENDRICKS. { 1901.
Aug. 14th.

This was an action for restitution of conjugal rights, failing which for divorce, brought by the plaintiff, Rachael Catherina Hendricks, against her husband, Samuel Richard James Hendricks.

Mr. De Waal appeared for the plaintiff. The defendant had been duly barred, but appeared in person.

The plaintiff's declaration set forth that the parties were married in community of property at Mossel Bay on March 30, 1891.

There was no issue of the marriage. In January, 1896, the defendant, without any legal cause, deserted plaintiff, and so deprived her of her conjugal rights, and had continued to live separate from her, although she had frequently asked him to restore her conjugal rights before the commencement of this action. She therefore asked for a decree of restitution of conjugal rights, failing which for divorce, with costs.

Rachel Catherina Hendricks, the plaintiff deposed that after their marriage at Mossel Bay she and her husband lived happily together for a few years, but then witness became ill, and a coolness sprang up between them. Defendant tried to get away from her several times, and tried to get her to sign notes saying she would have nothing more to do with him. Witness would not sign those notes. In 1893 witness, with defendant's consent, went to Johannesburg. She then sent down money to defendant, and he followed her to Johannesburg five weeks later. They lived together in Johannesburg for some time. They frequently quarrelled, and once defendant threatened to kill her. In 1896 defendant went to Port Elizabeth. He said he was going on a holiday, but he stayed away. Witness wrote to him asking him to support her, and in return received a letter, in which he refused to send her any money. He said that she could come to him if she cared to, but if not, she could stay away. Since then witness had asked defendant to restore her conjugal rights, but he had refused.

The Acting Chief Justice: Are you prepared to go and join your husband?

Witness: No, my lord. He has ill-treated me, and once threatened me with a chopper.

Interrogated by the Acting Chief Justice, the defendant said that he was ready to take his wife back. He was a porter at Stuttaford's, and earned 27s. per week.

The Acting Chief Justice said that under the circumstances there was no use in making an order upon defendant to receive his wife back, when she would not go.

Mr. De Waal pointed out that in this case the defendant had been away from his wife about six years, and although he now said he would take her back, it would be seen from a letter he wrote after proceedings were taken, that in case she went back he was going to lead her a wretched life.

The Acting Chief Justice said a separation might be obtained if cruelty were proved, or a divorce if adultery were proved. Here, however, the wife said she would not return

to her husband, so there was no use granting an order for restitution of conjugal rights. Therefore no order would be made.

DRYDEN V. DRYDEN. { 1901.
Aug. 14th.

This was an action for divorce brought by Mrs. Caroline Dryden against her husband, Henry Francis Dryden, on the ground of his adultery. The parties were married at Johannesburg on November 26, 1894, but now resided at Cape Town. They were married in community of property, and there was no issue of the marriage surviving.

Mr. Benjamin appeared on behalf of the plaintiff. The defendant was in default.

Caroline Dryden, the plaintiff, deposed that she and her husband were married at Johannesburg in 1894. She lived with him until April 25, 1896, when the left her and lived at Johannesburg with the woman with whom he was alleged to have committed adultery. Defendant subsequently came to Cape Town on a visit, but returned to Johannesburg. Then in 1899 he again came to Cape Town, and had been living here ever since. One child had been born of the marriage, but that child was now dead. When her husband left her he made her an allowance for some time. There was no property in the estate.

Henry Dryden, defendant's brother, deposed that in 1899 defendant came to Cape Town and lived in his (witness's) house. He was accompanied by a woman, and they lived together in witness's house as man and wife. The woman was not the plaintiff in this case. The woman had two children by defendant. Defendant was cohabiting with that woman at the present time. She went by the name of Mrs. Dryden. Witness did not know until a few months afterwards that the woman was not defendant's wife.

The Court granted a decree of divorce with costs.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1901.
Aug. 15th.

Mr. C. de Villiers moved for the removal of the name of Cornelis Jakob Langenhoven

from the roll of attorneys and notaries of the Court, and for his admission as an advocate of the Court.

Order granted as prayed, and the applicant duly sworn as an advocate of the Court.

Mr. Close moved for the admission of Frederick Jacobus van Zyl as an attorney and notary of the Court.

Order granted, and the oaths administered.

PROVISIONAL ROLL.

WALKER AND CO. V. MAIN.

Mr. P. S. Jones appeared for the plaintiffs, and said this was to have been an application for the final adjudication of defendant's estate as insolvent, but the defendant, who was in prison, had written to an attorney, who had communicated with plaintiffs' attorneys, asking that the matter be postponed for a week. To this the plaintiffs had consented.

The matter was ordered to stand over until August 26.

HAVENGA V. PAGE. { 1901.
Aug. 15th.

Mr. B. Upington said he had been instructed to appear for the plaintiff in this application for provisional sentence, but defendant had now filed an affidavit which had only been placed in his (counsel's) hands that morning, and he therefore asked that the matter stand over so that a reply might be filed.

Mr. De Villiers, who appeared for the defendant, said he had no objection to the matter standing over, but he trusted they would have an opportunity to supplement their affidavit, which had been drawn up rather hurriedly.

Mr. Upington said that in that case the supplementary affidavit would have to be filed in time to give the plaintiff an opportunity of replying to it.

The matter was ordered to stand over until August 26.

ESTATE OF DAWES V. SCOTT.

Mr. A. Upington moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £125, less £30 5s. 10d., together with £38 9s. taxed costs.

Decree granted.

GERSTNER V. CAPES AND ANOTHER.

Mr. Solomon moved for provisional sentence against the defendant Capes only, for

the sum of £121, less £51, amount due on certain conditions of sale.

Provisional sentence against Capes granted.

GROENEWOUD V. GROENEWALD.

Mr. A. Upington moved for the final adjudication of defendant's estate as insolvent. Final adjudication granted as prayed.

BESTER AND CO. V. HIRSCHWITZ, AND ZEE-
DERBERG AND DUNCAN V. HIRSCHWITZ.

Mr. B. Upington appeared for the plaintiffs in both these cases, and asked that they be taken together. The first was for the final adjudication of defendant's estate as insolvent, and the second for the confirmation of a writ of arrest issued in respect of a debt of £123 15s. owing on a promissory note.

The order for the final adjudication of defendant's estate was granted.

As to the confirmation of the writ of arrest, Mr. Justice Jones pointed out that the estate being finally adjudicated, that could not now be granted.

Mr. Upington said that the writ of arrest was taken out before the provisional order of sequestration granted by Mr. Justice Jones, and the plaintiffs had acted perfectly right in taking it out. Therefore, they were entitled to their costs.

Judgment was given for the costs of the writ.

MOSTERT V. WHITE.

Mr. De Waal moved for provisional sentence on a promissory note for £100, with interest and costs of suit.

Provisional sentence granted.

BELLEVLIE PROPRIETORS V. JESSE COHEN.

Mr. De Waal moved for provisional sentence for £80 6s. 8d., due under certain conditions of sale, being the first instalment of certain pieces of land situated at Observatory, and part of the Bellevliet Estate.

Provisional sentence granted.

IRWIN V. REYNOLDS.

Mr. Alexander appeared for the plaintiff, and moved that the provisional order for the sequestration of defendant's estate be superseded and discharged.

Granted.

ILLIQUID ROLL.

SEARIGHT AND CO. V. BLACK.

Mr. Close moved for judgment for the sum of £120 19s. 4d., for dock dues, shipping charges, etc.

Judgment as prayed.

COOPER AND ANOTHER V. W. C. HARMAN.

Mr. Close moved, under Rule 329d. for judgment for the sum of £67 4s. 6d., goods sold and delivered, with expenses incurred, interest and costs.

Judgment as prayed.

SOWERBY AND WIFE V. COLONIAL SECRETARY. 1901.
(Aug. 15th.)

Marriage—Registration—Incomplete Certificate.

The marriage officer who had married applicants' had neglected to fill in or sign the register. The said marriage officer was subsequently deceased. The witnesses had signed the duplicate original register. The Colonial Secretary now refused to accept the incomplete register without an order of Court and applicants applied for such order.

Ordered, that the incomplete duplicate register be filed in the Colonial Office, together with copies of the affidavits and the order of Court.

This was an application on notice by Mr. and Mrs. Sowerby, calling upon the respondent to show cause why an order should not be issued authorising and ordering him to accept, receive, and enregister a certain incomplete duplicate original marriage register as proof and evidence of the applicants' marriage.

The facts were briefly these: On December 16, 1895, the applicants were married at the homestead on the farm Stoneham at Maritzani, in the division of Mafeking, by the Rev. A. B. Stanford, at that time rector of Mafeking. The petitioners and the witnesses duly signed the duplicate original marriage register, but the officiating clergyman neglected to fill in or sign the register, and died on December 27, 1895, without having completed either the original or duplicate

The Court directed the incomplete duplicate original register to be filed in the Colonial Office, together with copies of the affidavits and the order of Court.

The Court ordered the removal of the bar, the plea to be filed forthwith, and the case to be set down for the 18th September, by consent; costs of the application to be costs in the cause.

The Court ordered the matter to be postponed in order to allow the petitioners to file affidavits in support of certain additional statements mentioned by counsel.

The Court granted an order as prayed.

Mr. Close appeared for the defendant, and said that, while he did not wish to oppose judgment, he wanted to bring certain matters before the Court. The defendant was a solicitor of the Court, and he had been making every endeavour to get into communication with the persons who were to give him transfer, but these people were residing in the Sutherland division, which

was in a disturbed state. The defendant was anxious to pass transfer, and do everything possible in the matter. He had specially obtained a permit to proceed from Paarl to Sutherland for that purpose, but when he got the length of Matjesfontein he was not, owing to the disturbed state of Sutherland, allowed to proceed further. The defendant's position now was that, in case the Court granted the order, he wished to have a reply from the persons who were to pass transfer to him in case he was not able to carry out the order, and so technically be guilty of contempt of Court.

Mr. Justice Jones said that now the Court would only have to give judgment against the defendant. If there were any further application owing to defendant's non-performance of the order of the Court, then the Court would take into consideration the circumstances now stated.

Judgment was given as prayed.

DAVIS V. NELSON.

Mr. A. Upington moved for judgment, under Rule 329, for £195 16s., for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Judgment granted as prayed.

BALLANCE AND CO. V. S.A. ADVERTISING CO.

Mr. C. de Villiers appeared in this matter to move for judgment in default of plea.

Mr. B. Upington appeared for the defendants, and said that on the motion list there was an application by the defendants for removal of bar and leave to plead. The matter was before the Court a few days ago, when it was ordered to stand over so that an affidavit of merits might be put in. That affidavit he now put in.

Mr. Justice Jones said that defendants would be given leave to file their plea before noon to-day (Friday), defendants to pay the costs of removing the bar. The order for judgment could not now be granted, so costs to abide the result of the action.

COLONIAL GOVERNMENT V. MEINTJES.

Mr. Sheil, K.C., moved for judgment in default of plea for the sum of £264 18s. 3d., for the maintenance of defendant's wife in the Graham's Town Lunatic Asylum.

Judgment granted as prayed.

REHABILITATIONS.

Mr. Solomon moved for the rehabilitation of the insolvent estate of Thomas Augustus King. According to the schedules, the liabilities in this estate, which was surrendered in October, 1895, were £16,236, and the deficiency £4,492, but the actual deficiency turned out to be £11,540. The insolvent attributed his insolvency to trade competition and heavy working expenses.

An order was granted as prayed.

Mr. Solomon also moved for the rehabilitation of the insolvent estate of William King, which had been surrendered in 1894. The schedules showed liabilities £118, and assets £113, but as a matter of fact the assets only realised £14 10s., the whole of which amount was absorbed by the costs of liquidation.

Mr. Justice Jones asked why it was that the assets realised so little.

Mr. Solomon said that there was a property in the estate which had been purchased for £800, of which only £200 had been paid, but on going into the matter, the trustee had recommended that this claim be abandoned.

An order was granted as prayed.

GENERAL MOTIONS.

MURRAY V. COLONIAL GOVERNMENT.

This was an application under Act 23 of 1891, section 13, to fix a date for the trial by jury of this case, which is a claim for £850 damages, brought by the applicant against the Government.

Mr. Wilkinson appeared for the applicant. Mr. Sheil, K.C., for the Government.

The Court fixed Thursday, September 5, for the trial of the case.

IN THE MATTER OF THE PETITION OF MARIA CORNELIA EBDEN, MARRIED TO JOHN ALFRED EBDEN. } 1901. Aug. 15th.

Prodigal—*Curator bonis* appointed.

Mr. Currey appeared in support of the application, which was for an order declaring the said John Alfred Ebden a prodigal, and to appoint a curator of the joint estate. Petitioner, in her application, stated that her husband had never been in regular employment, and the petitioner had supported herself and her family. Her husband was addicted to drink, had squandered her money,

and had sold certain property in the joint estate. She accordingly asked that the respondent should be declared a prodigal, and that a curator should be appointed to the joint estate.

The Court granted a rule *nisi*, returnable on the 26th August, calling upon the respondent to show cause why he should not be declared a prodigal, and his property placed under curatorship, the rule to operate as an interim interdict, restraining the respondent from dealing with his property; the respondent also to show cause why he should not be called upon to pay the costs of the application.

On the return day the rule was made absolute, and Mr. Roos, secretary of the Board of Executors, was appointed *curator bonis* of the joint estate.

PROSSER V. PROSSER.

Mr. Solomon applied for leave to sue by edictal citation in an action brought by the husband against his wife for divorce. It appeared from the application that the respondent had been living in Cape Town with a man named Barron, but had subsequently left for Kimberley, where efforts had been made to find her, but without success.

Mr. Justice Jones said that apparently very little effort had been made to discover the whereabouts of the respondent. The Court would, however, allow the matter to stand over until Monday week for further affidavits as to the efforts—if any besides those mentioned—had been made to find the respondent.

MCKENZIE V. JOHNSON. { 1901. Aug. 15th.

Mr. Close, on behalf of the defendants, mentioned this matter, which was set down for hearing on the 16th inst., and applied for a postponement of the case until the November term. It appeared that the defendant was the master of the steamship Volage, now on the high seas, and that his evidence, which was essential in the case—which was a claim for work done in connection with the stevedoring of the vessel—would not be available until November or December.

Mr. Uppington, for the plaintiff, objected to the postponement. The case, counsel pointed out, had already been once postponed from the May term, and ample opportunity had been allowed for obtaining the evidence of the master of the vessel.

Mr. Close said the plaintiffs were amply secured, £344 having been paid in, which would cover both the claim and costs.

After hearing counsel, the application was refused, with costs.

Mr. Justice Jones, in giving judgment, said that in this case the first attachment of the vessel was in February last, and the summons in the action was issued in March. The declaration was filed simultaneously with the summons, and appearance was entered on March 4. The defendant was then barred, but not until April 6, although afterwards, on April 27, the plea was filed by consent, and immediately afterwards the case was set down. Therefore, as far as the plaintiff was concerned, he did everything possible to hurry on his case, which was set down for May 3. Then, at the request, apparently, of the plaintiff, the setting down was withdrawn, and on May 28 an application was made to the Court, with the result that the trial was definitely fixed for June 14. Subsequently another application was made for a further postponement, and the Court then set the case down to be heard on August 16. Now an application for a postponement was made, and the basis upon which the application rested was that the defendant had communicated with the owners, who, in a cable, said that the vessel was loading for New York, and from there the petitioners believed that it was just possible that the vessel would return to the Cape. That statement as to the possibility of then getting the captain's evidence was so vague and uncertain that no Court would be justified simply on an allegation of that kind in postponing the case indefinitely. It was just possible that the vessel might be back in November or December, but there was no certainty, and yet the Court was asked to postpone the case on that. The Court would, therefore, refuse that application, and the case would go to trial in the ordinary way. Should it subsequently appear that justice could not be done to the parties without hearing the captain, then the Court might make a further order in the matter.

REX V. SOLOMON. { 1901. Aug. 15th.

Habeas Corpus — Extradition —
Smuggling—Fugitive Offenders'
Act.

The applicant, who had been arrested in Cape Town under a warrant granted by the Military

Governor of Pretoria, applied for his release on the ground that the warrant was indefinite and did not state under what Transvaal law prisoner had been arrested.

Held, that as the evidence raised a probable presumption of guilt against the accused, and that as the offence was sufficiently set forth in the warrant, the application must be refused.

The affidavit of the applicant's agent showed, *inter alia*, that on March 29, 1901, the applicant had been committed for trial to the Cape Town gaol on a charge of fraud to await surrender under the provisions of the Fugitive Offenders' Act. That the said applicant had been arrested in Cape Town on a provisional warrant, granted upon the following telegram:

"February 8, Pretoria.

"Please cause Wheeler Joe Solomons to be arrested and sent here for defrauding Customs here. His brother Sam resides at the Fountain Hotel. He was formerly employed in the Transport Department, and left here last Sunday."

The above telegram was received from the military authorities at Pretoria, and the applicant aforesaid was thereupon arrested on a charge of fraud. No further charge was made in the warrant on which he was arrested; but subsequently, on the arrival of documents from Pretoria, it was stated that the said applicant had received a parcel of cigarettes through the post without paying Customs dues thereon. No mention was made as to what Customs Act had been infringed, and as there appeared to be no offence under the Common Law which could bring the said applicant under the Extradition Act, I took the following exceptions:

(a) That there is no sufficient evidence required by the Extradition Act to warrant the Court in committing the accused for trial, presuming the case to have been one of an ordinary preliminary examination held within this colony.

(b) That there is no evidence of the commission of the crime of fraud, for which alleged offence the accused has been arrested.

(c) That the only offence of which there is any evidence before the Court is one of having failed to pay certain Customs dues supposed to be due.

(d) That there is an entire absence of information of what law the accused is supposed to have contravened.

(e) That the offence of which there is the only proof—and which the accused denies—is not an extraditable offence within the meaning of the Fugitive Offenders' Act.

That as the fifteen days allowed by law will expire before the next sitting of this Honourable Court, and it is necessary to restrain the authorities from removing the said William Joseph Solomon out of the jurisdiction of the Court, I have to apply on his behalf for a writ of Habeas Corpus, pending a further application for his discharge.

Mr. Wilkinson (for the applicant): "Fraud," as stated in the warrant, is generally taken to mean a Common Law offence, and hence a man would be rather surprised who, having been charged with fraud, found on being placed in the dock that the charge was one of having contravened some Act, Besluit, or Proclamation: we do not know exactly what it was, as it was not shown in the charge. Where a charge is as vague as this; if the offence charged be under the Common Law, then admittedly such offence might be specified in general terms (e.g., theft, robbery, murder, etc.), but if a man is charged with a statutory offence, the terms of the Statute must be closely pursued in the indictment. Now here the defendant is accused merely of having smuggled some cigarettes into the Transvaal. But this is not an offence *per se*; and if it be an offence at all, it is so simply and solely in consequence of some Act of the legislative body of the Transvaal. Therefore the defendant is fully entitled to be informed by the indictment what law of the Transvaal has been infringed by his act. As to Transvaal law, we know that one Government has been overturned and another has taken its place. Since the overthrow of the former Government the legislation of that colony has proceeded by proclamation. We do not know what laws were in existence up to the date of the establishment of the new regime: we do not know what laws may have been overturned by the new Government, or what laws have been promulgated by proclamation.

[Jones, J.: *Prima facie*, where one regime has been ousted, especially by the British, the result is simply that the old laws remain in force—as in this country.]

That is the general principle, but it may not apply to specific laws. I am assuming, though by no means prepared to admit that

there is any proof, that the defendant has contravened some law of the country which has applied for his extradition. Again, before an extradition order can be granted the Magistrate must be satisfied that the crime has been committed, and satisfied, too, on evidence every whit as cogent as would be required to convict a man of crime in this country. That brings me to the point that the Statute which applicant is said to have contravened should have been fully set out.

[Maasdorp, J.: That would be so in the case of an indictment, but here we have to deal merely with a warrant. I can remember cases of warrants which described the alleged offence in very vague terms.]

In *Queen v. Job* (5 E.D.C., 188) it was held that if persons are charged with a statutory crime the Statute which they are alleged to have contravened must be cited. In conclusion, I have only to say that save for the evidence of the police-constable, there is nothing to show that there is any law of the Transvaal under which applicant could be charged, and this evidence, I submit, is not sufficient.

Mr. H. Jones (for the Crown): The whole of the argument for the applicant has been based upon a false assumption, viz., that applicant has been tried and convicted on insufficient grounds. It is only necessary for the Magistrate to have a *prima facie* case before him, in order that he may be justified in granting this order; and there is the evidence of the Customs officials to show that applicant has imported these cigarettes, and has not paid duty on them. This evidence would have been quite sufficient to have justified the Magistrate in committing the applicant for trial had his crime been committed in this country, and it is therefore sufficient to justify him in granting the extradition order applied for.

The Court refused the application.

Mr. Justice Jones, in giving judgment, said: This is an application by the applicant Solomon for a writ of *habeas corpus*, and the grounds on which the application is made are as follows: It appears that a warrant of apprehension for the arrest of the applicant on a charge of contravening the Gold Law was issued in the Transvaal by the Military Governor. Afterwards this warrant was sent to Cape Town, and before execution it was endorsed by the Acting Chief Justice. In consequence of this being executed here, Solomon was taken before the Resident Magistrate of Cape Town, who had

before him the evidence taken in Pretoria, as well as some evidence taken here. It matters very little whether the Extradition Act of this colony or the Imperial Fugitive Offenders Act applies, because the principle in both Acts is practically identical. The provisions of the Act applicable are that "a fugitive, when apprehended, shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction. If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of the Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom, to the Secretary of State, and if in a British possession, to the Governor of that possession." In this case there is a distinct charge of fraud alleged, which is a common law offence here and a common law offence in the Transvaal, and which is certainly punishable by more than twelve months' imprisonment with hard labour. I do not mean to say that in every case fraud is punished in that way, but that is the punishment which might be imposed. Now, in this case, the Magistrate had before him duly authenticated copies of the evidence which had been taken in the Transvaal, which was in accordance with the provisions of the Act. If he had wished, the Magistrate need not have called any witnesses here, but might have satisfied himself from the duly authenticated evidence before him, and the depositions taken in the Transvaal that there was a *prima facie* case, or that there was a probable presumption that fraud had been committed, the offence actually mentioned in the warrant. Here the evidence, I think, was justly considered by the Magistrate to raise a probable presumption. The only question therefore that remains is whether the charge of fraud as it appears in the warrant sufficiently indicates the crime which is alleged against Solomon or not. I think the warrant does show exactly what

was intended, viz., that the applicant was guilty of, to use an expression of *Van der Linden's*, wilfully defrauding of the public revenue. That offence falls under the crime of fraud, according to *Van der Linden*. As to whether it was a crime in the Transvaal, we have the evidence taken here of the officer of the Criminal Investigation Department at Pretoria, who stated that it was an offence punishable with twelve months' imprisonment or more. As to this witness's evidence, one would have thought that if Solomon intended to dispute this allegation, there would have been some cross-examination, but instead, we find that there was none whatever. The simple statement made on the Magistrate's record is "no questions." Therefore, I think, there was sufficient to justify the Magistrate in committing this man, in terms of the Imperial Act, and the terms of the Colonial Act are practically the same. Therefore the Court is not in a position to say that the Magistrate was not justified in committing the applicant. The application for a writ of *habeas corpus* must be refused.

Mr. Justice Maasdorp concurred.

[Applicant's Attorney, D. Tennant. jun.]

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), and a Jury.]

HOOGENDOORN V. ROSS. { 1901.
Aug. 15th.
" 16th.

Sale of land—Variance between diagram and beacons.

Prima facie, a person purchasing landed property is entitled to have transferred to him all the land bought. If the seller wishes to give transfer of less than the property sold, the onus is upon him to show that there had been a contract to accept such insufficient transfer.

The jury found for plaintiff for the cancellation of a parol contract of sale, for interest on the purchase money from the date of payment and for nominal damages.

This was an action brought by Johannes Stefanus Theron Hoogendoorn against Johannes Hennock Neethling Roos for the can-

cellation of a certain sale of property in Cape Town for the return of certain moneys paid by plaintiff to defendant, and for damages. Plaintiff's declaration was as follows:

1. The parties reside in Cape Town.

2. In or about the month of November, 1900, the defendant, through his duly-authorised agent, one Dillman, represented to the plaintiff that the defendant had certain ground for sale, situated in Cape Town, and exhibited to the plaintiff a sketch showing the said ground, and represented to the plaintiff that the land shown on the said sketch was the ground for sale, and that it could be conveniently cut up into lots for sale by reason of the said ground abutting on public roads. The ground so represented by the said Dillman as for sale is the ground shown on the annexed plan contained within the beacons A B C D E, and bounded by the roads shown thereon.

3. Therefore the parties proceeded to the said ground, and the defendant himself represented to the plaintiff that the ground he was selling was contained within the said beacons A B C D E, which beacons the defendant pointed out to the plaintiff, and the defendant represented to the plaintiff that according to his transfers and diagrams he was the owner of the said ground contained within the said beacons, and that it was bounded as aforesaid by the said roads.

4. Thereupon, and induced by the said representations, the plaintiff agreed to buy the said land, enclosed within the said beacons, and bounded by the said roads, as represented aforesaid, from the said defendant for the sum of £11,000, of which £1,500 was to be paid in cash, the balance of the price, exclusive of £1,000, being payable on the 1st March, 1901, when it was to be settled partly in cash and partly by plaintiff passing a bond in favour of the defendant, and transfer was to be passed to the plaintiff, the said £1,000 being payable out of the proceeds of the sale of a certain property in Bree-street, Cape Town. The plaintiff duly paid the defendant the sum of £1,500 in cash on the 24th November, 1900.

5. The plaintiff was ready and willing to perform his part of the said contract, but the defendant neglects and refuses, and is unable to pass transfer of the said ground.

6. The defendant is not the owner, and is unable to pass transfer of the portions of the said ground marked in blue on the annexed plan, and which abut on the Belle Ombre road, and the plaintiff says that the aforesaid representations by which he was induced to

buy the said ground were wrongful, false, and fraudulent, and made with intent to induce him to buy.

7. The said portions so marked in blue constitute a very material and substantial part of the land sold by the defendant, and without them the land is not suited for cutting up into lots.

8. The said land sold has increased in value since the date of the sale, and the plaintiff, by cutting up the land into lots, which was the purpose for which he bought the land, as the defendant well knew, could have sold the same for a greatly increased price, and the plaintiff has by reason of the premises suffered damage to the extent of £5,000.

9. The said sale, by reason of the false and fraudulent misrepresentations aforesaid, in a material and substantial matter is, the plaintiff claims, void and of no force or effect, or otherwise the plaintiff says:

10. That he begs to repeat the paragraphs 1, 2, 3, 4, 5, 7, and 8.

11. That the defendant is not the owner, and is unable to pass transfer of the portions of the said grounds marked in blue on the annexed plan, and the greater portion of which abuts on the Belle Ombre road, and the plaintiff says that the difference between the land sold to him and which the defendant is able to transfer is so material and substantial, and that the misrepresentations and misdescriptions of the property by which the plaintiff was induced to buy the said land are so material and substantial that the plaintiff is entitled to rescind the said sale.

Wherefore the plaintiff claims:

(a) An order declaring the said sale to be cancelled and of no force or effect.

(b) A refund of the sum of £1,500 paid to defendant, with the interest of 6 per cent. from the 24th November, 1900.

(c) The sum of £5,000 as and for damages.

(d) Alternative relief.

(e) Costs of suit.

To this declaration the defendant pleaded as follows:

1. He admits paragraph 1 of the declaration.

2. As to paragraph 2, he specially denies that Dillman was, as alleged, his agent, or made any representations to the plaintiff for him or on his behalf, and he begs to refer this Honourable Court to such proof as the plaintiff may adduce of the alleged representations and of the plan annexed to the declaration, the correctness of which he does not admit.

3. He has ascertained that the said Dillman did in fact produce to the plaintiff a sketch purporting to represent the defendant's ground for sale, but he has not seen the said sketch, and therefore begs to refer this Honourable Court to such proof of such sketch as the plaintiff may adduce.

4. On the 22nd day of November, 1900, on the ground in question, and in the presence of the said Dillman, the defendant sold and the plaintiff bought certain ground, the property of the defendant, for £11,000, whereof it was agreed that £1,500 should be paid forthwith, £1,000 when the plaintiff had received payment for certain property in Bree-street, which he had sold, and £8,500 should be settled by the payment of such amount as the plaintiff might desire in cash, and by the passing of a bond bearing interest at 6 per cent. for the balance.

5. It was agreed that the plaintiff should receive possession and such transfers as the defendant held on the 1st March, 1901.

6. The defendant denies that he pointed out the beacons A, B, and D, E, to the plaintiff, but admits that he indicated the boundaries of the ground sold, and that it was bounded by certain roads.

7. He specially denies that he represented to the plaintiff that, according to his transfers and diagrams, he was the registered owner of all of the ground sold, and says that he informed the plaintiff in accordance with the facts that his title and diagrams did not cover the entire extent of the property sold, and that, if the plaintiff desired, as was the case, to cut up the ground into lots, he would have to obtain an amended title and diagram at his own cost, to which the plaintiff agreed.

8. The portion of the ground sold, which was and is not included in the title and diagrams held by the plaintiff, includes not only the portion coloured blue in the plan annexed to the declaration, but also a small triangular piece immediately adjoining, and the defendant and his predecessors in title have for a period far exceeding the period of prescription occupied the said portion as of right, and the defendant is by prescription the owner thereof, and lawfully sold the same to the plaintiff, who bought the same with just knowledge as aforesaid of the facts.

9. The plaintiff paid the sum of £1,500 aforesaid on the 24th November, 1900, but has made no further payments, nor has he taken possession of the said ground or transfer of such part as the defendant holds by title and diagrams, but the plaintiff twice

requested and was allowed further time—first, to the 31st day of March, 1901, and, secondly, to the 31st day of May, 1901, in order to complete arrangements whereby he was seeking to obtain an amended title to the whole of the said ground, but on the 31st day of May the plaintiff wrongfully and unlawfully repudiated the purchase of the said ground.

10. Save as aforesaid, the defendant denies all and singular the allegations of fact and conclusions of law contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the declaration.

11. He is and has at all times since the 1st day of March, 1901, been ready and willing, and hereby again tenders and offers to pass transfer as he holds it of the land sold, and to give possession thereof, including possession of the portion above mentioned in paragraphs 7 and 8 hereof, upon compliance by the plaintiff with the terms and conditions of the sale as to payment and passing of the stipulated bond.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

II. For a claim in reconvention, the defendant (now plaintiff) says as follows:

1. He begs to refer this Honourable Court to the several paragraphs of the foregoing plea.

2. All things have happened, all conditions have been performed, and all times have elapsed, necessary to entitle the defendant (now plaintiff) to demand payment by the plaintiff (now defendant) of the sum of £1,000, with interest at 6 per cent. from the 1st day of June, 1901, and to demand further that the plaintiff (now defendant) shall, upon receiving possession of the ground sold and such transfers as the defendant (now plaintiff) holds, and hereby again tenders, either to pay the whole of the remainder of £8,500 in cash, with interest at 6 per cent. from the 1st day of June, 1901, or to pay such portion thereof in cash as he may desire, together with interest as aforesaid, and to pass a bond bearing interest at the rate of 6 per cent. per annum for the balance, but the plaintiff (now defendant) wrongfully and unlawfully neglects and refuses to make such payment, or to carry out his contract with the defendant (now plaintiff).

Wherefore the defendant (now plaintiff) prays for:

1. Judgment for the sum of £1,000, together with interest at 6 per cent. from the 1st day of June, 1901.

D 3

2. An order compelling the plaintiff (now defendant) forthwith, upon receiving possession of the ground sold and such transfers as the defendant (now plaintiff) holds, and hereby tenders, either to pay the whole of the remainder of the purchase price, to wit, £8,500, in cash, with interest reckoned as aforesaid, or to pay such portion thereof in cash as he may desire, together with interest as aforesaid, and pass a bond bearing interest at 6 per cent. per annum for the balance, or that he may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for the plaintiff. Mr. Benjamin (with him Mr. Gardiner) for the defendant.

Charles Marais, Government land surveyor, said he was retained to watch the interests of the Cape Town Council in regard to amended titles of land. He knew of an application for a diagram of property sold by Mr. Roos. He went into the matter at the time. The plan produced and handed to the jury was correct. Amongst the diagrams witness had examined was the one of 1892. On this a portion of the ground, including that shown as a private road, was marked as not being covered by title. According to the title the proprietor of Roos' land was given the right to make use of the roads marked on the diagram. The Bellombre-road was marked out in 1892 or thereabouts. The road was cut off from the Leeuwenvoet property, and the small triangular piece shown on the plan fell on the Leeuwenvoet side. Defendant had no title to the strip marked blue on the plan. In regard to another bit of property not marked blue, the last transfer witness could find was to one Scholtz, in 1868. Along the Bellombre-road there was a wall and fence, and the whole property lay between fences with the exception of one part.

In cross-examination by Mr. Benjamin, witness said he did not prepare the plan produced. It was substantially correct. Witness had not inquired into the question of whether Roos had acquired the property not shown on the plan by prescription. Witness did not know the conditions upon which the private road was granted. It was difficult to say how old the fence at the private road was. The private road did not look as though it had been used by the public.

Mr. Benjamin explained that the defendant did not claim title to the little bit of land shown with the red line on the bottom in the plan annexed to the declaration.

That was still in Jurgens's estate, but defendant had arranged to give transfer of this to plaintiff.

Witness, further cross-examined, said he had not gone into the question of the value of the property.

Re-examined by Sir Henry Juta: The taking away of a large portion of the frontage would depreciate the property in value considerably.

Johannes van Hoogendoorn, plaintiff, carrying on business as an undertaker, said he called on business last November at the Board of Executors, and saw Mr. Dillman. Witness had just sold certain property in Bree-street. Mr. Dillman mentioned that a Mr. Roos had a fine property, for which he wanted £12,500. He also suggested witness should make an offer, and produced the sketch (put in). The sketch showed certain property bounded by certain roads. Mr. Dillman told witness where the property was, and described it to witness. He spoke about cutting up the property for lots, and said it would make about forty-two or forty-three lots. Witness wrote forty-three lots as a memorandum on the plan at the time.

The Acting Chief Justice, addressing the jury, said that any conversation between Dillman and plaintiff was irrelevant unless witness could prove Dillman's agency.

Proceeding, witness said that Dillman told him the house was valued at £2,000. Two days afterwards witness met Mr. Dillman in Long-street, and they went to see the property in Kloof-street. They walked right round the property, Mr. Dillman pointing out the boundaries. They then met Mr. Roos, who took him to the gate at the corner of Kloof-road, and took him along the Bellombre-road. They went up Kloof-road, and discovered a peg there, and afterwards they went all round. It was bounded by Warren-road, Bellombre-road, Lawrence and Kloof roads. Witness saw watercourses on the property, and asked whether there were any servitudes. Roos said it was all free. They then discussed the price, which Roos fixed at £12,000. Witness asked for the diagrams, but Roos said the diagrams consisted of so many small pieces that witness would not understand it. Roos recommended having a new diagram made at a cost of about six guineas. Witness then agreed to buy the property within the fences. Witness bought it for speculative purposes to cut up and sell.

If you had known that there were disputed pieces of ground would you have bought it?—I wouldn't think of it, wouldn't look at it.

Proceeding, witness said that on November 24 he paid £1,500 deposit, and got the receipt produced. That was witness's contract of sale. Witness then employed a surveyor to make a new diagram. Transfer was not to be given till March 1, as Mr. Roos said he had to look out for another place, and wished to stop on until then. Witness went to Roos about the end of February, and Roos asked if he might stop on longer, as he had not yet got a place. He had, he said, bought a house, but it was on a lease to Mr. Brown till the end of July, when Mr. Roos would enter his new house. On March 20 witness received a note saying Roos would go on April 30. Witness saw Mr. Roos, and said that was not according to the agreement. There was then added to the agreement that witness was only to pay interest till June 1, and that witness was to receive possession on May 1. The diagram never came from the surveyor, and it was at the latter end of May that witness first found out that Mr. Roos would not give transfer, and was not the owner of the property. Witness found that out by asking the surveyor what was the cause of the delay in transfer, and the surveyor showed him on the diagrams certain portions which were not covered by Roos' titles. Witness saw Roos about it, and the latter said the ground was covered by prescription and that witness must fight it out with the Town Council. Witness said he could not do that, and insisted on having transfer on all the land, and went to see his legal advisers. Witness knew nothing about the deficiency in the title till he found it out from the surveyor. Witness got a letter on May 31, sending him the key. Mr. Roos was, he believed, in possession of the house during May. Witness returned the key. The cutting off of the land without a title took away the best portion of the estate, fronting on Bellombre-road, and without that the estate was useless to witness. Witness could never have got forty-three lots out of the estate. The most was thirty-seven, and these would have sold at about £450 each. Altogether he estimated that by cutting up the estate and reselling he would have made fully £13,000. As the estate was now it was useless.

Cross-examined: Witness was offered £600 for one corner lot. It would cost about £2 a foot to cut up the land. Witness admitted that he had paid far too much for the property, but he had paid that amount on account of misrepresentation.

The Acting Chief Justice: There is no complaint of misrepresentation.

Mr. Benjamin: The real fact is, Mr. Hoogendoorn, that you have made a bad bargain, and want to get out of it?—That's your idea, not mine.

Proceeding, witness said he had never dealt with such a big property before. Witness instructed Mr. Teubes, the surveyor, to make a new plan. Mr. Teubes got defendant's title deeds from the latter's attorneys. Witness had heard that Mr. Teubes had to make application to the Town Council in respect of an amended title. Witness had never seen Mr. Teubes's correspondence with the Town Council. Mr. Teubes told witness that the Town Council had refused the application at the latter end of May.

I put it to you, that as soon as Mr. Teubes received Mr. Roos's title deeds, he communicated to you that there was a portion of land which was not covered by the title deeds?—Mr. Teubes never told me that.

Witness was in Teubes's office on several occasions when the clerk, Smith, was present. Mr. Teubes never told witness about the deficiency in the title deeds on those occasions. Witness had known Mr. Dillman for some time, and might have asked him to mention if he heard of any little speculations in land. Witness never remembered Mr. Dillman suggesting that he should form a syndicate to buy the property. Mr. Dillman said he was trying to form a syndicate, but never asked witness to join. Mr. Dillman never asked witness to take shares in a syndicate, and witness never said that the syndicate must not be too large, and that he would take two or three shares. Mr. Dillman asked witness to see the property, but witness never asked Mr. Dillman to take him there. When witness met Mr. Roos on his property, Mr. Roos did not take him right round the property. Witness did not go down to the orchard with Mr. Roos. Mr. Roos said he would take £11,000 for the property, but would pay no brokerage or anything else.

I put it to you that Mr. Roos told you a portion of the land was not covered by titles, and that you would have to fight it out with the Town Council?—I never heard a word of that till I saw the pleas.

Didn't Mr. Roos suggest that you should employ Mr. Marais to go into the question of the titles?—No.

Didn't he promise to assist you as far as he could to get your amended titles?—No. Proceeding, witness said that a few days after the sale he went to defendant and asked him to cancel the sale, as the ground was not what it was represented to be. Wit-

ness offered Mr. Roos £1,500 to cancel the sale.

The fact was, you had made a bad speculation?—No, that wasn't it. I was "ver-neuked."

Are you willing to take transfer now?—Yes, because the ground has considerably increased in value since.

Supposing we can give you transfer in a month, are you prepared to take it?—(Witness made no reply.)

The Acting Chief Justice: It is on the question of damages. Are you prepared to take transfer in a month?

Witness: I am not prepared to say.

James Sibbett said he was a broker carrying on business at Cape Town, and was a member of the partnership firm of Sibbett and Stephan. Witness had had a conversation with one Labron respecting the property, with a view to witness selling the property as Roos wished. Labron gave witness particulars verbally. Labron had a paper before him, and witness took down these particulars in Labron's presence. Witness copied the particulars on a piece of paper, and afterwards entered it in the brokers' book. He was not sure of the accuracy of these particulars as he now had them. Witness advertised the property for sale. Witness asked to see the diagrams. Roos said he had a number of diagrams, and was going to get an amended diagram. He could not let witness see the diagrams before this was done. This was in November. Witness got the dimensions of the property. The value of the property would be depreciated very much if there were no title to the Bellombre-road. The frontage to this road was good, and the loss of it would depreciate the property, in witness's opinion, to the extent of from 25 to 30 per cent.

Cross-examined: Witness was not sure of the particulars which he took concerning the property. His conversation with Labron was more in the nature of a preliminary talk. There was nothing really definite about it. The property was worth more at present than when purchased. It was not at the time of the sale worth the amount paid by Hoogendoorn, even if the disputed portions were included.

By the Acting Chief Justice: In June last, £11,000 would have been a high price for the property. He did not think it would be worth £11,000 as a speculation.

Richard Rosenthal, broker, Cape Town, said he knew Dillman, who was a clerk under Roos, in the Board of Executors' office. Last year Dillman told witness of some land Mr.

Roos had for sale. Witness sold this land, and afterwards went to see if there was any more land to sell. He saw Dillman and Roos in connection with the matter. Dillman gave witness a sketch of the property now in question. On this sketch a calculation was made, showing the property divided into forty lots, valued at £500 each. Witness tried to sell the property at £12,000, which was the figure stated. Witness failed to sell the property. During the negotiations he saw Dillman and Roos. The latter never disputed anything said or done by Dillman. Witness would not have tried to sell the property if he had known Roos did not have the transfer of portion of the property, but only claimed a prescriptive title. While witness was still negotiating, he received a note from Roos telling him that the property had been sold. The Bellombre frontage was a valuable part.

Cross-examined by Mr. Benjamin: Witness was given the figure of £12,000 by Mr. Roos. Witness thought it a fancy price. Roos was not anxious to sell. Witness saw Hoogendoorn after the sale. He offered to sell at a sacrifice, complaining that he had been done. His allegation was that the frontage on the Kloof-road was only 160 feet or thereabouts, whereas it was represented to be 200 feet. Dillman was present.

Re-examined: Dillman admitted that he had made a mistake, and that the frontage to Kloof-road was less than he had stated it to be. He said he had acted *bona fide*.

Wm. Cook, broker, Cape Town, said he had sold many thousands of pounds worth of property in Tamboer's Kloof locality. The Bellombre frontage was the best portion on the ground shown in the plan, with the exception of the little frontage in Kloof-street. He estimated that the ground would decrease in value to the extent of £3,500 if the frontage of Belle Ombre road were cut off. In June last the value of the property would be about the same as at present. He had gone into the matter, and he considered the whole round was worth £1,200 if cut up.

Cross-examined by Mr. Benjamin: Supposing we could give you the registered title to-morrow, would you take it at £11,000?

Witness: Well, that wants a little explanation. It may be worth that; it is worth that, but in cutting it up there would be some expense in connection with it. There would be the brokers to pay, in the first place.

It would take the edge off the profits?— I would give £10,000 for it myself, and I think it is worth £12,000.

I did not consider the property to be worth £11,100 for speculative purposes in November last.

Sir Henry Juta closed his case by handing in certain letters, etc.

Mr. Benjamin called

George Wm. Dillman, clerk to the Board of Executors. He said he was never appointed agent by Mr. Roos in regard to the sale of the property. Witness knew that Mr. Roos had the property for sale, and he knew of the sale to Scholtz through Rosenthal in September of part of the property. Witness was told the price of the property by Mr. Roos. Defendant had not given him a plan. Witness obtained the plan in the office. Witness knew Hoogendoorn before the sale, and the latter had asked him if he knew of any good property to let him know. Witness had the idea of getting a syndicate to take the property, and he told Hoogendoorn of this when the latter called and asked him if he had anything good. Hoogendoorn said he would take two or three shares, and he asked to be shown a plan. Witness showed him the sketch produced, which he (witness) had drawn up for his own information, in order to determine how many lots could be made, and what they would realise. Witness afterwards met Hoogendoorn casually in the street, and the latter asked him to take him to the property. On the way up Hoogendoorn mentioned that he thought of buying the property himself. Witness referred to the risk of one man taking it all, but Hoogendoorn said he could not make money without risk, and that if it failed he could only go bankrupt. They went around the property and met Mr. Roos, who accompanied them over the ground. Roos did not, however, go to the boundaries. Hoogendoorn told defendant he had come to see his property. Defendant told him that whoever bought the land must get an amended title, as there was a piece of land not covered by title. Witness was perfectly certain that Mr. Roos said this to Hoogendoorn. He further said that he would bear no expense in getting the amended title. Roos named £12,000 as the price, but afterwards agreed to sell for £11,000 net. The bargain was closed. Hoogendoorn subsequently told witness that he had made a bad speculation. Mr. Roos, when on the land, told Hoogendoorn that the land was

within the fence. He pointed out where the land not owned by him under the title lay.

Cross-examined by Sir Henry Juta: Roos did not mention that the land not covered by the title was along the Bellombre-road. He pointed in that direction. Hoogendoorn did not ask the exact place where this land lay. Witness did not know of this part of the land not being covered by title until then. Hoogendoorn did not ask how much was the extent of the land, or where the land was that was not covered by title. It never struck witness to ask. Nothing was said about prescription. Witness gave Rosenthal a plan in order that the latter might try to get up a syndicate. The writing on the plan showing a calculation of forty plots at £500 each was not witness's. The Bellombre frontage was valuable. Witness first found out the extent of the ground not covered by the title a month or two ago when he saw the plan on which it was marked blue.

He would not have bought the property if he knew this part not covered by the diagram would not be got, and if he knew there was no possible way of getting the title.

If you had bought it, you would not have expected to go to law for this piece; you would have expected to have it transferred to you?—Oh, yes.

Johannes Enoch Neethling Roos, the defendant in the action, said he never gave Dillman any authority to act on his behalf in the matter of the sale of this property. The property had been in the family since 1873. Dillman told witness that he was getting up a syndicate to buy the property. Witness took little notice of this, but mentioned the price. On the 22nd November witness met Hoogendoorn and Dillman, and Hoogendoorn said, "We are coming up to see the property." Witness took it that by "we" he meant the syndicate. Witness asked him if he knew the extent of the property, and he said he did. Witness pointed out two beacons on the property. He went around the property with them, and when standing near the house, witness pointed to the strip of disputed ground, upon which an oak tree stood, and said that anyone purchasing the ground, and wishing to have it divided into plots, would have to get an amended title, because there—and he indicated the place—was a strip not covered by the title. Hoogendoorn said he thought he would buy the property, and witness named £11,000 as the net figure, saying he would

not pay brokerage or the cost of getting an amended title. Terms were agreed upon for the sale of the property. Witness, in 1882, bought the property from his father. That road was then put down on witness's transfer. This was the first time it was put in on a transfer diagram. It was not really a road. It could hardly be called a garden path. It was grassy, and witness had fed his cows upon it. Witness and his father had always occupied the property upon which the private road was shown without let or hindrance. Witness purchased a piece of ground on the Leeuwendvoet Estate for his father, who, in exchange, gave him his right to the disputed strip of property over which the private road ran. Included in the property sold by witness to Hoogendoorn was a small strip, four or five feet in extent. This, witness now found belonged to Jurgens, but witness had arranged to have it transferred to Hoogendoorn. The receipt did not contain the complete terms of the contract. Hoogendoorn asked witness to hand the diagrams to his surveyor, Mr. Teubes. Witness handed the diagram to Messrs. Sauer and Standen for drawing up the declarations. Afterwards plaintiff wanted to cancel the sale, but witness could not do that, as he had already bought another place. Hoogendoorn wanted to cancel it even at a loss of £1,500. When witness sent the key, Hoogendoorn returned it, and wrote to say that he repudiated the transaction, as witness could not give him transfer of the property he had sold. This was on May 31, and witness was astonished to receive the letter. Witness replied that he was prepared to give plaintiff transfer in terms of the provisions of the receipt.

Cross-examined by Sir Henry Juta: What terms are not contained in this receipt?

Witness: That about the land not covered by transfer.

You say it contains everything else?—Not quite.

Well, what else of the contract should it contain except this about land not covered by transfer?—That is all as far as I can see.

This about the land not covered by title is a very important omission—quite as important as anything else in that receipt. The matter of the fruit trees and all those little details were put in, but the important point that the transfer did not cover all the ground—was that too unimportant to put in?—I never thought of that. Our contract was so clear. That was an omission from the receipt.

You admit you sold land of which you could not give transfer?—Yes, but which belonged to me.

Your attorneys applied for an amended title?—Yes, for Hoogendoorn's benefit.

They applied in your name and it was refused. You cannot get it?—I can.

Then why couldn't you get it?—For the simple reason that the surveyor went to work the wrong way I am informed.

In further cross-examination witness said that when the sale was agreed upon, nothing was said about prescription. Hoogendoorn never inquired the extent of the property, nor did he ask if there were any servitudes. It was very nearly dark when Hoogendoorn came to the property, and there was no time to talk of these things. Witness did not tell Sibbett that he (witness) was going to get an amended title. Witness was astonished to find Sibbett had advertised the property for sale. Witness did not employ any brokers to try to sell the property. He did not tell any brokers anything about a prescriptive title.

Re-examined: The receipt was only an acknowledgment roughly drawn up by witness of the receipt of the £1,500. The receipt was imperfect in certain respects, but would have been made out properly if it had been drawn up by an attorney.

By the Court: During the time witness and his father had the property they had made no effort to get a proper title of the land over which the private road ran. He did not want to go to the expense, as he had no intention of selling the land until this boom in land tempted him.

The Acting Chief Justice: Why have you not taken steps to give transfer since the summons was issued in June?

Witness: In this case I have acted more or less under the advice of my attorneys.

Sir Henry Juta put in certain documents obtained from the Town Council relative to an application in 1886 in respect to getting an amended title to include the property marked blue on the plan attached to the declaration.

Mr. Roos was recalled, and questioned by Sir H. Juta in respect to these. The witness said that in 1886 he employed Mr. Maskew, who was his brother-in-law, to make a certain application to the Town Council. This application was to fix certain boundaries in connection with this disputed ground. The plan produced by counsel was framed by Mr. Maskew on November 2, 1886. Mr. Maskew was acting for witness and his

father. Mr. Maskew was asked to apply to the Surveyor-General for an amended title, and amongst the documents was one which was described as being an explanatory plan to accompany an application for amended title by Mr. J. H. N. Roos. This was witness. The private road, marked on that diagram as a common road, was not claimed on that diagram by witness. It was claimed by his father. Witness got a consent paper from the Town Council to the amended title, but it did not go through. Property was very cheap then, and he could not afford the expense of getting it through.

Sir Henry Juta closed his case.

The Acting Chief Justice said that he could not see how defendant could claim the ground then. It belonged to his father. His lordship also remarked that the term common road was clearly a mistake. It should have been private road.

Kenneth Nicholas Teubes said he was the surveyor employed by Mr. Hoogendoorn, by whom he was subpoenaed, but not called in this case. Witness, in investigating in the Deeds Office and Surveyor-General's office, came across the title deeds of Scholtz. As witness made his discoveries he always reported to Hoogendoorn. On January 17 there was a communication from Messrs. Sauer and Standen to the Town Council. A diagram was prepared some time before this, and witness showed it to Hoogendoorn and explained it to him. Another diagram prepared by witness showed the ground not covered by title, marked in blue. Witness could not swear to having shown Hoogendoorn this diagram before the 17th January. There was a letter on March 6 from the Town Council objecting, as the ground was not covered by title. Witness reported everything to Hoogendoorn, but he could not positively swear to having told him specifically about this land not covered by title when he made the discovery. Most likely he did.

Mr. Benjamin: At any rate Hoogendoorn knew of it in March?—Yes.

Cross-examined by Sir Henry Juta: It was necessary to have the consent of the Town Council before going to the Surveyor-General to get an amended title. Witness was of opinion that the Town Council had no right to the land, and that the Council would fail to establish the right. In trying to get an amended title witness acted on the precedent of the Locuenvoet property, in regard to which an amended title was obtained. This he considered the right procedure.

Marthinus Johannes Spengler, seventy years of age, said he knew the property, and knew that the Belle Vue boundary was considered to be the wall at the Bellombre. The wall was still there. There was no vacant land between the two properties.

Henry Hamilton Jones, auctioneer, said he valued the property in question at not more than £5,000 for speculative purposes. He believed this was what it would fetch at public auction.

By Sir Henry Juta: He estimated that there would be twenty-four lots, each 100 x 50, and he valued these at £150 each on an average.

Joseph Fock, sworn appraiser and valuator, for the Town Council, said he estimated the value of the property at £7,500.

Sir Henry Juta, K.C.: A written contract cannot be varied by oral evidence, especially as to important matters. It was not possible that defendant could have forgotten to say that he had no title to the land on the Belle Ombre-road. He said his property abutted on that road; and it did not. He cannot now be heard to say that he forgot to insert the words "save such portions as abut on the Belle Ombre-road," because such a clause would have rendered the contract meaningless. In his evidence defendant said: "The land I sold to Hoogendoorn is that included in the receipt of November 24." Then in his letter of June 1 plaintiff said he was prepared to give transfer of the property as sold. It now seems that he has not the land, and cannot give transfer. When it came to the pleadings, defendant offered transfer of what he had no title to, and so on an £11,000 transaction, we are asked to take possession of land not covered by title, to sit down on it, and to wait for the Town Council to come and turn us out. This is not the footing on which landed properties are usually bought. People do not buy lawsuits with land. The land in dispute is a material portion of the property, and of this portion defendant cannot give transfer. To this his defence is that he told Hoogendoorn that that ground (indicating it by a sweep of his arm) was not covered by title. I could have understood the defence had he told Hoogendoorn that there would be no difficulty in getting title. But, of course, defendant could not say that, because we cannot get title now. Then as to the evidence. Defendant's chief witnesses were Dillman and Roos. According to his own account, Dillman used to amuse himself during office hours by mak-

ing little plans of this property for his own amusement, and he then used to hand them to any brokers who might happen to drop in. But surely he would not have made these plans unless he had had something to do with the sale of the property. He himself said that he would not have bought the property if he could not have got possession of the land not covered by title. In short, defendant engaged to give transfer, and he cannot do it, and therefore we are entitled to cancel the contract of sale, to the return of our money paid, and to damages. As to damages, the value of the property has increased, and we have suffered by not getting transfer.

Mr. Benjamin: Dillman did not make plans for his own amusement. He was trying to form a syndicate to deal with this property. As to the claim for damages, plaintiff has asked the modest sum of £5,000, and yet in last November he was so anxious to forego the sale, that he was willing to sacrifice £1,500 to get out of it. He went to broker after broker, and hawked the property over the whole town to get rid of it. All the witnesses (with the exception of Cooke) considered that the property was very much over-valued. Cooke considered the property worth £11,000, but frankly admitted that he would not give that sum for it. Jones valued it at £5,000, and Fock at £7,000. This is quite sufficient to show what damages have been sustained. Coming to the main question, viz., the cancellation of the contract on the ground of misrepresentation. The only point in our case on which the plaintiff has been able to fix is the receipt, in which defendant admitted that he had received £1,500. But that was a mere receipt, and not a contract. It was not drawn by a skilled attorney. The evidence of plaintiff's witnesses was far from conclusive, and their demeanour was well worthy of observation. Teubes got the diagrams as far back as last November. Is it to be supposed that holding these diagrams, and therefore knowing that a portion of the ground was not covered by title, he kept all this knowledge to himself? It is very significant that plaintiff has not put him (his own surveyor) into the box, not even to prove his own plan. The fact that plaintiff took no steps at the time to repudiate the sale showed that he quite understood what he was about, and well knew what he had bought. I would, therefore, ask you to conclude that when the property was sold on November 22, Roos told him that the whole of the ground was not

covered by title, and that now finding he has made a bad speculation, he wishes to get out of it. What then has plaintiff acquired by this sale? First of all he has acquired the property covered by the diagram, which will be transferred in the ordinary way. He has also acquired the rest of the property not so covered, but which had been acquired by prescription, and for this an amended title can be obtained. It is nothing uncommon to find that the diagram attached to a title does not exactly represent the land held under such title. But it is quite open to plaintiff to get his diagram rectified, either under the Land Beacons Act, or, if he has held the land for thirty years, under the Derelict Lands Act. As to our title by prescription, that is proved by the evidence of Jurgens and Spencer as to the boundary walls. See *Theron v. Schoombie* (14 S.C.R., 192), and particularly p. 198.

Sir H. Juta (in reply): Defendant having sold this land at twice its value, and then being unable to give transfer of the half of it, comes and asks you to be easy with him, because he has made another speculation with the money he got out of us. First of all, he cannot get over the receipt. The writing of an ordinary receipt is a very simple matter: but Roos acted like a shrewd business man, and set down what he was supposed to have given for the £1,500. He wrote out the whole contract of sale, the amount of land, the price. He provided for the rate of interest, and did not forget to insert a clause reserving to himself the fruit. That so-called receipt of November 24 acknowledges that the £1,500 was for land abutting on the Belle Ombre-road. Then, again, ever since January Messrs. Sauer and Standen have been endeavouring to get a title for Roos, so that he could transfer the land. Sauer and Standen have not sent in their account to us, so I suppose they were employed by Roos, and acted for him when they asked transfer from the Town Council. Roos has been trying to get title for months. He thought no doubt that he could get it, but he cannot. We only ask for transfer in terms of his receipt and of his letter of June 1. I cannot understand why my learned friend referred to *Theron v. Schoombie*, because, according to that case, they must give us free and undisturbed possession. This we have not got, for the Town Council will not let us go on the land. We are told we can easily get title under the Derelict Lands Act, but if this is such a simple matter, why

did Roos not do it rather than contest an action like this? To come to the application of 1886. The beacon therein referred to was the lower beacon on the Belle Ombre-road, and not the upper beacon. Defendant says in his plea that when plaintiff purchased, he (defendant) informed him that the title did not cover the property, and he would have to get it surveyed and to have diagrams framed at his own expense. The evidence does not support this. Nothing was said about either the diagram or prescription. A good deal has been made of the high price paid by defendant for the property. That is a point in our favour, for surely the higher the price the more secure is the tenure of the property which a man expects to receive in return.

In his address to the jury, the Acting Chief Justice said that this case arose out of a transaction which took place between plaintiff and defendant in the month of November, 1900. What this transaction was was one of the issues which the jury had to try. In these cases which came before a jury, the Rules of Court provided that the parties could arrange to have certain questions put to the jury and answers obtained, upon which answers the judgment could be drawn up. That procedure had not been followed in this case, but the jury had been left to decide upon the whole case. He would put certain points to them to guide them in arriving at their decision. The questions were these: Admitted that there was a transaction, what was that transaction; had the contract entered into between plaintiff and defendant been adhered to; and, if not, by whom had it been broken? If by defendant, Hoogendoorn was entitled to have the contract cancelled, and the £1,500 returned. If not, Roos asked them to give judgment in his favour, and order plaintiff to carry out the contract. One thing had struck him, as he dared say it had struck the jury. Here was a transaction for the sale of property of considerable value. The amount involved in the transaction was, it was admitted, one of £11,000, and on the day the contract was entered into there was no written agreement of any kind. They entered into a verbal contract for the sale of the property for £11,000, and yet neither party had chosen to reduce the contract to writing. Two days afterwards, in performance of this verbal contract, Hoogendoorn paid Roos the sum of £1,500, and a receipt was given. Roos said this receipt did not contain the

whole terms of the contract, and if they were to look at the pleadings, it was clear that this was the case. Hoogendoorn said in his plea that at the time of the sale the defendant stated that the diagrams consisted of many small pieces, and that a new diagram would have to be made, and that he (Hoogendoorn) undertook to have that new diagram prepared, but at the expense of Roos. Roos, on the other hand, said that he told Hoogendoorn his diagrams did not cover the whole extent of ground sold, and that Hoogendoorn agreed to take transfer of what he held, and by an amended diagram secure the remainder. Anyway, the parties were agreed that the receipt did not contain the whole contract. The first point was: What was the contract between the parties? In his declaration, Hoogendoorn said that Roos, through his duly authorised agent Dillman, made certain representations. Dillman was a clerk in the office of the Board of Executors and Roos was secretary to the Board. This was not a transaction which concerned the Board of Executors, and it would not come within Dillman's duties as clerk. Dillman had said that he thought the buying of the property would be a good speculation, and he approached Rosenthal and others, as well as Hoogendoorn himself, with a view to getting up a syndicate to buy this property. Roos positively denied that Dillman had any authority to represent him in this matter. Dillman evidently thought he could get up a syndicate, by means of which he himself could make something out of a re-sale of the property. It was for the jury to consider whether Dillman made any representations for Roos, or whether he made representations to Hoogendoorn and others, with the objection of effecting a transaction from which he might have some benefit. But apart from this, there was evidence to show that the parties themselves on the day of sale met on the property. What took place then was the first important question for the jury to consider. Did Roos sell and Hoogendoorn buy and agree to take the title deed for less than was actually sold? or did Roos only say, "I own my property under a number of different titles, and you will have to get an amended title to enable you to get transfer of what I have sold"? On May 31 Hoogendoorn, for the first time, repudiated the whole contract, and the ground of his repudiation was that Roos could not give him transfer of the ground sold. He said he never undertook to take transfer of any-

thing less than he bought. *Prima facie*, if a man bought property he was entitled to have transferred to him all he bought. If the jury found that Hoogendoorn agreed to take transfer according to the diagrams and titles held by Roos and to make an amended title at his own risk and cost, he would be bound by that. The question they had to decide in the first place was whether Hoogendoorn agreed to take transfer of less than he bought and to fight out the question of getting an amended title for the balance at his own risk and expense, or whether Roos simply said he must have the amended title to enable him to cut up the lots. If the jury found that Hoogendoorn bought property and did not undertake to take transfer of less than he bought, they would find in his favour; if they thought, on the other hand, as was pleaded, that he bought this property and agreed to take transfer of whatever interest in it Roos had, they would find in favour of Roos. It might be that there never had been a mutual agreement come to, that one party intended one thing and the other another, and in that case there would be no contract. A good deal of extraneous matter had been introduced into this case. He would not say it was altogether irrelevant to the case, but it was only incidental. It had been shown in this way that there was a dispute as to the ownership of this property, and that a claim had been set up thereto by the Town Council. In case the original grant was erroneous, as many old diagrams had been shown to have been in that court, it could be amended, if the actual beacons shown on ground were not covered by a grant, and if that ground had been occupied according to those beacons. In such a case, though the ground within the beacons was not covered by the diagram, the Surveyor-General would give an amended title. The question of whether the diagram covered the ground between Leeuwendvoet and Belle Vue did not affect this case. If there were no vacant ground, and if the two properties were intended to adjoin each other, the fact that the diagrams did not cover portion of the ground did not settle the question of ownership. That, however, was only an incidental question. The jury need not trouble themselves with the matter of whether the Town Council had any claim to the ground. What they had to decide was who took the risk of the dispute. They could not, under any decision

in this case, determine the rights of the Town Council one way or the other. If they found that Hoogendoorn did not undertake this risk, the next question they had to consider was whether the loss of this ground was a matter of such importance as to render the contract void. The law did not take notice of trifles, and would not break a contract for a mere trifle; but if they found Hoogendoorn did not undertake this, they would decide whether the deficiency in the title was such as to make it an important question in the purchase. Looking at the evidence, he (the Acting Chief Justice) thought they would have very little difficulty in saying that his not having this strip of land up to the road was a matter of considerable importance to Hoogendoorn, and would justify him in breaking the contract. If Hoogendoorn was to have his money returned, the jury would consider whether he ought to get interest on the money, and whether that interest should be given from the 24th November, the date of payment, as claimed, or from the 31st May, when he repudiated the contract. If the jury decided that the sale should be cancelled, and Hoogendoorn should have his money returned, and interest thereon, the next thing they had to consider was the question of damages. Plaintiff claimed £5,000 damages for breach of contract. The evidence called seemed to him (the Acting Chief Justice) to show that the contract was an onerous, a burdensome, and a bad one, and if this were so, it might be said that Hoogendoorn should be glad to get out of it. All the witnesses seemed to think that the price Hoogendoorn agreed to pay for the property was—well, a very good price. Hoogendoorn had himself offered £1,000 and £1,500 to have the bargain cancelled. Had Hoogendoorn lost anything by not having his contract completed? One would expect that if the property was now so very valuable, that Roos would be only too glad to have the contract cancelled, but instead of that, he wished the contract carried out. Did the jury think that any damages had been proved to have been sustained, or did they think that Hoogendoorn would be perfectly well satisfied to get back his money? He might be entitled to nominal damages, at any rate, for breach of contract, but had he really suffered any loss? About the question of the Town Council's claim they need not decide, but it did seem to him to be extraordinary that, after having, in 1886, admitted as cor-

rect the boundaries at points A and B, which would cover the blue line, the Town Council should now claim that property. After that admission, his lordship thought it would be difficult for the Town Council to substantiate any rights at all to this property. That, however, was not before the Court. If the jury found for Hoogendoorn, the sale would be declared cancelled, the £1,500 refunded, and the jury would consider the question of interest and damages. If they found for Roos, the sale would be ordered to go through, and Hoogendoorn would be ordered to take transfer.

The jury then retired to consider their verdict. They returned after a quarter of an hour's absence, and in reply to the usual questions, the foreman said that they unanimously found for the plaintiff for the cancellation of the contract, that the £1,500 be returned to plaintiff, with interest from November 24, 1900, and that damages of 1s. be awarded plaintiff.

Judgment, with costs, was entered in terms of the jury's verdict.

[Plaintiff's Attorney, G. Trollip; Defendant's Attorneys, Messrs. Sauer and Standen.]

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

COSGROVE V. COSGROVE. { 1901.
Aug. 16th.

This was an action brought by Mrs. Mary Kathleen Cosgrove against her husband, William J. Cosgrove, for divorce on the ground of his adultery.

Mr. C. de Villiers appeared for plaintiff; the defendant was in default.

Mary Kathleen Cosgrove, the plaintiff, said she was married to the defendant at Blackrock, Ireland, on January 12, 1899, and the certificate produced was that of their marriage. Shortly after they were married they went to Canada. Witness then returned to Ireland, and towards the end of April last year came out to this country. Just before their marriage defendant had been in South Africa. When witness came to this country she came with the definite intention of settling here. While they were in America the defendant had been intimate with a married

woman in Toronto. This woman used to be in his office with defendant with the door locked. Witness had gone to the office door when the woman was there and had been refused admittance, the defendant saying they were talking business. When they came out here in April, 1900, defendant took employment in the Railway Department. Witness's sister was out here in October last, and when she went back to England in November witness accompanied her. Before witness left for England she was living with defendant at Woodstock. While she was in England defendant wrote to witness saying that he had given up the house and taken a room. Continuing, the letter said: "You will notice the coolness of the letter, but I am tired of seeing you, and now you are away I take the opportunity of writing you on the subject. There is a woman in the case, as usual, and now you are away I write to tell you." Later on defendant wrote again and repeated that he was living with another woman, and said that perhaps if witness knew all about how he had been living she would not come to live with him again. He also said that he could never live with her again unless she knew all and could forgive him. Witness returned to this colony last April, but she never went to live with her husband again. Before witness went Home she had twice seen her husband with the woman referred to in the letters. She had asked her husband about the woman, and he had said that it was somebody who appreciated him more than she (witness) did. Witness suspected her husband of misconduct, and with a view to proving it, after her return from England she employed a private detective. On July 9 she went out with this detective and followed defendant, who went into a house in Shortmarket-street. It had been reported to her that this house was one of ill-fame. When witness married, some property which she inherited under her father's will was settled upon her. She was not of age when she married. She had property invested in railways in England, bringing her in about £200 a year. Her husband had no property when they married. The photograph produced was that of her husband. There was no issue of the marriage.

Carmen Domade said she lived at a house in Shortmarket-street. She recognised the photograph produced (that of defendant) as that of a man who had been unduly intimate with her.

The Court granted a decree of divorce as prayed, with forfeiture of the benefits of the marriage.

VOS V. VOS.

This was an action brought by Mrs. Theodore Christina Vos against her husband, Christoffel P. Vos, for divorce, on the ground of his adultery with one Maud Burke.

Mr. B. Upington appeared for plaintiff. The defendant was in default.

H. J. Wasserfall, the sexton of the Adderley-street Dutch Reformed Church, produced the marriage register showing the marriage of plaintiff and defendant.

Theodora Christina Vos deposed that on April 21, 1874, she was married to defendant in the Adderley-street Dutch Reformed Church. In 1882 her husband left her, and went to Kimberley, and she had last heard from him in 1884. There were two children, issue of the marriage.

By the Court: When she last heard from defendant in 1884, he was in Johannesburg. She then wrote to him, but did not get an answer. Her youngest child was twenty-one years old last June. After 1884 witness did not make any inquiries, because she heard defendant was at Johannesburg. When she last wrote to him she did not know that he was living with a woman. She believed it was in 1884 that she last heard from defendant, but she was not sure.

Jacob van Reenen said he lived at Salt River, and knew both defendant and plaintiff in this case. He made defendant's acquaintance in Johannesburg about twelve or thirteen years ago. They were neighbours. Defendant was living with a woman, not plaintiff, who was known by witness and all the neighbours as Mrs. Vos. Witness had met plaintiff before then, but not defendant, so that he did not know that defendant was the husband of plaintiff. He was sure the photo produced was that of defendant.

Aletta van der Spuy deposed that about nine years ago she lived in Johannesburg, and knew a man named Christoffel Vos. She recognised the photograph produced as that of defendant. He lived with a woman, not plaintiff, whom witness and the neighbours knew as Mrs. Vos. This woman had told witness her name was Maud Burke. Defendant and this woman had three children, who addressed them as father and mother. Witness did not know where defendant was now. She left Johannesburg seven years ago, and had never heard of defendant since then.

A decree of divorce was granted.

SUPREME COURT.

[Before the Hon. Sir E. J. BUCHANAN
(Acting Chief Justice), and the Hon. Mr
Justice MAASDORP.]

IN THE MATTER OF THE PETI-
TION OF WILHELMINA CARO-
LINA HAFSLUND (OR HAFS-
LUND), ALIAS WILHELMINA
CAROLINA FREDERICKA WIL-
LIAMS. { 1901.
Aug. 22nd.

Mr. Close applied for a postponement *sine die*, as the case was in course of settlement.
Granted.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), the Hon. Mr.
Justice JONES, and the Hon. Mr. Justice
MAASDORP.]

WILLIAMS AND CO. V. JAMES { 1901.
MAIN. { Aug. 25th.

Mr. P. S. Jones moved for the final sequestration of defendant's estate as insolvent.
Final sequestration adjudicated.

Ex parte GREGGANS.

Mr. Searle, K.C., moved, in the matter of the petition of Peter James Greggans, master of the steamship Beira, and as such acting for the owners, that a rule *nisi*, attaching certain moneys in the hands of Messrs. Dunn and Co., and belonging to the charterers of the Beira, for the purpose of founding jurisdiction, be made absolute.

The Court granted an order attaching such balance of moneys, due to the charterers, as might remain in the hands of Messrs. Dunn and Co., to found jurisdiction in an action to be instituted forthwith, costs to be costs in the cause.

Ex parte THE TRUSTEES IN THE CAPE COLONY OF THE SEVENTH DAY ADVENTIST MEDICAL MISSIONARY AND BENEVOLENT ASSOCIATION.

Mr. Close moved that the rule *nisi*, calling upon persons concerned to show cause why transfer of certain land at Claremont should not be passed, be made absolute. Counsel at the same time moved for an order of the Court authorising the Registrar to

pass transfer of the land on a power of attorney signed by certain gentlemen who had been elected trustees in May, 1900. Counsel said the reason the order was asked was that all these gentlemen were not the original trustees, but the two gentlemen who had originally been trustees had signed a supplementary power of attorney.

The rule *nisi* was made absolute, but as at a later stage Mr. Close stated there was some hitch as to the trustees, the second order asked for was allowed to stand over for a report from the Registrar.

LEYLAND V. CHETWYND. { 1901.
Aug. 9th.
„ 25th.

Guardian — Custody of minors — Jurisdiction.

The English Court of Probate had granted Mrs. Chetwynd a divorce and custody of the minor children of her marriage. The Court, however, ordered that these children should remain within the jurisdiction of the said English Court. The Court had also appointed applicant as guardian of the aforesaid children. Thereafter Mrs. Chetwynd removed these children out of the jurisdiction of the said Court, and at the date of this application they were in her custody in Cape Town, on their way to Australia. A judge of the English Court of Probate had ordered that the minors should forthwith be delivered to the applicant, who now applied for an order of the Supreme Court to that effect.

Held, that as applicant was the legally appointed guardian of these minors, and as by section 30 of the Charter of Justice, the Court has jurisdiction over all persons residing and being in this Colony, the respondent must be ordered to deliver up the children to applicant.

The case of Einwald v. The German West Africa Co. (5 Juta, 86), distinguished.

This was an application for an order calling upon the respondent, Florence Mary Chetwynd, to show cause why she should not hand over to the High Sheriff of this colony her two minor daughters, pending the arrival from England of a certain Mr. C. Lethbridge, attorney-at-law, who had been deputed by Mrs. Leyland, the guardian of the said children, to convey them to England.

Mrs. Chetwynd had obtained a divorce from her former husband, together with custody of the children, issue of their marriage, by an order of the English Court of Probate and Divorce, but she had been forbidden to remove the minors out of the jurisdiction of the Court. In contempt of the said order of Court, she had so removed them, and at the date of the present application they were (together with her) in Cape Town, on their way to Australia. Mrs. Chetwynd had originally booked her passage under her own name to Natal. She had subsequently booked under another name to Australia. It having been represented to the English Probate Court that its order had been disobeyed by the removal of the minors aforesaid, the Registrar of the said Probate Court despatched the following telegram to the Registrar of the Supreme Court: "Justice Sir J. G. Barnes, on July 29, 1901, in *Chetwynd v. Chetwynd*, ordered that Mary Ann Naylor Leyland be appointed guardian of the person of the infants, Mary Eleanora Chetwynd and Amelia Mary Chetwynd, and that she do have the custody thereof until further order, and that Florence Mary Chetwynd do forthwith hand over both the above-named infants to the said Mary Ann Naylor Leyland, or such person or persons as she shall in writing appoint. And it is further ordered that the said Mary Ann Naylor Leyland, or such person or persons as she shall appoint as aforesaid, be at liberty to take all lawful steps which may be necessary either within or out of the jurisdiction of this Honourable Court for the enforcement of this order."

Clement James Boonzaaier Foster, clerk to the firm of Findlay and Tait, solicitors, Cape Town, made the following affidavit, dated August 10, 1901:

1. That all yesterday I was engaged in watching the movements of the respondent.

2. That she (the respondent) had obtained from the Union-Castle Mail Steamship Company a refund of the money paid for the passage of herself and her two children per Norham Castle, and that she had removed all her luggage from the said Norham Castle.

3. That the respondent left the Mount Nelson Hotel, Cape Town, at about two p.m. yesterday, and that from there she proceeded to the Customs-house, Cape Town, where her baggage had been left, and that she informed the clerk there that the packages, about fifteen in all, would be required on board the Australasian.

4. That the respondent proceeded to the Queen's Hotel, Sea Point, last evening, and engaged lodgings there, and that upon entering the said hotel she gave the names of both Chetwynd and Winston.

5. That the packages referred to in paragraph 3 of this affidavit were still at the Customs-house this morning, but that the names on the said packages had not been altered from Chetwynd to Winston.

6. That on inquiry at the office of Messrs. W. Anderson and Co., of this city, this morning, I found that passages for Mrs. Winston and two daughters per S.S. Australasian to Sydney had been booked and paid for.

7. That the said Australasian is due to arrive in Table Bay to-day, and that she will remain here for a few hours only, and resume her voyage to Australia.

8. That jewellery to the value of about £500, the property of the respondent, has been pledged in Cape Town in the name of the manager of the Mount Nelson Hotel for the sum of £130 sterling.

Frederick William Herbert, Deputy Sheriff's officer, of Cape Town, made the following affidavit on the same day:

1. That yesterday I duly served the order of Court in the matter of *Leyland v. Chetwynd* upon the respondent at Queen's Hotel, Sea Point.

2. That I found that on entering the said Queen's Hotel the respondent had given her name both as Chetwynd and Winston.

3. I found upon inquiry at the office of Messrs. Wm. Anderson and Co., of this city, that a Mrs. Winston and two daughters have booked and paid for passages to Sydney per S.S. Australasian, which is due to leave Table Bay to-day.

Mr. Searle then read the following affidavit by the respondent:

1. I am the respondent referred to in the above proceedings, and on the 9th day of August I was served by the Sheriff with a copy of the rule issued out of this Honourable Court on that date, and on the 10th instant my children were removed from me by a Sheriff's officer, in accordance with the further order.

2. I feel aggrieved at the manner in which I have been treated in being thus summarily

deprived of my children, who were entrusted to my custody by the Probate, Divorce, and Admiralty Division of the High Court of Justice in England, when I obtained a decree finally dissolving my marriage with my former husband.

3. The divorce suit against my husband came to trial on the 14th day of July, 1900, when a decree *nisi* was granted upon the usual conditions, and made returnable six months thereafter, and in due course, namely, on the 14th January, 1901, this divorce was confirmed, my marriage dissolved, owing to my husband's misconduct and cruelty, and the custody of the children was granted to myself.

4. The two infants of whom I have been thus deprived were the only issue of my marriage with my former husband, Richard Walter Chetwynd.

5. The applicant, Mary Ann Naylor Leland, is my mother, a lady of sixty years of age, and I regret to have to state that she and I have never been on very good terms, and that we differ upon the question of the bringing-up of my children.

6. I am convinced that it is not in the interests of my children that they should remain in the custody and under the control of their grandmother, who, in addition to being an elderly lady, is, for other reasons, which I prefer not to mention unless compelled to do so, quite unfit to be entrusted with them.

7. After the anxiety consequent upon the proceedings in the Divorce Court, I found it necessary to have a change, and upon medical advice I proceeded to warmer climes, and took my children with me, sailing on July 20 by the Norham Castle, booked through to Delagoa Bay.

8. When the steamer arrived in Table Bay I made up my mind to proceed to Australia, and on inquiry I ascertained that there were vessels sailing from here to Australia, and accordingly I arranged a passage for myself and my children per the Australasian.

9. I was aware before I left England that my divorced husband was having my movements watched, and I somewhat feared he would make an attempt to interfere with my dealings with the children, consequently I did consider the advisability of adopting an assumed name whilst travelling, in order to prevent him from molesting me, and I have reason to believe that my mother has lent her assistance to him for the purpose of this application.

10. I have read the copies of the affidavits filed in the matter, and would say that the cable is the first intimation I had of Mr. Justice Barnes's alleged order granting *ex parte* to my mother the custody of my children, and I most emphatically protest against any such peremptory order being made during my absence. The children are mine, and until good cause is shown to the contrary, I maintain that the law of England and the law of the Cape both agree in leaving them under my control.

11. In the exercise of my discretion, I have considered it advisable for my own health and the benefit of my children to avoid the winter in England, and I shall consider it a very great hardship if I am compelled now to hand over my children to others, the more so where there is no complaint against me.

12. With reference to the affidavit of G. M. Findlay, I would state that paragraph 4 is inaccurate. I did not intend proceeding by the Norham Castle up the coast, as, in accordance with my decision, I had made up my mind to sail for Australia instead.

13. I wish to state with reference to the affidavit of one F. Harrill, that the alteration of the labels of my luggage was made quite irrespective of the order of this Court. In point of fact, it was made before the first rule was served upon me, and it was made in consequence of a message which I received on landing, and in order to prevent my divorced husband from worrying me, I decided to continue my journey to Australia under the assumed name of Winston.

14. I state most emphatically that these alterations were not made in order to avoid the rule of this Court, issued on August 9, but were made previous to the service thereof upon me, which the Sheriff effected at nine o'clock on the evening of the 9th inst. at the Queen's Hotel, Sea Point.

15. The clerk Foster must be mistaken when he states that I gave both the names of Chetwynd and Winston. Reference to the books at the Queen's Hotel will show that I gave the name of Chetwynd, and it was by that name that the Sheriff's officer asked for me and was shown to my rooms.

16. I say further that the passages were booked for me on the Australasian in the name of Winston on the morning of the 9th instant, before I had any idea these proceedings were contemplated.

17. I left the Queen's Hotel on the morning of the 10th at about 11 o'clock with my children in order to consult my solicitor, and whilst I was in his office the Sheriff's

officer called and took possession of my children, in pursuance of the second order of the Court—an action which I consider extremely harsh and quite unnecessary, as I had no intention of disobeying the order of the Court.

18. I have been very much inconvenienced by the proceedings, and have had to make arrangements to remain here instead of proceeding to Australia, and I appeal to the Court to cancel the order and to restore to me my children, whose custody was entrusted to me by the High Court of Justice in England.

The following answering affidavit by Mr. Christopher Lethbridge, a solicitor of the High Court of Justice, England, and a member of the firm of Lethbridge and Prior, solicitors to the applicant, was then read by Sir Henry Juta:

1. I am a solicitor of the High Court of Justice, England, and a member of the firm of Lethbridge and Prior, solicitors to the above-named applicants, of 25, Abingdon-street, in the City of Westminster, England.

2. I have come to Cape Town by the instruction, and on behalf of the above-named applicant in order to obtain possession and custody of the minor children Mary Eleanora Chetwynd and Amelia Mary Chetwynd, having been appointed the attorney and agent of the said applicant by a power of attorney dated 2nd August, 1901, duly signed, sealed and executed by her, which said power of attorney is hereunto annexed marked "A."

3. I also desire to place on record the following records hereunto annexed, namely:

(a) A sealed copy of the order of Court dated July 29, 1901, granted in the High Court of Justice, Probate, Divorce and Admiralty Division (Divorce) appointing the above-named applicant the guardian of the aforesaid minors (marked "B").

(b) A sealed copy of the report as to the custody of the children, dated July 27, 1901, granted by Mr. Registrar Musgrave in the High Court of Justice aforesaid (marked "C").

(c) The order on summons to Registrar to report, dated July 17, 1901, granted by his lordship Mr. Justice Gorell Barnes (marked "D").

(d) A sealed copy of the Decree Absolute, dated January 14, 1901, granted in the High Court of Justice aforesaid in the divorce suit of "Chetwynd, F. M., against Chetwynd, R. W." (marked "E").

(e) A sealed copy of the decree nisi, dated July 4, granted in the High Court of Justice aforesaid in the said divorce suit of "Chetwynd against Chetwynd" (marked "F").

4. I have brought with me to Cape Town the applicant's lady's maid, named Miss Cross, to take charge of the aforesaid minors, and she is at present looking after the said minors at S. Cyprian's School, Annandale-street, Cape Town, where the said minors were placed by the High Sheriff.

5. I propose returning to England by the R.M.S. Carisbrook Castle, on Wednesday, the 28th day of August next, and have booked passages for the said minors and the lady's maid by the same steamer.

6. I have perused the affidavit of the above-named respondent, sworn on the 23rd day of August, and in reply thereto I beg to refer this Honourable Court to the terms of the decree nisi granted in the divorce suit of "Chetwynd against Chetwynd," whereby the said respondent was granted the custody of the said minors, but it was directed that such children should not be removed out of the jurisdiction of the Court without its sanction, which said sanction has never been applied for by the said respondent.

7. The application for the custody of the said minors made by the above-named applicant, who is the grandmother of the said children, was necessitated by the fact that the said children were being absolutely neglected by their mother, the above-named respondent, and were neither being educated nor was proper care being taken of their persons. And had their maternal grandmother not moved in the matter their paternal grandfather, Lord Chetwynd, would have so moved.

8. The minors will, on the death of their mother, succeed to a fortune of about £60,000 each.

9. I have no knowledge of most of the matters referred to by the respondent in her affidavit, but I have every reason to believe that she received notice of the order dated 29th July, 1901, granted by Mr. Justice Gorell Barnes, prior to any proceedings having been taken in this Court, inasmuch as her solicitors in London, Messrs. Arthur Newton and Co., informed me, before I left England, that they would cable the said order to the respondent.

10. The applicant is very wealthy, and is in every way a fit and proper person to have the custody of the said minors, and is

prepared to maintain and educate the children at her own expense.

Sir Henry Juta, K.C., was heard in support of the application.

Mr. Searle, K.C. (for the respondent): This Court has no jurisdiction. (1) The parties are not domiciled here; (2) They have no landed property here; (3) There is no contract in question, either made or to be performed here. The Court is now asked to act in aid of an English Court. It cannot do that without a process in aid. Mrs. Chetwynd is merely passing through this colony on her way to Australia. How then can the Court have jurisdiction? It is true that section 74 of the English Bankruptcy Act of 1869 (32 and 33 Vict., c. 71, section 74) cited in *Trustee of Howse, Sons and Co. v. Trustees of Howse, Sons and Co.* (3 Juta, 14) directs that all British Courts should act in aid of each other on request: but here there has been no request from any Court, and this Court cannot act as if there had been. My ground is that this Court has no jurisdiction in the matter. We have possession of the children, and respondent is the mother of the children, and is their guardian under an order of an English Court. That Court has cancelled its order because she removed them out of the jurisdiction.

[Maasdorp, J.: You say that you are entitled to the custody of the children only under an order of the English Court?]

No, we do not admit that. It is very peculiar that the same judge who gave the custody of the children to the mother afterwards revoked his order and ordered that that revocation should run throughout the Colonies. In *Dickens v. Eastern Province Herald* (4 Searle, 33) under a special Act (5, 6 Vict., c. 45, sec. 15) an order running throughout the Colonies was granted; but, unless there is some special statute to authorise its doing so, the Court cannot aid.

[Jones, J.: In this case, the person wronged, the person doing the wrong, and the children are all within our jurisdiction.]

Then I say there is nothing to deprive respondent of the custody of the children. This Court cannot punish contempt of an English Court. 22 Vict., C. 20, section 1, refers only to the taking of evidence, but there is no general rule by which a foreign Court can order this Court to give effect to its judgment. See *Einwald v German W. African Co.* (5 Juta, 86). If this Court has jurisdiction at all, it must deal with the matter *de novo*, and go into the merits. We

have nothing to do with the English judgment. In *Einwald's case* the Court went very fully into the question of jurisdiction, and laid down that it exists only *ratione domicilii vel contractus vel rei sitæ*. All of these are wanting in this case, just as they were in that. No doubt, if it were proved that the mother were ill-treating the minors, while resident in this colony, the Court might grant an order; but that is not the case the applicants put forward. This Court is asked to punish contempt of an English Court. This, I submit, the Court cannot do. The respondent is quite prepared to go into the merits and to show that the mother is the fittest person to have the custody of the children, though it would require a very strong case to justify the Court in interfering in the case of persons passing through the Colony unless a present existing evil were proved. Contempt of an English Court does not give this Court jurisdiction.

[Buchanan, A.C.J.: Of course, this Court would not punish contempt of an English Court.]

Then, as this order was granted to punish contempt of court, this Court can take no notice of it. (*Dicey* p. 269). In the case of divorce (and these proceedings arise out of divorce), domicile, and domicile alone founds jurisdiction.

Sir H. Juta, K.C., was not heard in reply.

In giving judgment, the Acting Chief Justice said: On July 4, 1900, Mrs. Chetwynd upon proceedings instituted in the English Court of Admiralty, Probate and Divorce against her husband for divorce, obtained a decree *nisi*, and when that decree was given, the Court ordered that the two children of the marriage should remain in the custody of the petitioner (Mrs. Chetwynd) until further order of the Court. The Court also directed that the children should not be removed from the jurisdiction of the Court without its sanction. While the children were still in the jurisdiction of the Court, and after this decree had been made absolute, application was made to the same Court in England to appoint Mrs. Naylor Leyland guardian of these children. This application was referred by the learned judge to one of the registrars for report. The then applicant and the present respondent were represented before the Registrar. The Registrar made his report, and when this came before the Court, Mrs. Chetwynd was again represented by counsel. The Court, after hearing the report,

appointed the present applicant, Mrs. Naylor Leyland, guardian of these two children. Meanwhile the children had been removed from the jurisdiction of the English Courts, and brought to this colony, and an order was given by Mr. Justice Barnes that the children should be delivered up forthwith to Mrs. Naylor Leyland, and that she be at liberty to take all lawful steps either within or without the jurisdiction of the English Courts for the enforcement of that order. The children having been brought to this colony, the applicant, their guardian, now applies this Court to have them given up to her. Mr. Searle, for the respondent, urges that this Court has no jurisdiction to interfere in the matter. I quite agree with him that no English Court, as such, has jurisdiction in this colony, but there are several principles upon which orders of other Courts can be enforced in this colony. In this case I do not think it necessary to go into a discussion of these principles, as the application can be decided on simple grounds. Nor do I think either that the case of *Finwald v. The German West African Company* is applicable here. That was a dispute between foreigners, on a contract entered into elsewhere and which was to be performed elsewhere, and the parties were simply passing through a Cape port; and it was held that the Court could not exercise jurisdiction in that case seeing that the *forum domicilii*, the *forum rei sitæ*, and the *forum loci contractus* were all wanting. Where disputes arise between parties there must be some jurisdiction before the Court can hear the disputes. Under the 30th section of the Charter of Justice, this Court has jurisdiction over all His Majesty's subjects and all other persons whomsoever residing and being in the Colony. All the parties are subjects, and the respondent and the children are in the Colony, and on that simple ground alone I think the Court has ample jurisdiction to deal with this case. On the affidavits before us there is nothing against Mrs. Chetwynd. It is not necessary to cast any imputation upon her character either directly or indirectly, but she is here with two children of whom she is not the guardian. Applicant is here as guardian of the children, and being in the Colony, the Court now orders that these children be delivered up to their proper guardian. After the application first came before the Court it was stated that Mrs. Chetwynd attempted to leave the Colony with the children, whereupon a peremptory order was granted by Mr. Justice

Jones. But, as there had not been an order of Court served on respondent at this time, there could be no contempt of Court. We are dealing now with the original rule obtained by applicant, which will be made absolute, and the respondent ordered forthwith to give up the children. The Sheriff, in whose custody they are at present under the peremptory order, will be authorised to hand them over to Mrs. Naylor Leyland, their lawfully appointed guardian.

Mr. Justice Jones concurred, and said it seemed to him that the argument that the Court had no jurisdiction was unsupportable in face of the judgment of Lord Cramer in the well-known case of *Steward v. Wade*.

Mr. Justice Maasdorp also concurred.

MOSSEL BAY BOATING COMPANY V. BRINK. { 1901.
Aug. 25th.

Mr. Searle, K.C. (with whom was Mr. Close), moved for the attachment of a certain vessel as security to answer plaintiff's claim.

The petition asked that the vessel should be attached to found jurisdiction, and to secure payment of any amount for which judgment might be given. The claim was for salvage services rendered in Mossel Bay on June 27. Plaintiffs claimed £2,000, part of which sum was tendered. The hearing of the action was set down for the following day, but it could not then be brought on owing to the absence of certain witnesses.

The Acting Chief Justice said that if they had not founded jurisdiction the whole of the proceedings so far were futile, and would have to be abandoned.

Mr. Searle said that jurisdiction was acknowledged.

Mr. Justice Jones pointed out that there was no allegation that the vessel was leaving.

Mr. Searle said it would have been better had this been stated in the petition. He asked that the Court would hear the application again if it were found that the vessel was leaving.

The Acting Chief Justice said that the Court could make no order at present.

Ex parte HOFMEYR.

Mr. De Villiers presented the petition of John Henry Hofmeyr in his capacity as secretary of the Paarl African Trust Company, executors in the estate of the late Robert Blake, jun., and moved for an order in terms thereof.

An order was granted in terms of the Master's report.

JOHNSTONE V. JOHNSTONE. { 1901.
Aug. 25th.

This was an action instituted by Richard James Johnstone, of Mowbray, for a decree of divorce, the respondent, Julia Henrietta Johnstone, having, it was alleged, been guilty of misconduct with one Harry Williamson. Plaintiff asked for custody of the two children of the marriage.

Mr. C. de Villiers for the plaintiff.

Richard J. Johnstone, the plaintiff, said he lived at Mowbray, and was married to defendant at Woodstock in November, 1891. They lived at Mowbray for two years, and after removing to Cape Town, returned to Mowbray in 1899. Williamson came to live with witness. On the 6th May of the present year witness was shown certain letters from his wife to Williamson. He was shown these letters by Williamson's wife at Claremont. Before that respondent had left him, witness being out of work. On the 7th or 8th of May witness met respondent at Wynberg, and accompanied her to the house where she was living. He accused her of misconduct, to which she ultimately confessed.

Honora Williamson deposed to finding the letters produced in her husband's shop. Witness's husband, while still living with witness, took a house at Wynberg, where witness found a woman living under the name of Mrs. C. E. Williams. Witness saw her, and taxed her with being Mrs. Johnstone.

A house agent gave evidence as to the taking of the house at Wynberg by Williamson.

The Acting Chief Justice remarked that the evidence was not sufficient.

On the application of Mr. De Villiers, the case was ordered to stand over *sine die*.

MILLER V. MILLER.

This was an action for restitution of conjugal rights, failing which a decree of divorce. Plaintiff, Frances Martha Miller, lives at Beaufort West, and defendant, Henry Hamilton Miller, at Cape Town. The parties were married in March, 1897, and there were two children.

Mr. C. de Villiers represented plaintiff.

Evidence as to the marriage was led.

Frances Martha Miller said she was married to respondent on the 8th March, 1897. Defendant afterwards came to Cape Town, and went to England for the purpose, he told witness, of getting agencies. Eleven months afterwards he returned to Cape Town, where witness met him. He returned with her to Beaufort West, and remained

there for three months. He then went back to Cape Town, leaving her at Beaufort West. Before going to England respondent got advances of money to the amount of about £200 from witness's father. In December, 1898, he visited her at Beaufort West, but remained only two days, failing to get money from her father. There were two children, aged four and three. Before marriage defendant travelled for Messrs. Reid Bros. Witness had not seen respondent for two years.

The Court made an order for restitution of conjugal rights, defendant to receive plaintiff on or before the 30th September, failing which a rule would be issued calling on him to show cause on the 12th October why a decree of divorce should not be granted, plaintiff to have custody of the children.

ATKINS V. CAMP'S BAY } 1901.
TRAMWAY CO. } Aug. 26th.
.. 27th.

Negligence—Public company with statutory powers.

The defendants—a certain Tramway Company—whilst executing certain works in pursuance of statutory powers had and obtained, had made an excavation in the public street immediately in front of certain houses. No care was taken to protect the public against—or to warn them of—this danger—and plaintiff being ignorant of its existence and being lawfully upon the premises aforesaid fell down the place so excavated while proceeding by night from one of the houses aforesaid to the road in front thereof.

Held, that as the defendants were executing this work for their own proper use and benefit, albeit under the sanction of the Town Council, they were liable for the injury caused by their own negligence.

The case of Newman v. Town Council of East London (9 E.D.C., 84, and 12 S.C.R., 61) distinguished.

Plaintiff's declaration was as follows:

1. The plaintiff is a bookkeeper residing in Cape Town. The defendant is a company duly registered in this colony, pursuant to Act 34 of 1899, and is subject to all the rights, powers and liabilities contained in the said Act.

2. In or about June, 1901, the defendant company had, for the purpose of carrying out the objects of the said Act, with the object of widening a public road situated in Cape Town and known as Kloof-road, excavated a sloping bank adjoining the said public road and in front of certain houses, known as Montrose Villas, the ordinary and usual egress from which was down the said sloping bank into the said public road, to a depth of about four feet; and in the said public road excavated a furrow or ditch adjoining and near to the said excavation of the said bank.

3. It was the duty of the defendant, in excavating the said bank and the said furrow or ditch, to make all due provision for the protection of the public and of the plaintiff, and to cause the said excavation or ditch to be properly lighted and watched. But the defendant neglecting, and in breach of its duty, wrongfully and unlawfully and carelessly and negligently performed the said work, and omitted and neglected to make any provision for the safety and protection of the public and the plaintiff, and to lighten the said portion of their said work under the said Act, so that the plaintiff, on or about the 12th day of June, 1901, coming at night from the said Montrose Villas towards and into the said public road, as he was lawfully entitled to do, stepped off the said excavated bank and fell into the said public road, and thereafter fell into the said furrow or ditch, and did thereby sustain serious injury to his person, and suffered great pain, and was, and still is, incapacitated from attending to his business, and has sustained loss and injury, including medical advice, attendance and assistance.

4. By reason of the premises the plaintiff has suffered damage to the extent of £250.

The plaintiff claims:

(a) The sum of £250 as and for damages aforesaid.

(b) Alternative relief.

(c) Costs of suit.

To this declaration defendant pleaded as follows:

1. The defendant company admits paragraph 1, and says that it has acquired rights and powers, and is subject to the obligations created or arising under a lawful agreement in writing with the Town Council, as contemplated by the said Act.

2. The defendant company does not admit that the ordinary and usual egress from Montrose Villas was down the sloping bank referred to in paragraph 2 of the declaration, nor that it excavated a furrow or ditch adjoining and near to the excavation of the said bank, but otherwise it admits the allegations in that paragraph.

3. Under the Act and agreement aforesaid the defendant company was bound to widen the Kloof-road at the spot referred to in the declaration to a width of 60 feet, and in order to perform its duty the defendant company was bound to cut away and remove portions of the sloping bank then existing along the same side of the said road as Montrose Villas, and was bound, in order to preserve proper grades in the road as widened, to leave a rapidly sloping bank of some height at the side of the road.

4. The work which the defendant company was bound and obliged to do, as aforesaid, was duly and properly executed and performed in accordance with its duties and obligations, and in the Act and agreement there was no obligation upon the defendant company to watch, or light the spot referred to, and there was no carelessness or negligence on its part in discharging its duties as aforesaid.

5. The defendant company has no knowledge of the manner in which the plaintiff may have sustained the injuries referred to in the declaration, or of the cause or extent of such injuries, but denies that it is responsible for such injuries as plaintiff may have sustained, and disputes the plaintiff's claim.

6. Save as aforesaid the defendant company denies the allegations in paragraphs 3 and 4 of the declaration.

In his replication, plaintiff denied any knowledge of the alleged agreement between defendant and the Town Council, and joined issue.

Sir. H. Juta, K.C. (with him Mr. B. Uppington), for plaintiff; and Mr. Searle, K.C. (with him Mr. Benjamin), for defendants.

The Acting Chief Justice: The question is whether there was any negligence, and if so, what are the amount of the damages?

Sir Henry Juta: Yes.

Sir Henry Juta called

Robert Owen Wynne Roberts, who said that he was City Engineer of Cape Town, and knew Kloof-road where Montrose Villas are situated. Some of these villas he knew had been built on plans approved by the Council. Others were very old houses, and the plans for these might have been approved of, or the houses might have been built be-

fore the building regulations were promulgated. Witness believed that the ground between these villas and the road was Municipal ground. He was personally acquainted with the ground opposite Montrose Villas. Before the Tramway Company took it in hand there was a slope from the garden wall to the street proper, and the ordinary egress from the villas would be down this slope. Part of the slope was within the street line as shown on the plan. There was an agreement made between the Council and the Tramway Company, by which the latter had to widen the street at that part. The former roadway was about thirty-five feet wide, and the Tramway Company had to widen the road to sixty feet, taking in part of the waste land on either side. In widening on the one side they took away part of the slope, to an average of about fifteen feet, on the Montrose Villas side of the road. The work of excavation was not yet completed, there being several hundred feet lengthwise to be done. The excavation had been roughly completed opposite Montrose Villas. It was not yet completed to witness's satisfaction, and no application had yet been made for handing it over. There would have to be some work done yet before witness would say it could be taken over.

Cross-examined: The plan produced was a portion of the plan annexed to the agreement between the Council and the Tramway Company. The portion in the middle was the old track, and the pink-coloured portions were those which had to be taken in. The new road had not yet been made up. It would have to be metalled, etc., and a gutter made, according to the agreement, before it would be completed. There would also have to be access to the houses. The declivity of the bank or slope spoken of was sharper than the declivity of the road, and consequently it met the road at Kloof House. Witness had made no special inspection of this slope in front of Montrose Villas, but he was acquainted with it, as he was with other parts of the town. He could not say the exact time at which the Tramway Company took in hand the work at that spot. He could not say exactly what the gradient of the slope was before, but judging by the eye it would be about 1 in 10, probably 1 in 8 across the slope, but as to the rough nature of the ground, there was a paved causeway there before, part of which had been removed by the Tramway Company in removing the bank. The causeway was composed of cobble stones, and extended from the gate of one of the houses to the road. There was a

bridge, composed of some sleepers, opposite Montrose Villas.

Re-examined: Witness considered the work would not be completed until proper access was given to the houses, for, whatever was disturbed, there should be an equivalent given. That was, if there was direct access before, steps would have to be provided now. In all works of that sort the Municipality used lights while they were going on. That was his experience, and he had nineteen years of experience in making and excavating roads.

Questioned by Mr. Searle through the Court, witness said he thought the Tramway Company should have taken some precautions to light the place. The Council had never called upon the Tramway Company to light or guard the place.

At this stage the Court adjourned, and, accompanied by the representatives of parties to the suit, inspected the ground in question.

Sir Henry Juta called

Joseph Atkins, the plaintiff, who said he lived in the Gardens, and was a married man with a family. He was a bookkeeper employed by Mr. Ritter. On June 12 he went to visit Mr. Botha, at No. 1, Montrose Villas. He had not visited Montrose Villas before, but he was acquainted with the locality, and had noticed the slope in front of the villas. It was a dark night when witness visited Montrose Villas. There was a friend, Mr. Musket, with him, and the friend led the way. His friend had previously been at Montrose Villas. They turned up by the villa nearest the Cape Town side and came to No. 1, Montrose Villas, and turned in. When they walked up to the house he did not notice any excavation as the night was very dark. After staying an hour and a half with Mr. Botha, witness left the house by the front door, which he shut after him. He went out by the gate to proceed down the slope, and when a few steps from the gate he fell into the excavation and hurt his hand and wrist. After getting out of the excavation witness joined his wife, who was waiting for him at a friend's house in Union-street, and went to a doctor, who afterwards attended him until the end of June. The wrist was broken, and witness could not use it. Even now he could only write for a few hours per day. He had to employ clerical assistance to keep up the books of his business, and had also to pay for the carting of his books from his business to his house and back again, as witness, while confined to the house, had the books

brought there and dictated to his wife the entries to make. In that manner he kept his books up. On the night he visited Montrose Villas there were no lights on the road. Witness's doctor's bill amounted to £4 10s., clerical assistance cost him about £8, and he had still to employ clerical assistance, while the conveying of the books to his house would cost him about £4. He suffered great pain, and even yet his wrist pained him, and he did not think his claim for £250 excessive.

Cross-examined: Witness used to live in the neighbourhood of Kloof-road, and knew the locality. Just about Montrose Villas the slope was easy of access. Mr. Musket remained in the house after witness left. Witness's salary did not cease while he was confined to the house. For clerical assistance witness paid 2s. 6d. per hour. So far as he remembered, he paid that up to July 22. He hoped soon to be able to resume his full duties, but at present he was not able to do so.

Dr. Charles McGowan Kitching said that on June 12 Mr. Atkins came to consult him. He had a fracture of the right wrist. One bone was fractured. It would take some time before the wrist would regain its flexibility. It would probably be about six weeks before a person whose wrist was fractured would be able to write, and probably he would easily tire for some time afterwards; it might be for a couple of weeks or for a few months.

Cross-examined: The fracture was as simple a one as it could have been, and witness did not think it would give more trouble. He did not anticipate any permanent injury.

James Wellwood Musket, a draper, carrying on business in Wale-street, deposed that on the night of June 12 he met plaintiff and walked with him to Montrose Villas. Witness had been there before, but had no knowledge of the excavations being carried on by the Tramway Company. Plaintiff left before witness. When witness left Mr. Botha accompanied him, and told him to be careful and walk along the slope until he reached the end. At that time witness knew nothing about the accident to plaintiff. It was a very dark night, and there were no lights to show the excavations.

By the Court: Plaintiff was perfectly sober on the night of the accident.

Thomas Botha, a letter-carrier, said that he now lived at No. 2, Montrose Villas, but in June last he resided at No. 1, Montrose Villas, which he had occupied for fifteen

months. Before the excavation was made there was an easy slope, which was the access to the house. Witness believed the excavation was made about April last. Witness remembered the night plaintiff and Mr. Musket came to visit him. Plaintiff left first, and afterwards Mr. Musket left, witness accompanying him to the gate. It was a dark night, and there were no lights. After the accident the Tramway Company's workmen were working in the road, and then there were some lights, and there was also a light placed on the embankment in front of the house Westbourne, next door. Witness spoke to the foreman in charge of the boys working for the Tramway Company the day after he cut away the slope. Witness met the foreman a bit higher up, and said, "I suppose you will give us some means of getting to the house; steps or something." The foreman asked what house was referred to, and on witness telling him, said, "Oh, yes, we will see to that."

Arnold Cross, a clerk in the Deeds Registry Office, produced the title deeds of Montrose Villas.

John Elliott Bygott, an engineer, deposed that he lived at Lindum, which he had built. Westbourne, the house next door, he had also built. Montrose Villas were next to that house. Witness had known the locality for twelve years. There was a slope there, and the usual way in which people got up and down to their houses was by crossing the slope. In wet weather it was easier to come straight down the slope than to cross it sideways. From the gate of Westbourne witness made a cemented cobble-stone path to the roadway.

Herbert George Ford, a clerk at Arderne's, and living at Westbourne, next to Montrose Villas, said that before the excavation by the Tramway Company there was a slope, which was used by the people in getting to their houses. After the accident lights were placed by the Tramway Company along the road. Boards were also placed across the hole in front of Westbourne. Witness did not know who put them there, but it was not at the request of his people.

Cross-examined: The lights were placed just where the boards were.

Sir H. Juta closed his case.

For the defence, Mr. Searle called

Chester P. Wilson, who said he was an engineer by profession, and became general manager of the defendant company in May last. He arrived in this country in April last. The plan put in was a portion of the plan of the whole work attached to the

agreement with the Town Council. He also put in a plan showing the levels of the embankment at Montrose Villas, which he had made from actual measurements. It was necessary in order to do the work contemplated in the agreement to cut into the embankment, and so far as the preliminary work was concerned it was properly done. The work had, as a matter of fact, not been done under witness's supervision, but if it had he would have done it in the same way.

By the Court: Witness intended to leave the houses with that steep bank. He considered it safe in view of Cape Town conditions. There were many other places where it had been left like that in Cape Town.

The Acting Chief Justice: They may have to pay for it one day.

Mr. Justice Jones: Why can you not put in some steps; it is a simple thing?

Witness: It could be done, but who would pay for it?

By Mr. Searle: The only way to make the place perfectly safe would be to fence it.

Mr. Justice Jones: Well, that is simple enough.

The Acting Chief Justice: You take no precautions whatever to protect the public at that bank?

Witness: Absolutely none.

Mr. Searle: Are there banks of this kind all the way round the Kloof-road?

Witness: Yes, and as high as this in some cases. There are some equally as high where people pass backwards and forwards.

The Acting Chief Justice: And you take absolutely no precautions to prevent the people falling over the banks?

Witness: We take no precautions.

The Acting Chief Justice: I suppose your case is that you think the Town Council ought to take precautions?

Witness: No, that is not my idea. I take the position that we should carry out the obligations imposed by the Act and by the agreement. I do agree that the work we do we must do in a safe way. If we do anything to disturb the surface of the road, and it is dangerous to the public, we must protect them.

The Acting Chief Justice: What you say is that within the 60 feet you are answerable, but beyond that you are not?

Witness: Yes.

By Sir Henry Juta: Witness could not say whether the Kloof-road was lighted. Witness considered the place was safe for Cape Town conditions. They could not drive roads on the mountain slopes without having the embankments on both sides.

By the Court: Witness considered it impracticable to put a barrier or embankment on the inner side.

Thomas Sewell, foreman, at present in charge at Camp's Bay, said that in February when the widening was done, he was in charge of the work of widening at the point near Montrose Villas. The embankment in front of Montrose Villas was very rough. It was dangerous to walk on this embankment, and the people living in Montrose Villas went from the lower side near Kloof House. The bank now was no more dangerous than it was before the work was commenced.

Mr. Searle closed his case.

Sir H. Juta: The first question is: are the public entitled to use this road? Then, as to the Tramway Company, they have made an agreement under the Act 34 of 1899, but this agreement was not part of the Act. By their contract, by the Act and by common law the company were bound to protect the public (see section 28 of the Act). This work has not yet been finished. The defendant company are breaking up a public road, and are bound to protect the public by lights and watchmen at night. Section 28 clearly holds them liable for injuries resulting from non-compliance with these provisions. The work was dangerous work. Wilson admits this. Then, too, it must be remembered that this road was not lighted. Not the least precaution had been taken to protect the public after digging away a bank in front of a man's house. True, after the accident a light had been put up. Whoever carries on work in a public road must protect the public. This work is still being carried on. At all events it is very much in the rough, and the Town Council will certainly not take over a road in the condition in which that road is at present. Plaintiff was lawfully there. He was not aware of the excavation, and he fell owing to the negligence of defendants without any contributory negligence on his own part. They (as independent contractors) did not finish their work, and therefore the Town Council are not liable. Defendants themselves admit that they took no precautions. As to damages, plaintiff is a bookkeeper, who depends upon what he can earn by the use of his right hand. That right hand has been injured, and he may never recover the use of it. Then, too, the pain and suffering he has undergone must be taken into account. Considering these things the amount asked for is not extravagant.

Mr. Searle (for respondents): It may be as well to look at the pleadings in order to see

on what this action is founded. The declaration states that the excavation was on ground adjoining the public road, and that a ditch was excavated on the public road. Their case was (1) that the bank was off the public road; (2) that it had been cut away; (3) that it had not been protected by lights or otherwise at night. Plaintiff admits that the path from the house to the public road was not straight down (see declaration). As the case stands on the pleadings, there was a bank which had to be cut away in order to widen the road. Section 15 of Act 34 of 1899 is the only section founded on. But that section does not refer to a case of this kind, but to an interruption of ordinary traffic, as in the case of *Newman v. Town Council of East London*. As far as the excavation was concerned that part of the work was done. Section 65 of the Act provides that an agreement between the company and the local authority should govern the interpretation of the Act - provided that such agreement should not be contrary to the express terms of the Act. Any section of the Act can be altered by this agreement.

[Buchanan, A.C.J.: Any man interfering with a road must do so with ordinary precautions. Suppose the Town Council alter or construct a road?]

Then, in case of accident, they would be liable, for they are bound to provide roads.

[Buchanan, A.C.J.: The Town Council and an independent contractor may both be liable as in *Newman v. Town Council of East London* (12 S.C.R., 61).]

In that case the work had been improperly done, and in such a case both those who did the work and those who ordered it to be done are liable. Here the work was not improperly done. It was done in pursuance of the company's agreement with the Town Council. If the company have done their work as it ought to be done they are not liable. They have done the work they were told to do.

[Jones, J.: If the work is of its very nature dangerous the company must take special precautions to protect the public.]

Yes, during the progress of the work. In this case, it was for the Town Council and not for the company to protect the place. They were neither bound nor empowered to put a fence there, and nothing less than that would have made the place perfectly safe. At the date of the accident the work was already completed as far as the safety of the place was concerned. The completion of a gutter at the bottom of the cutting would not have made the place any safer. Section 15 refers

to work done on the road itself, as in *Newman's* case. It is true that section 5 provides for barriers on the outside of the road, but not on the inside. In passing this Act the Legislature did not take away the liability of the Town Council. Section 17 of the Act shows that the Legislature regarded this company as bound to perform certain acts, but as liable to the Corporation, and the Corporation is in its turn liable to the public. The company can take precautions only within the terms of its agreement, *e.g.*, they could not fence this place. The real point is: has the company carried out its terms of agreement? If so, it cannot be held guilty of negligence. In *Newman's* case, and also in *Murray's*, a duty was cast upon the contractor.

[Jones, J., quoted judgment of Jones, J., in *East London Municipality v. Murray* (9 E.D.C., 55).]

There the obstruction was in the middle of a public street. Here there was an agreement between the Town Council and the Tramway Company, and if the company has kept to the terms of that agreement they are not *tort-feasors*.

[Buchanan, A.C.J.: The agreement was that they were to widen the road. It was not necessary to cut away the bank.]

Yes; both Roberts and Wilson said it was necessary.

[Maasdorp, J.: Did these contractors do work for the Municipality or for themselves with sanction of the Municipality?]

They bound themselves to widen the road to 60 feet, and they did so as much for the benefit of the Town Council as for their own. No doubt, if defendants had done the work wrongly they would be liable; but that is not the plaintiff's case.

[Maasdorp, J.: Suppose the Municipality had left the bank in that state, would they have been liable?]

I suppose so, because a special duty is cast upon them to provide roads. Section 28 of Act 34 of 1899 makes the company liable for accidents arising from its default in connection with its work. Hence, if there is no default, there is no liability. Section 8 gives the company power to make all necessary excavations. Then there is a further point, *viz.*, the question of fact as to the condition of the *locus in quo*. It is a very rough place, and very steep in front of No. 1, but easier in front of No. 2. Has, then, the place been so materially altered as to make it a source of danger? It was a place where accidents might have happened in any case. There was no pathway at the place where plaintiff

came down. The work had been done openly and had been finished months before the accident. As to damages, plaintiff claims £250. It is true he broke his wrist, but he has not lost his situation. He has proved about £17 or £18 of actual damage. Dr. Kitching said it was a very simple fracture, and he attended only 14 days. The doctor says plaintiff will have made a perfect recovery within a month. We say we have done all we were bound to do or could do, that the work was well done, and that the accident was not due to any negligence on our part.

[The Court intimated that they would like to hear Sir H. Juta on the question of damages.]

Sir H. Juta: It is hard to gauge pain and suffering by money. The plaintiff is a book-keeper, dependant for a livelihood on the use of his right hand. He has a wife and family to support. Not only must his physical sufferings be taken into account but also his mental torture and anxiety as to whether he would ever be able to exercise his calling again.

The Acting Chief Justice: The plaintiff in this case is a book-keeper residing in Cape Town, and he sues the defendants, who are a Tramway Company, for damages which he sustained on June 12 last by falling down an excavation made by the defendant company. The declaration states that this excavation was on a sloping bank adjoining the public road in front of certain houses known as Montrose Villas, but according to the evidence led in this case this excavation had been made in the public street, as the diagrams put in show that the Montrose Villa property is bounded by Kloof-road. Although the Kloof-road extended from the boundary of the garden wall immediately in front of Montrose Villas to the boundary wall of the property on the other side of the road, only a portion of the distance in the middle had been prepared as a roadway. On the Montrose Villas side there was a sloping bank, extending some 20 to 25 feet, going down from the boundary wall into the prepared roadway; then came that roadway, and on the other side there was also an unprepared part of the public road up against the wall on the other side of the Kloof-road. The defendants, the Camp's Bay Tramway Company, obtained from Parliament authority to establish a tramway along the Kloof-road, and by agreement with the Town Council, the local authority governing the road, the Tramway Company undertook for the purpose of laying their own tramway down on this

road to widen the prepared roadway at this point to 60 feet in breadth. In so doing they excavated along the Montrose Villas side of the road, leaving in front of these villas a steep bank about 4 feet in depth; an abrupt, steep bank dropping from part of the slope right into the roadway below. The plaintiff, who was previously acquainted with this locality before the excavation was cut, was on the evening in question on a visit to Montrose Villas. In going he had met a friend, and was taken to the villas by a pathway alongside the boundary garden wall, and so had no opportunity of seeing the excavation, of which he was in perfect ignorance. The plaintiff's visit was on business, and when he left the house by the front gate, going down the slope he fell down the embankment of 4 feet or so made by the Tramway Company, and sustained the injuries of which he now complained. The defendants set up the defence that they are not responsible for the consequences of anything they do along this road under their contract with the Town Council, provided that they simply do what the Town Council gave them permission to do. They want to throw any liability there may be upon the Town Council. That is really as far as one can gather their real defence in this case. Now, this road is vested in and controlled by the Town Council, and a good deal might be said for the liability of the Town Council to the plaintiff in consequence of their allowing this excavation to be made without proper protection for the public. A very instructive case on this point is that of *Newman v. The East London Town Council*. In that case Newman was injured while passing along a road upon which an excavation was being made by a contractor for the East London Town Council. The case was heard at the Circuit Court, and the Circuit Court found that the act of negligence which resulted in the accident was due to the contractor or his servants, and on this ground gave judgment against the plaintiff, and in favour of the Town Council. When the matter came on appeal before this Court, that judgment was reversed, and it was held that the Town Council was answerable for the misconduct of their contractor under the circumstance. A passage from the Chief Justice's judgment in that case read as follows: "But assuming that the negligent acts of the contractor were not the acts of the defendants, the obvious question arises, why did they not adopt some precautions against such negligent acts? I

can well understand the doctrine that a person who employs an independent contractor upon works which, in the ordinary course, would entail no danger to the public, is not liable for incidental injuries caused by the contractor's negligence. But where, as in the present case, the work is to be performed upon and near a public road, and it may be reasonably anticipated that, without due precautions, the safety of the public using the road will occasionally be endangered by the carelessness of the workmen, it is surely an act of negligence to order the work without the precautions." Though the judgment of the Circuit Court was reversed, that case so far as it goes is an authority that the contractor himself would also be answerable for his own negligence; though the Court held that the Town Council could not shelter itself behind the allegation that this negligence was that of an independent contractor of theirs, and not their own direct negligence. Now, in this case, the defendants stand in an even more responsible position than an independent contractor would be in. They are not independent contractors doing work for the Town Council, but are doing work for their own benefit. Under the agreement with the Town Council the Tramway Company have the right to do certain acts, and in the performance of these for their own benefit they so did their work that the plaintiff sustained the injuries complained of. The defendant company had to widen the road, and finding this bank on the one side, cut this excavation four feet in depth, and took the land so excavated and threw it on the other side of the road, as they had to raise and widen the road there as well. Mr. Wilson, the defendants' engineer, said distinctly in the witness box, "We took absolutely no precautions to protect the public against falling over this bank." After that evidence was given it was difficult to see what defence could be set up in that case. The position taken up by the defendants is: "We were authorised to widen the road to 60 feet; we did so, and for anything that occurs outside that, the Town Council or somebody else must be responsible, not we." Now, here is an act done for their own benefit, an act done in the midst of a public road, and in front of private houses which had access to the road, yet absolutely no precautions are taken to protect the public against accidents. Mr. Searle contends that even under these circumstances the Tramway Company would not be liable unless there was some negli-

gence on their part, but it was hardly possible to conceive a set of facts which could more conclusively evidence negligence. Cutting a four-foot trench in the middle of a public road, and leaving it unprotected, unlighted, and unwatched, seems to me gross negligence in the carrying out of the work entrusted to them. As a question of fact I am bound to find that there was negligence on the part of the Tramway Company in carrying out their work. The defendants say that what they did in widening the road was not improperly done. It is true that they had the right to widen the road, but it must be remembered that this widening of the road is not yet finished, and the work is still going on, and the danger was still existing, and no steps are taken to protect the public. That the Town Council had only inserted conditions in the contract for the erection of an embankment or barriers at the other side did not excuse the Tramway Company from taking steps to protect the public from danger on this side of the road. I think there is clear negligence, and the only question that remains is what damages have ensued. In this case it has been shown that the plaintiff is a healthy, temperate man, and, fortunately for himself and fortunately for the Tramway Company, the accident has not resulted in his being laid up for any length of time. It is admitted that the plaintiff was perfectly sober at the time of the accident, and it was not pleaded that there was any contributory negligence or that there was any wrongful act on his part. In fact, it was not alleged that any blame attached to the plaintiff for the accident. Under these circumstances, there are no grounds on which we can absolve the defendant company. Now with regard to the question of damages, £250 are claimed. I suppose the Tramway Company fought this on a question of principle, otherwise one would regret that some reasonable tender had not been made, and if it had been made no doubt the case would not have come into court. I think about £25 would cover the actual pecuniary loss sustained by plaintiff. There has been no loss of employment, as plaintiff still retains his position. He has had to employ clerical assistance to carry on his work while he was recovering, but he has been paid his salary. This accident occurred in June last, and Dr. Kitching informs us that he has no reason to believe that any permanent injury will result. The plaintiff, in falling down the bank, frac-

tured his wrist, but the fracture was a simple one, and not very serious. Looking at all the circumstances of the case, I think that £25 will cover the pecuniary loss, while in addition £50 will be given for the inconvenience, suffering, and loss of time to which plaintiff has been put. Judgment will therefore be given for £75 damages with costs.

Mr. Justice Jones concurred.

Mr. Justice Maasdorp said that it seemed to him that the place where the accident took place was undoubtedly a portion of the public thoroughfare, and that it was a place where plaintiff was entitled to be at the time when he crossed this ground. There was no doubt that the Municipality had certain statutory powers to alter this road for the public benefit, and in so far as they made alterations, improvements, and obstructions upon it, the public had to submit. The Tramway Company also had certain rights, in constructing the tramway, to interfere with and alter the road, but it was quite clear that where such powers existed in any public body, they must be performed with due regard to the public safety, and it was clearly laid down in many cases where there was negligence in the performance, that such public body would be responsible for any injury sustained in consequence of its negligence. The main defence in this case seemed to be that the Municipality, having certain rights to alter the road, conferred upon the Tramway Company the rights possessed by them to make alterations, and the contention raised upon that was that the Tramway Company carried out the work entrusted to them correctly under their agreement, and that therefore they were not guilty of any negligence. It seemed to him quite clear that where a Municipality was bound to do a certain work, and to do it with due care and without negligence, they could not entrust the same work to anyone else, exempting such person from the exercise of due care and the avoidance of negligence. That was to say, they could not give anyone rights which they did not themselves possess, and such person must take the responsibility of the Municipality. That being so, he came to the conclusion that the contractor was liable as well as the party with whom he contracted for any wrong he might do to any of the public, and the wrong in this case consisted in having performed the work negligently. The negligence was that they had done the work up to a certain point and

then left it unfinished. How it could be rectified the parties themselves would have to consider. It would appear that provision was made for the construction of a certain barrier on the one side of the road for the public benefit, and he did not think that there should be any difficulty for either the Town Council or the Tramway Company to construct similar works on the other side for the public safety. Though both parties might be responsible in this matter, it was quite clear to him that the Tramway Company were responsible. He wished to say nothing against the Municipality at present, or to suggest that they were in any degree responsible. They were, as it seemed to him, simply consenting parties, consenting to the work being done, and approving of the work the Tramway Company wanted to do for their own benefit. He was not now prepared to say that the Municipality were responsible for any injury that might be suffered. He concurred in the judgment.

[Plaintiff's Attorneys, Messrs. Walker and Jacobsohn; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

DILWORTH V. DILWORTH. 1901.
Aug. 28th.
Oct. 12th.

This was an action for restitution of conjugal rights, failing which, a decree of divorce. The plaintiff was James Dilworth, shoemaker, of Claremont, and the defendant Clementina Dilworth. They were married in 1887, and there were two minor children, a boy and a girl.

Mr. Close appeared for the plaintiff.

James Barber Dilworth, plaintiff, said he was married to defendant at Egmont, in Cheshire, on the 30th March, 1887. On the 5th February, 1899, witness came out to the Colony to make a home. Defendant followed him in May with the two children of the marriage. Witness sent for her to come out in May. They lived at Claremont until September, 1899, where there was unpleasantness. Defendant then, contrary to

witness's wishes, went into a bar to work. Witness stored the furniture, and went to Beaufort West. Afterwards, one of the children met with an accident, and defendant returned to live with him. In October, 1900, witness sent the children to his wife's mother, as defendant insisted on taking a situation in a bar. She said that life at home was too quiet. After the children had been sent home in accordance with defendant's wishes, she left home and went into employment at the Masonic Hotel, afterwards going into the Theatre Bar. Defendant wanted to have one child, but would not go back to live with witness. Witness was willing to let the defendant have the one child. He wanted the other boy, who was a cripple, his leg having been amputated. Although he asked for costs in the declaration, he did not press for costs against his wife.

The Court made an order for restitution of conjugal rights, defendant to return to plaintiff on or before the 1st October next, failing which a rule would be issued calling upon defendant to show cause why a decree of divorce should not be granted, plaintiff to have custody of the minor son, the rule being returnable on the 12th October.

On the return day, the defendant not having complied with the order of Court, the rule was made absolute.

WALTER SEARLE AND SON V. { 1901.
BROUGHTON. { Aug. 28th.

The declaration set forth that on the 7th February, a written lease was entered into between plaintiff and defendant, John W. Broughton, by which plaintiff let a certain room in Church-street to the defendant for the purpose of carrying on a cigar and cigarette manufactory, and that defendant wrongfully and unlawfully, and in breach of the contract, used the room for immoral purposes by allowing it to be used as a gambling den. Plaintiff asked for an order of ejectment. There was also a claim for damages, but this was withdrawn, the whole object of the case being to get rid of the gambling den.

Sir H. Juta, K.C., and Mr. Close for the plaintiffs.

The Court ordered that the lease be cancelled, and that the defendant give up possession on or before Wednesday next. Defendant was ordered to pay costs.

KING WILLIAM'S TOWN MUNI- { 1901.
CIPALITY V. ATTWOOD. { Aug. 28th.

Nuisance — Municipal regulations —
Act 5 of 1883—"Government Gazette."

Appellant had been convicted by the Resident Magistrate of King William's Town of contravening section 58 of the Municipal Regulations framed under Ordinance 9 of 1864. Appellant excepted on the ground: (1) That it was not stated on the charge sheet that Ordinance 9 of 1864 was a Kaffrarian Ordinance; (2) That these regulations were not proved until after plaintiff's case had been closed, and then only by the production of the "Government Gazette" containing a copy of a proclamation promulgating the said regulations.

Held (1) That by the omission of the word "Kaffrarian" in the charge, appellant had not been prejudiced on the merits.

(2) That by Act 5 of 1883, section 7, production of a copy of the "Government Gazette" is evidence of a proclamation therein contained.

(3) That as a fact Gidi was the servant of appellant, and had been proved to have committed the nuisance with which appellant had been charged on the premises of said appellant, with his knowledge and for his benefit.

(4) That the appeal must therefore be dismissed with costs.

This was an appeal from a judgment of the R.M. of King William's Town. The appellant (defendant in the Court below) had been charged with contravening sub-section 58 of section 6 of the General Municipal Regulations of the Municipality of King William's Town. The aforesaid sub-section reads as follows: "Any person creating any nuisance which may tend either to injure the health, or in any way affect the safety or rights of the inhabitants shall upon conviction be

liable to a penalty not exceeding the sum of ten pounds sterling and, in default of payment, to a term of imprisonment not exceeding three calendar months."

The Medical Officer deposed on affidavit that this nuisance was injurious to health. The contravention of the Municipal Regulation aforesaid had been committed by one Giddi who (as it was alleged) was a servant of appellant. This was disputed, but the R.M. found that the said Giddi was a servant of appellant. The grounds of the appeal were as follows:

1. Gross irregularity in the proceedings, inasmuch as

(a) The indictment charges the accused with contravening sub-section 58 of section 6 of the regulations framed under Ordinance 9 of 1864, whereas there is no such Ordinance.

(b) The regulations referred to were not proved until after the case for the Crown had been closed, and the accused had applied for his discharge.

(c) The accused was found guilty upon the action of one Gidi (or Giddy), a native, whereas the evidence adduced shows that the said Gidi was not a servant in the employ of the accused.

2. The admission of illegal and incompetent evidence, inasmuch as

(a) The evidence of one Henry M. Chute was admitted, the same being irrelevant to the charge under consideration.

(b) The regulations referred to in clause 1, section (a), above were admitted as evidence upon being handed in to the Court by Mr. Bertram, who appeared for the Council, whereas the said regulations should have been proved by a witness upon oath.

Mr. Gardiner appeared for the appellant; and Mr. Searle, K.C., for the respondents.

In argument Mr. Gardiner said he had overlooked the Act which made the regulations provable by putting in a copy of the "Gazette" containing them. That ground of appeal would therefore have to be abandoned. The Ordinance under which accused was charged was a Kaffrarian Ordinance, and it should have been so stated. He contended that defendant did not employ Giddi as his servant, but that Giddi was in the position of a partner, and that no liability therefore attached to defendant for Giddi's act.

Without calling upon Mr. Searle, the Court dismissed the appeal.

Acting Chief Justice: Appellant was charged before the Resident Magistrate of King William's Town with contravening section 58 of the

General Regulations of the town, framed under Ordinance 9 of 1864. These regulations were to protect the inhabitants of the town against nuisances being committed which were injurious to health. The nuisance alleged in this case was the soaking of certain hides on premises occupied by defendant. The nuisance had been proved by the medical officer called to be injurious to health. Consequently the offence came within the regulations. The first exception taken by the appellant was that in the charge sheet the ordinance under which he was indicted was referred to as Ordinance 9 of 1864. This was a Kaffrarian Ordinance and not a Cape Colony Statute, and the objection is that the word "Kaffrarian" was omitted in laying the charge. But this omission did not prejudice defendant, and was not a sufficient ground upon which to quash the conviction. Exception is next taken to the fact that the regulations were not proved until after the plaintiff's case was closed, and that then the only proof given was the production of the "Gazette" containing the Proclamation promulgating the regulation. Counsel argued that, as King William's Town was not constituted a municipality under the General Municipal Act (No. 45, 1882), the 114th section of that Act, which made the "Gazette" evidence of the due making of a bye-law or regulation, was not applicable here. But the learned counsel candidly admitted having overlooked the General Interpretation Act of 1883, which made the "Gazette" sufficient evidence generally. The remaining point was one of fact. The nuisance was committed by one Giddi, who was alleged to be a servant of the defendant. This Giddy, who was called by the defendant, himself stated he was defendant's servant. He did this work under the defendant's direction, and for the benefit of the accused as well as for himself. There was a nuisance committed, defendant was charged with it, it was proved to have been committed by his servant, on his premises with his knowledge, and for his benefit. There was therefore no ground upon which the appeal could be allowed. The appeal must be dismissed.

REX V. FLENI AND ALLAN. { 1901.
Evidence. { Aug. 28th.

The two appellants had been convicted of stealing two horses. A considerable amount of hearsay

evidence had been admitted by the Resident Magistrate, who had moreover admitted, as part of the record, certain telegrams and letters which were not evidence. The only direct evidence was that of a boy of twelve years of age, who had been punished by one of the accused.

The Court quashed the proceedings and allowed the appeal.

This was an appeal against the decision of the Resident Magistrate of Engcobo. The appeal first came before the Court in the May term, when it was ordered that the Magistrate should take the evidence of certain three witnesses, named Clarke, Sullivan, and Greenaway.

Three natives were convicted by the Magistrate of the theft of two horses belonging to another native. Two of the convicted men—Fleni and Allan—brought the appeal.

It appeared from the evidence that Greenaway bought one horse from Clarke, and that Sullivan purchased the other. The principal evidence against the accused was that of a boy of twelve years of age, who said he saw two of the accused go to the kraal of the third, and heard them discussing about the theft of the horses. They went off, and returned with horses, which the boy said belonged to complainant.

Mr. Searle, K.C., was for the appellants, and Mr. Howel Jones for the Crown.

Mr. Searle said that the Magistrate had taken the evidence of Clarke and Greenaway. The latter said he bought the one horse from Clarke, who was a trader. Clarke said he could not recognise the persons from whom he bought the horse. He did not identify accused.

After hearing argument, the Court allowed the appeal.

The Acting Chief Justice, in giving judgment, said that three prisoners were charged before the Resident Magistrate of Engcobo with the theft of two horses, the property of a native. The complainant lost these two horses, which were a bay pony and a mare. One horse was found at the time of the trial in the possession of a native, who had bought it from the Government Remounts. At the trial of the three prisoners a great amount of evidence was led, almost all of it being hearsay. There was no direct evidence given against them, except the statement by a boy, who said he had happened to go out of the

hut one evening and saw the horses outside the hut after the prisoners had come in. This boy, a lad of 12, had been punished by one of the prisoners. He did not make the statement at the time, but after being punished he left the prisoners' hut and went to the complainant's. Complainant had had a lawsuit with one of the prisoners, although he said he was not on bad terms with them. Telegrams and letters which were not evidence had evidently been acted upon by the Magistrate, and had been made part of the record. With this unsatisfactory state of the record, when the case first came up for hearing, the Court directed that the evidence of the person who was said to have bought the horse from the prisoners, and of other persons connected with the transaction should be taken. This had now been done, and it made the case more unsatisfactory than it was before. Clark, in whose possession one of the stolen horses was found, could not recognise the prisoners as the men who sold him the horse. And, moreover, he denied at first that he had ever sold the other horse to the Remount Agency, though he afterwards in a way admitted that he had done so. The whole case was so unsatisfactory, and so irregular in procedure, and the evidence was so weak, that the Court felt compelled to quash the conviction. This Court, sitting as a Court of Appeal, would not quash a conviction solely on a question of a conflict of testimony, but would follow the usual rule that the Magistrate must be the judge of the veracity of the witnesses. Here the only direct evidence was the boy's. He had a vindictive motive in the matter, and the Magistrate should have been very careful before relying solely on the boy's tainted evidence. The Court did not say that the boy was not telling the truth. Though the evidence in the case was very weak, the conviction was quashed mainly on account of the gross irregularity which had attended these proceedings. Only two of the prisoners had appealed, but the result of the appeal would affect the three. The whole of the proceedings would be quashed, and the appeal allowed, with costs.

[Appellants' Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

REX V. DELPORT. { 1901.
Aug. 28th.
Sept. 23rd.

Incest—Wife's sister—Act 40 of 1892.

Appellant had been tried and convicted at the East London Circuit

Court of having had sexual intercourse with his wife's sister during the lifetime of his wife aforesaid. The facts were not disputed and the point was reserved as to whether the said acts constituted the crime of incest.

Held, that intercourse with a wife's sister even during the lifetime of the said wife does not constitute the crime of incest: since by Act 40 of 1892 an unmarried wife's sister is placed in the same relation to her brother-in-law as that which would be occupied by any other unmarried female.

This was an argument on a point reserved by the judge of the East London Circuit Court, as to whether sexual intercourse with a wife's sister during the lifetime of the wife aforesaid constituted the crime of incest. The fact that the accused had been guilty of such intercourse was not disputed.

[Mr. De Waal (at the request of the Court) argued the point for the accused. Mr. H. Jones appeared for the Crown.]

Mr. De Waal: The accused, one Delport, was tried before the Circuit Court in East London, on April 12 last, for the crime of incest, in that he had had carnal connexion with his wife's sister, his wife being still alive. The jury returned a verdict of "guilty under great temptation," and he was sentenced to pay a fine of £5 or, in default, to a short term of imprisonment. Counsel for the accused took exception to the verdict on the ground that the indictment did not disclose a crime. Barry, J.P., however, held that as accused's wife was alive at the time of the alleged intercourse with her sister, accused had committed the crime of incest. Hence the question now before the Court is, "Does a man's carnal connexion with his wife's sister, while his wife is still alive, constitute the crime of incest?" There can be no question that had the wife of accused been dead he (the accused) would not have committed incest by sexual intercourse with her. *Van der Linden's Institutes* (Bk. 2, chap. 7, sec. 8). "Incest," he says, "is the contracting of a marriage or carnal intercourse between persons, inter-marriage between whom is prohibited on the ground of relationship." This has always been accepted in this Court as the true definition of incest. It was

adopted by De Villiers, C.J., in *Q. v. K.* (Buch., 1875, 98) and in *Q. v. Arends* (8 Juta, 176). His Lordship said "The test, according to the authorities, is whether the inter-marriage between the parties is prohibited by law on the ground of relationship." This crime then can be committed between parties only who are not allowed to intermarry. In other words, the guilt of the crime depends entirely upon the prohibition of marriage on the ground of relationship. No doubt, according to Common Law, marriage with a deceased wife's sister was prohibited. *Schorer's Notes to Grotius* (p. 366, Maasdorp's Tr.). The decision in *Q. v. K.* (Buch., 1875-98) was based upon this doctrine. Act 40 of 1892 has, however, done away with the prohibition of the Common Law, and this being so, it follows that incest cannot be committed between a man and his wife's sister. Such, at all events, was the view taken by Jones, J., in *Q. v. Mentoor* (11 E.D.C., 125). The decision, however, of Barry, J.P., and Solomon, J. (in review), in *Q. v. Hatting* (13 E.D.C., 141) was opposed to that in *Q. v. Mentoor*. In that case Barry, J.P., clearly held that the relation between a man and his wife's sister continues only during his wife's lifetime and ceases at the wife's death. Hence intercourse with a deceased wife's sister would not be incest. I submit that the conclusion drawn from Act 40 of 1892 by Jones, J., in *Q. v. Mentoor* is the more correct, for if the death of a man's wife has the effect of removing the relationship between him and his wife's sister the same principle would hold good with respect to his daughter-in-law. As soon as his wife dies, his daughter-in-law ceases to be his daughter-in-law, and he may marry her or have intercourse with her with impunity.

Surely the death of a party can have no effect on the relationship of parties, and this principle has been strictly upheld by our Common Law, which recognised that the wife's death notwithstanding, the relationship of brother and sister-in-law still subsisted between the husband surviving and the sister of the wife deceased.

Solomon, J., appears to differ from Jones, J., and Barry, J.P., inasmuch as he seems to hold that the relationship never ceases, Act 40 of 1892, sec. 2, notwithstanding. He says "I take the intention of the Legislature to be that, although a man and his wife's sister are within the prohibited degrees, still for the purpose of marriage, when the wife dies, the barrier is removed, and the husband and his deceased wife's sister shall no longer

be considered as within the prohibited degree." In other words, the relationship does not cease, but, for the purpose of marriage, the barrier—that is the prohibition to marry—is removed.

If this view is correct, I would argue that intercourse with a deceased wife's sister would be incest if not held under the sanction of the marriage bond, but that if a marriage has been contracted between parties it would be no crime at all.

It is not then correct to define incest as "carnal connexion between persons related within the prohibited degrees," for here (in the view of the prosecution) the intercourse is not prohibited and yet is criminal!

I submit that the reasons why the Dutch legislators, centuries ago, ordained that marriage with a deceased wife's sister should be unlawful was because they considered (as many people do, to-day) that a man's intercourse with his wife's sister would affect her blood, and consequently her offspring. The mingling of the blood was what was they chiefly feared. The very name "bloedschande" seems to indicate this — "blood-shame," or "crime of the blood." But this notion, as far as the legislation of this country is concerned has been abandoned. Our Legislature has not considered the relationship of a man with his wife's sister so close that they twain commit a "blood-crime" if they marry. It follows, then, from the definition of incest which has been accepted by our Courts that intercourse without the formal seal of marriage cannot amount to incest. The reason why a man may not marry his divorced wife's sister is not on account of the relationship between the parties being too close: since, if that were so, marriage with a deceased wife's sister would never have been legalised, but the Legislature wanted specially to discourage intercourse between a man and his wife's sister and encourage reconciliation. Otherwise what an easy matter it would be for a man who should lust after his sister-in-law to know her carnally—thereby to court divorce—thereafter to marry the sister-in-law aforesaid, and thus reap the fruit of his own evil-doing. By prohibiting such a union the shame of the illicit intercourse is augmented and discouraged.

To sum up. The two primary elements that must be present in the crime of incest are relationship and the prohibition of marriage. There are many prohibitions of marriage which have nothing to do with relationship, e.g., a man who has contracted a

marriage still subsisting is prohibited from marrying any other person whatsoever. A minor is not allowed to marry without consent of parents. Members of the Royal family of England may not marry without the consent of the Sovereign, but no such marriages as the aforesaid would be incestuous.

Mr. Howel Jones (for the Crown): It seems clear that by Common Law connexion with a wife's sister is incest.

[Buchanan, A.C.J.: What is your authority for saying that?]

I did not know that that question was raised in this point reserved, and have not the authorities here. I understood that it was settled law. See *R. v. K.* (Buch., 1875, p. 98).

[Buchanan, A.C.J.: That was not a decision of the Supreme Court.]

Incest is having carnal connexion with a person within the prohibited degrees of marriage.

[Buchanan, A.C.J.: *Van der Linden* (2, 7, 8) defines incest as the marriage or carnal connexion between persons who are prohibited from intermarrying on account of their relationship. Is not that relationship by consanguinity?]

In the following sentences *Van der Linden* seems to show that it would be committed by connexion between persons related collaterally or by marriage. *Van der Linden* (Bk. 2, c. 7, sec. 8, Juta's Translat.) mentions "relationship" as a sufficient condition for incest arising from intercourse.

[Buchanan, A.C.J.: If A and B are two sisters. If A dies her husband can marry B. He cannot marry an ascendant or a descendant: for such relationships continue after the death of the wife, but the relation with wife's sister does not. Even before Act 40 of 1892 was passed a man could marry his deceased wife's sister by Roman-Dutch law.]

A man's wife and her mother stand in the same degree of relationship.

[Buchanan, A.C.J.: Curiously enough, *Voet* (23, 2, 35) does not deal with affinity.]

But see *R. v. Arends* (8 Juta, 176). *Voet*, in the passage cited there, holds that incest may be committed between parties related by marriage.

[Buchanan, A.C.J.: If the marriage is dissolved a man may marry his wife's sister.]

[Jones, J.: The only reason why you may not marry a second wife is because the law says you must not; but in certain cases the law allows you to do so.]

See *Van Leeuwen* (Bk. 4, 37, 9) and *The State v. Fouchee* (Kotzee's Reports, V. 2, p.

23). In that case it was held that connexion with a wife's sister was incest.

[Maasdorp, J.: Suppose there were issue of this intercourse, which you say is incestuous, and that after the death of his wife accused had married her sister. What would be the position of these children?]

The law would legitimate them.

[Maasdorp, J.: The law will never legitimate incestuosi.]

[Buchanan, A.C.J.: You say that intercourse between a man and his wife's sister is incestuous as long as she lives, but not after she dies. Does not that show that the subsistence of the marriage makes the incest?]

The Act 40 of 1892 does not prohibit anything. It is in derogation of the Common Law and therefore must be interpreted most strictly.

[Buchanan, A.C.J.: *Van der Linden* (Bk. 2, c. 7, sec. 8) clearly states that a man is prohibited from marrying within the prohibited degrees on account of relationship.]

[Jones, J.: The Act says that if the marriage is dissolved by death you may marry your wife's sister, but not if your marriage is dissolved by divorce. You certainly cannot marry one with whom you have committed adultery in any case.]

[Buchanan, A.C.J.: My brother Jones's point is: that incest can arise only out of relationship, and that not every prohibition of marriage constitutes incest.]

[Jones, J.: Intercourse between people who are not permitted to marry is not always incestuous. Suppose a man runs away with a girl. Is not this a mere academic discussion? Why do you not prosecute the man for adultery?]

I have never heard of a conviction being obtained for adultery.

[Jones, J.: In *Queen v. Koch* (5 Buch., 1875, p. 6) it was held that adultery is a crime by the law of this colony.]

Undoubtedly it is a crime, but it does not follow that at this date a conviction would be obtained from a jury.

Cur ad. rult.

Postea (September 23).

The Acting Chief Justice, in giving judgment, said: The accused was tried before the Circuit Court for the district of East London on an indictment charging the crime of incest, in that he had carnal intercourse with Frances Viljoen, he being then and there married to her sister then living. Prisoner being arraigned pleaded not guilty, but was convicted by the jury, and on the request of counsel the presiding judge

reserved the point for the consideration of the Court of Criminal Appeal, whether or not the indictment disclosed facts to justify the charge of incest. Sentence was passed of a fine of £5, or in default of payment one week's imprisonment, and it was ordered that prisoner be treated as an unconvicted prisoner until the point reserved be decided. There are no reasons with the record given by the presiding judge; but in a letter from the Circuit Court Registrar it is stated that his lordship, in charging the jury, told them, upon the authority of the *Queen v. Hattingh* (13 E.D.C. Rep., p. 141), that the law did not permit connection with a sister-in-law, that having such connection during the wife's lifetime was incest, and that it was for the jury only to find on the fact whether the prisoner had or had not had such connection. The first question which arises is whether or not incest can be committed between persons related by affinity only. The definition of incest given by *Mathaus* (De Crim., 48, 3, 6, 2), refers only to consanguinity: "In presenti vero capite incestus nihil aliud nobis erit, quam foeda et nefaria maris et feminae commixtio, contra reverentiam sanguini debitam." But in the next section he states that according to the *jus gentium* it can be committed between persons related by affinity. *Voet*, on the other hand (48, 5, 19), holds it to be clear that it extends to cases of affinity as well as of consanguinity. *Van der Linden's Institutes* is the latest text-book on the common law. In the translation by Henry, section 8 of chapter 7, book 2, was rendered as laying down that by incest "we understand the intermarrying or carnal connection of persons whose marriages with each other are forbidden by law on account of consanguinity." In the case of the *Queen v. K.* (Buchanan, S.C. Rep., 1875, p. 98), tried at the Cape Town Criminal Sessions, the learned Chief Justice, in charging the grand jury, is reported to have said: "The popular idea of incest is, carnal connection between persons too nearly related by blood. There are certain authorities which would seem to confine it to that, but the weight of authority goes to show that no distinction in law is to be made between relationship by blood and relationship by marriage." In that case there was an acquittal, so the matter did not go further. In a footnote to the report the editor points out that the word translated by Henry as "consanguinity" should have been rendered "relationship." Hence in the later translation of the *Institutes* by Sir Henry Juta, we have

the passage rendered (p. 234), that by incest "must be understood the marriage or carnal connection between persons who, on account of their relationship, are prohibited by law from intermarrying." The definition given by *Van Leeuwen* in his Commentaries, is more distinct (b. 4, c. 37, section 9). He says that "incest is the sexual union of two persons who, on account of their being related by blood or affinity, may not enter into matrimony together." This view of the law, extending the crime to affinity as well as to consanguinity, has been favoured in our courts in all the reported cases, and may now be taken to be established. The next point for consideration is the effect of Act No. 40, 1892, which now makes it lawful for a widower to marry his deceased wife's sister, or any female related to him in any more remote degree of affinity save and except an ancestor of or descendant from such deceased wife. Apart from the obstacle created by the existence of another marriage, the degree of relationship in this case is one in which intermarriage is by the statute now permitted. The question upon which the decision of the point reserved depends is, does the fact that prisoner's wife is still alive make intercourse between the parties incest? Now, the crime of incest is in no way dependent upon the fact of the existence or non-existence of the bonds of matrimony. As long as the marriage tie subsists the party so bound cannot marry any person; but all illicit intercourse on his part is not therefore incest. The crime of adultery may be also committed in a case of incest, but every case of adultery is not necessarily incest. Nor is it the true test to apply whether or not the persons are prohibited from intermarrying, unless such prohibition is founded on the degree of kinship of the parties. The Roman Dutch Law recognised a number of relationships which prevented marriage between the parties, but in which there was no question of consanguinity or affinity. For instance, under the old law, a Governor of a province during his term of office was prohibited from marrying a subject, nor could a guardian marry his ward. So, too, minors were not permitted to marry without proper consent, nor were the guilty persons where a divorce had been granted for adultery; yet in none of these cases, unless there existed a relationship of kinship within the prohibited degrees would there be incest. It was the confusing of the prohibition founded on the degree of relationship, with the incapacity to marry

arising from an existing marriage, that seems to explain the view expressed by the Eastern Districts Court in the case of the *Queen v. Hattingh*, which, after full consideration, appears to me to be a mistaken one. From the judgments, it would seem that the Court would have held in that case that there was no incest had the intercourse taken place after, instead of before, the wife's death. And so in the case under review. The existence of the marriage tie made the intercourse in both cases adultery, but that is very different from saying that the fact that the wife of the accused was alive, and not dead, made it incest. Since the Act No. 40, 1892, as far as the husband is concerned, no disability now exists on the ground of affinity as regards the wife and her unmarried sister, any more than it would exist in a case where the wife and the other female were not in any way related. The provision of the 4th section of the Act, which exempts from legalisation the marriage of a man who had been divorced from his wife, with the wife's sister, was, in the *Queen v. Hattingh*, used to illustrate the absurdity of the proposition that intercourse during the wife's lifetime would be incest if there had been a divorce, and not incest if no divorce had been obtained. But this supposed absurdity disappears altogether if it is held that in neither case would the crime of incest be committed. As already pointed out, a disability to intermarry, attached as a consequence to a divorce, is altogether different from a disability arising from the relationship of the parties. This being my view of the existing law of the Colony, in my opinion the question reserved by the Court below at the trial of the accused must be answered in favour of the prisoner, as the illicit intercourse in this case was not between persons who, on account of their relationship, are prohibited by law from intermarrying. The conviction must therefore be quashed.

Mr. Justice Maasdorp fully concurred.

The Acting Chief Justice said that Mr. Justice Jones had heard that judgment, and fully concurred in the conclusion arrived at, so that it was the decision of the full Court.

REX V. SLATER AND ANOTHER. { 1901.
Aug. 28th.
Forgery—*Crimen falsi*—Act 3 of
1861.

A conviction for forgery can be sustained even in the absence of

any proof of prejudice to a third person, beyond the possible prejudice to the safety of the general public or of military forces. Under the Common Law it was necessary to prove (1) fraudulent intent; (2) Actual injury to some third person, but by Act 3 of 1861, proof of fraudulent intent suffices for a conviction.

This was an argument on a point reserved by the Eastern Districts Court.

The record of the Court below showed that Cornelis Slater and Peter Base were charged on May 18, 1901, before the Resident Magistrate of the district of Albany, at Graham's Town, with forgery, and uttering a forged instrument, well knowing the same to have been forged. It appeared that the prisoner Base produced at the office of the commandant at Graham's Town, a note reading as follows: "Dear sir,—Please will you be so kind and give my boy a pass after nine every Friday, and before five, as he is a butcher boy, P. Base.—Yours truly, J. H. Webber, High-street." The clerk at the commandant's office saw that the signature was not that of Mr. Webber, and subsequently Base admitted that it had been written by Slater. The prisoners were convicted by the Magistrate, and the point reserved by the Eastern Districts Court was as follows: "In the absence of any proof of prejudice to any third person, beyond the possible prejudice to the safety of the general public or the military forces, and having regard to the facts on record, can persons be convicted of the crimes of forgery and uttering a forged document?"

Mr. C. W. de Villiers (for the prisoner): The point is, what amount and what kind of actual or possible prejudice is necessary to complete the crime of forgery.

Forgery is a branch of the *crimen falsi* of Roman Dutch Law. The text writers all agree that *falsitas* implies prejudice to someone. *Van der Linden* (p. 225, Juta's Tr.); *Voet* (48, 10, 1); *Carpzovius* (*Pr.: rerum criminalium*, q. 83, par. 5 and 10); *Matthæus* (*De Criminibus*, 48, 7, 1).

In *R. v. Brandford* (7 Juta, 173) the Chief Justice approved of the definitions of *Van der Linden* and of *Voet*, and said that there should be actual prejudice to another. He proceeds to indicate the nature of this prejudice, which, to constitute fraud, must be a

prejudice assessable in damages. See also *Carpzovius* (93, par. 62, and par. 1 in which he likens fraud to theft). In *R. v. Fortuin* (1 App., 30) *furtum usus* was held not to be an indictable offence. *Furtum rei* is the only actual theft. This shows the true nature of the crime of theft, and forgery is of the same nature.

Now, what is the nature of the prejudice in this case? If the scheme had succeeded it would have resulted in an advantage or privilege to the prisoner Base, but this privilege would not have entailed any correlative subtraction from the rights of the public—at any rate nothing material. The possible prejudice to the public is of such an unsubstantial and illusive character that the law will not regard it. *Matthæus* (48, 7, 1). This is a very different case from that of forging a public document. It is of the utmost consequence that documents of that kind should not be falsified or counterfeited, and clearly mischief of a very serious nature would result if they were.

The English authorities agree substantially with ours in defining forgery. See *Russell on Crimes* (2, 564); *Stephen's Digest of Crim. Law* (267); *Stephen's History of Crim. Law* (V. 3, 187); *Stephen's Digest of Common Law* (p. 267); *R. v. Hodges* (D. and B., C.C., 3).

Mr. Howel Jones (for the Crown) was not called on.

The Acting Chief Justice, in giving judgment, said: These persons were charged before the Resident Magistrate of Albany with the crimes of forgery and uttering a forged instrument, well knowing the same to have been forged. This instrument was a letter purporting to be written and signed by one J. H. Webber, applying for a pass in favour of the accused. It is not disputed that this signature of Mr. Webber's was a forgery; or that the prisoners forged this instrument, and presented it at the commandant's office with the object of obtaining from the commandant a pass. The matter came before the Eastern Districts Court, when they reserved for the consideration of the Supreme Court the following question: "In the absence of any proof of prejudice to any third person, beyond the possible prejudice to the safety of the general public or the military forces, and having regard generally to the facts on record, can persons be convicted of the crimes of forgery and uttering a forged document?" The Magistrate convicted the prisoners and sentenced them to imprisonment. Mr. De Villiers, at the request of the Court, has argued the case on behalf of the prisoners, and has gone fully

into the authorities, and put them before the Court. After hearing Mr. De Villiers's argument on these authorities, it was unnecessary to call upon Mr. Jones. Now under the old common law the crime of forgery was a branch of what was known as "crimen falsi," or fraud, and to constitute the crime of fraud it had to be proved first that there was wilful intention, and secondly, that actual injury to a third person had been committed. But our Legislature, following the example of England and other countries, passed Ordinance No. 3 of 1861, which provided, with regard to trials on charges of forgery generally, that it shall not be necessary to prove intent on the part of the defendant to defraud any particular person, but shall be sufficient to prove that the defendant did the act charged with intent to defraud. Without going into the particulars of this case, I may say that on the evidence there was distinct proof of the intention to defraud the commandant. So that, even without relying on the Act, and even assuming that it was necessary to prove that a particular person was prejudiced, the evidence shows a fraud to have been committed, even under the old common law. However, since the passing of the Act of 1861, it is not necessary to prove that, and the question put by the Eastern Districts Court must be answered against the prisoners, and the conviction will be confirmed. The Court is indebted to Mr. De Villiers for taking the trouble to look up all the authorities, as he has done, but I cannot see any grounds for quashing the conviction.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDOEP.]

ADMISSIONS. { 1901.
Aug. 29th.

Mr. Solomon moved for the admission of George Welsh as an attorney and notary.

Order granted, and the oaths administered.

Mr. Benjamin moved for the admission of Andrew William Hofmeyr as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate at Montagu.

Mr. B. Upington moved for the admission of Theodore William Key as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate of Colesberg.

Mr. Benjamin moved for the admission of William Hendrik Kempen as a sworn translator.

Order granted and the oath administered.

PROVISIONAL ROLL.

PITTMAN V. KOHNE.

Mr. Russell, for the plaintiff, asked that this matter be allowed to stand over until September 12.

Postponement granted.

NEL V. FREDERICK J. VAN ZYL.

Mr. B. Upington moved for provisional sentence for £195 5s. due on a promissory note, with interest thereon, and also interest from the due date, June 26, 1900.

Provisional sentence granted as prayed.

TRUSTEES OF THE ZULULAND BISHOPRIC V. HARRY W. PARR.

Mr. C. de Villiers moved for provisional sentence for £60, rent due under a lease, and also under Rule 329d, for judgment for £15, arrear rent, with interest and costs.

Granted.

SACHS V. HENRY DE KLEBK.

Mr. Close moved for provisional sentence on a promissory note for £63, value received, less £10 paid on account.

Provisional sentence granted as prayed.

ILLIQUID ROLL.

ROBERTSON V. THE SALESIAN INSTITUTE.

Mr. Howel Jones moved for judgment, under Rule 329d, for judgment for £100 14s. 2d., goods sold and delivered.

Judgment granted as prayed.

HARRIS V. BUCHARTH.

Mr. Solomon moved, under Rule 329d, in this claim, which was for delivery of certain lime bags, and also damages and costs, but said that now he only asked for costs.

Judgment was given for the costs as prayed.

REITZ AND ANOTHER V. VAN ZYL.

Mr. Close moved for judgment, under Rule 329d, for the sum of £282 10s., with interest at the rate of 8 per cent. from May 28 last, also for 5 per cent. commission, and costs of suit.

Judgment granted as prayed.

PATERSON V. PATERSON. { 1901.
Aug. 29th.

This was an action in which Mrs. Paterson sued her husband, Archibald Paterson, for judicial separation. Plaintiff also asked for the custody of the three minor children of the marriage, and for a contribution of £8 per month for the support of herself and children.

Mr. Benjamin appeared for the plaintiff; the defendant was in default.

Mrs. Paterson, the plaintiff, said she was married to defendant in Australia in 1887, and she lived with him there until 1893. At the time of their marriage, defendant said he had been a drunkard a year or two previously, but had reformed. After their marriage, however, defendant again took to drink. On one occasion, in 1892, previous to their leaving Australia, he threw his boot at witness and broke her cheek-bone. In 1893 defendant received a letter from a friend advising him to come to Cape Town, and defendant suggested that he should go, as he might have a chance to reform. He came to Cape Town, leaving witness behind, and then when he got work he wrote saying that he would send her £5 per month. Afterwards defendant sent for witness, and on her joining him they lived together at Mowbray. Instead of reforming, defendant got worse, and, particularly during the last six months, had treated witness cruelly. One night in May last he pulled her out of her bed and turned her and the children out of the house at three o'clock in the morning. Witness complained to the police, and defendant was summoned and fined. Witness asked the Magistrate for a separation, but he said he could not give her one. In July last defendant also ill-treated witness cruelly, and kicked her. She was afraid there was no chance of defendant reforming. There was no property in the estate. Witness had partially supported herself by keeping boarders, but she had given that up as she could not get respectable people to stay on account of defendant's intemperate habits. There were three children, aged thirteen, eleven, and nine years respectively, born of the marriage.

Defendant was a carpenter, and was employed at Salt River Works, his wages being 11s. per day. Lately defendant had not contributed at all to witness's support. He did not give her £10 the whole of last year. He was still living in the same house with her. He knew of this case, but said he would not move in the matter. They were a long way in arrears with their rent. Defendant threatened that if she got a separation he would leave witness in the house and take lodgings. He said he would not pay her anything.

The Court granted a decree of separation, with costs, the plaintiff to have the custody of the children, and further directed that defendant contribute £2 per month towards the maintenance of the plaintiff, and £1 per month for each of the children.

REHABILITATIONS.

Mr. Alexander moved for the rehabilitation of the insolvent William Cornwall, a general dealer, who voluntarily surrendered his estate on June 3, 1897. Counsel stated that there was nothing unfavourable in the trustee's report.

Order granted as prayed.

Mr. Alexander moved in terms of section 117 of the Insolvent Ordinance, for the rehabilitation of the insolvent Frederick Reuben Daniel. The necessary consent of creditors had been obtained.

Order granted as prayed.

Mr. C. de Villiers moved, in terms of section 117 of the Insolvent Ordinance, for the rehabilitation of the insolvent Pieter Johannes Barend Voese. The requisite consent of creditors had been obtained.

Order granted as prayed.

GENERAL MOTIONS.

MURRAY V. COLONIAL GOVERNMENT.

Sir H. Juta, K.C. (with him Mr. Sheil, K.C.), moved in the above matter, for a commission to take the evidence of Professor Simpson, who was leaving that afternoon. Plaintiff's attorneys had consented to the commission.

Order granted as prayed, Mr. B. Upton being appointed commissioner, costs to be costs in the cause.

HOOGENDOORN. V. ROOS. { 1901.
Aug. 29th.

New trial—Weight of evidence.

A new trial on the ground that the verdict of a jury was against the weight of evidence will not be granted unless the verdict has been so perverse that a man of ordinary intelligence could not have arrived at it.

This was an application for a new trial on the ground that the verdict of the jury delivered in the former trial, which took place on August 15 and 16, was against the weight of evidence.

Mr. Benjamin (with him Mr. Gardiner) appeared for applicant.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for respondent.

Mr. Benjamin: The Acting Chief Justice told the jury that the sole question for them was "had a false representation been made by defendant to plaintiff or not."

[Buchanan, A.C.J.: What is your point? Is it a mere question of credibility?]

Yes.

[Jones, J.: I do not see how you can argue that point if the jury believed one party rather than the other.]

The evidence for the defendant was overwhelming. Act 23 of 1891 sec. 36 authorizes a new trial for the reason *inter alia* that the verdict is against the weight of evidence.

[Buchanan, A.C.J.: The issue was "did the purchaser undertake to take the property with a defective title or not?"]

Yes.

[Mr. Gardiner read the evidence taken at the trial.]

Mr. Benjamin: The evidence was directed to three points: (1) The value of the property; (2) The nature of defendant's title—had he a title by prescription or otherwise? (3) Was the defect in the title pointed out? As to the first point. It was admitted that he paid a very high price for the property. As to the second point. He had a good title to all the property save that indicated on the plan by a red line, and this he had arranged to purchase from Jurgens. He had a good title by prescription to the ground adjoining the Belleombre-road.

[Buchanan, A.C.J.: The point is, was the defective title disclosed to the purchaser or not?]

The evidence on this is quite on our side. There is the receipt of November 24, 1900. In that no date of transfer is mentioned.

[Buchanan, A.C.J.: It is mentioned inferentially. On a certain day the price was to be paid partly by bond and partly in cash, and a bond cannot be passed unless transfer has been made.]

[Jones, J.: A vendor of land is *prima facie* bound to give title. If you say you were not bound to do so you must show a special contract. Where is your proof of such a contract?]

We have the evidence of Roos, Dillman and Teubes. Plaintiff knew early in December that all the land was not covered by title. Teubes knew it, and he kept plaintiff fully informed.

[Jones, J.: You must make out a very strong case if you say that the verdict was against the evidence.]

To be sure there is the case of *Hunter v. Cape Town Tramway Co.* (10 Sheil, 141), but that was a very curious case. Each case must be decided on its own merits. It would be difficult to apply that case to the present. In this case the presumptions support the defendant's witnesses. As early as January 17 the Town Council took up a hostile attitude, and Teubes said that he had informed Hoogendoorn of all the facts bearing on the business. Then there are the diagrams and the very first diagram showed that a portion of the ground was not covered by title, and defendant knew that he would have to hand over his diagrams to plaintiff. Plaintiff saw he had made a bad bargain and did his best to dispose of the property through brokers at a considerable sacrifice.

[Buchanan, A.C.J.: I think a new trial was granted in the case of *Paterson v. McLouhlin and Solomon* (Buch., 1877, p. 62), but not on the ground of the verdict being against the weight of evidence.]

[In reply to a question from the Bench, Sir H. Juta said that the test of a right to a new trial on the ground that the verdict was not in accordance with the evidence was (according to English text writers) that such verdict must be "perverse and wilful."]

The Acting Chief Justice, in giving judgment, said: Hoogendoorn brought an action against the defendant Roos for the cancellation of a contract which he alleged had been entered into, but had been broken by Roos. This contract was for the sale of certain property known as part of the Belleombre Estate. The contract which was entered into between the parties was a verbal one; there was no written contract determin-

ing the conditions upon which the property was sold. The boundaries of the property were pointed out, and the property was sold up to specified beacons. There was no dispute between the parties as to the question of the ground sold, but at the time of the contract the seller Roos had no title or diagram covering the whole of the property which he sold. He had bought the property in lots at different times, and he held a number of small diagrams, which, put together, represented nearly but not quite the whole of the land. The defendant said that at the time the sale took place he was asked by the plaintiff to produce a diagram, but the defendant replied, "It is no use doing so; you will not understand it. A portion of the property is not covered by diagrams, and you must take and rectify that at your own expense." The purchaser Hoogendoorn, however, denied that such a representation had been made, and said that he would not have bought the property at all if he had known Roos could not give transfer of the whole of the estate. The case came before a jury for trial, and it is admitted that the issues were properly put to the jury. The question was whether or not the buyer undertook to take the property subject to the defective title. If by the agreement he was to take the property with the defective title, then the jury were directed to find for the seller, Roos, but if not then the jury were directed to find for the buyer, Hoogendoorn. All that the jury had to go upon was on the one hand the evidence of Hoogendoorn, and on the other hand the evidence of the seller Roos. True, the latter was corroborated as to one statement, viz., that he had referred to the fact that his diagrams did not cover the whole of the land by Dillman, a clerk employed by the association of which Roos was secretary, who was present at part of the conversation between the parties. On the other hand, two days after the sale a receipt was given by Roos to Hoogendoorn for the first instalment to be paid in cash, and although in that receipt Roos carefully recited all the conditions in his favour, such as rent, taking fruit, etc., he did not in any way refer to the fact that it was a condition that he should satisfy his contract by giving transfer of less than he actually sold. All the arguments which Mr. Benjamin has used were the same as those to which the attention of the jury was directed, and with these facts and these arguments before them, the jury found that the account given by Hoogendoorn was cor-

rect, and the one given by Roos incorrect, and found for the plaintiff. It is now said that this verdict was against the weight of the evidence, and that a new trial should be granted. It is difficult in any case to lay down the precise and accurate rules which would define the amount of evidence necessary on the one side or the other, before a new trial should be granted, but in a case which was recently before this Court, and which was also an application for a new trial on the ground that the verdict was against the weight of evidence, the Chief Justice said: "I take the correct rule to be that where the question is one of fact, and there is evidence to support the verdict, that verdict once found ought to stand, unless there is such a preponderance in favour of an opposite conclusion that it would be unreasonable and unjust to allow the verdict to stand." His lordship, Mr. Justice Laurence, who presided in that case, referred to the English authorities, and said that according to the phrase used in some of the cases the verdict must be so distinctly perverse that a man of ordinary intelligence could not have arrived at it. His lordship also said that if sitting alone in that case he would probably have given a different verdict, but that alone did not induce his lordship to support the granting of a new trial. In this case I cannot find any perverseness about the verdict. There is strong evidence on one side, but there is equally strong evidence on the other side, and the jury had to hold the balance. The jury found for the plaintiff, and as the judge who presided in that case, I cannot say that I consider the verdict so objectionable that it ought to be set aside. The case made for a new trial in the matter of *Hunter v. The Tramway Company* referred to above, was much stronger than this one. In this case I cannot find any ground for saying that the verdict of the jury was so distinctly perverse or wilfully wrong that a new trial ought to be granted. The application will therefore be refused with costs.

[Applicant's Attorney, Mr. Gus Trollip; Respondent's, Messrs. Sauer and Standen.]

LITTLEJOHN V. LITTLEJOHN. { 1901.
Aug. 29th

This was an application by Robert Littlejohn, represented in the Colony by Mr. Currey, for an order on respondent to give up certain premises forthwith. Applicant, who was respondent's brother, had permitted her to occupy the premises Devonshire Hill, Rondebosch, of

which he was the owner. In February last Miss Littlejohn was requested to leave, but after repeated promises, she refused to do so. In consequence of her refusal, formal notice was given her in April, and a further notice was given on the 10th inst. The premises had been let to a tenant, who was to take possession on the 1st September.

Mr. Searle, K.C. (for applicant), read an affidavit by Mr. Currey to the above effect. He stated that a certain allowance made to respondent by her brother had been stopped until she quitted the house.

Miss Littlejohn (who appeared in person) put in a written statement, wherein she made reference to the causes of her having to remain. She stated that ill-health had prevented her leaving in the first instance. Then slanders were uttered concerning her, and these had been the cause of her having to put off her departure to England. She said that her brother had entered into an agreement to pay a certain sum each quarter, but this had been stopped, and the agent said it was her brother's instructions that payment of that money should be stopped until she gave up Devonshire Hill. She had been refused accommodation in two different boarding establishments, and she thought that the slanders in question had a good deal to do with these refusals. She had no guarantee that she would be able to pay for accommodation. She intended to have sailed for England in July, but had had some of her necessary luggage stolen. "She was as anxious to get away as they were to get her out." She was not disputing her brother's right to his own property, but only asking if the very hard circumstances in which she was placed should not be taken into account.

The Acting Chief Justice, after reading the statement, said that it showed no reason why an order should not be granted. The complaints made by Miss Littlejohn against certain people were not a ground why she should be allowed to stay in the place. Miss Littlejohn had no right there.

Miss Littlejohn put in other papers, and said she could not go now. She denied that she had had fourteen days' notice. Accusations had been brought against her by one who had already been convicted for slander. These accusations had been made to her brother, and it was this that caused him to withdraw his permission for her to occupy the place.

The Acting Chief Justice said that he was afraid Miss Littlejohn would have to go out on or before next Saturday.

Miss Littlejohn said she had been prevented from going out by ill-health and slander. She did not dispute her brother's right. Could not she have a little time?

The Acting Chief Justice said respondent had shown no reason why she should stay in the house at all. An order would be granted compelling her to give up possession of the house before noon on Saturday, August 31.

Ex parte STRASBURGER. { 1901.
Aug. 29th.

Mr. Benjamin moved for leave to attach certain funds *ad fundandam jurisdictionem*, and for leave to sue by citation. Counsel applied to attach the sum of £3,000 in the hands of the Cape Canning Company, who were indebted to the defendants for this amount. Defendants were a foreign firm. Applicant was manager of the Cape Canning Company.

The Acting Chief Justice said that the object of the application was to found jurisdiction. If applicant wanted to get security, respondent must have an opportunity of being heard. There was no application for security. The order of the Court would be that £500 of this money be attached to found jurisdiction, leave being reserved to respondents to move to set aside the order, if so advised.

Leave to sue by citation was granted, the return day being November 14.

Ex parte MARGARET CHARLOTTE EDITH LEPPAN, MARRIED WITHOUT COMMUNITY TO THOMAS STANLEY LEPPAN.

Mr. Russell moved for an order compelling Thomas Stanley Leppan to assist petitioner in passing a bond, or, in the alternative, for an order authorising the Registrar to pass a bond without his assistance.

A rule *nisi*, returnable on September 12, was granted, calling upon respondent to show cause why the prayer of the petition should not be granted.

POTGIETER AND OTHERS V. DE JAGGER AND OTHERS.

Mr. Searle, K.C., applied for the removal of this case to the Circuit Court at Oudtshoorn. Counsel stated that a consent paper had been filed.

The application was granted.

**IN THE MATTER OF THE MINOR DANIEL
HENDRIK BENEKE BREYTENBACH.**

Mr. Solomon moved for leave to sell certain property.

Granted in terms of the Master's report.

**IN THE MATTER OF THE MINOR FREDERICK
CARRINGTON RAPER.**

On the motion of Mr. C. de Villiers, leave to sell certain property was granted, subject to the Master's report.

CAMP V. CAMP.

Mr. Benjamin moved for leave to take the evidence of plaintiff on commission in London in connection with an action for restitution of conjugal rights. Defendant, who was at Port Elizabeth, is the husband. He had been barred.

Leave was granted, Mr. McLean, barrister-at-law, being appointed commissioner.

***Ex parte* GREGGANS, MASTER OF THE S.S.
"BEIRA," AND AS SUCH ACTING FOR
THE OWNERS.**

Mr. Searle, K.C., moved for leave to sue Harold C. Sleight, charterer of the vessel, by edictal citation.

Granted, the order being returnable on the 14th November.

***Ex parte* SAMUEL STEWART, FATHER AND
NATURAL GUARDIAN OF THE MINOR
JACK STEWART.**

This was an application for leave to the petitioner to sue the Southern Suburbs of Cape Town Tramway Company (Limited) for damages sustained by the minor on the 21st on the 21st July last.

Mr. Searle, K.C., who appeared to support the petition, asked that the matter should be allowed to stand over in order that affidavits should be made.

Granted.

***Ex parte* JORRIS, EXECUTOR DATIVE OF
THE ESTATE OF THE LATE HOP JORRIS,
AND OF HIS SUBSEQUENTLY DECEASED
SPOUSE, CATHARINE JORRIS.**

Mr. Langenhoven moved for an order confirming the sale of certain property, and for leave to transfer.

Granted.

***Ex parte* BROWN, IN HIS CAPACITY AS
EXECUTOR DATIVE OF THE ESTATE OF
THE LATE CHARLES ROBERT LANGE.**

This was a motion for the cancellation of a certain mortgage bond.

Mr. Searle, K.C., appeared for the petitioner.

The application was granted, and the Sheriff was authorised to effect the necessary transfers.

***Ex parte* WARAIS.**

Mr. Close moved that a rule *nisi* under the Titles Registration and Derelicts Lands Act be made absolute.

Granted.

**IN THE MATTER OF THE CALEDON-STREET
TRAMWAY COMPANY, IN LIQUIDATION.**

Mr. Percy Jones moved for confirmation of the liquidator's report.

Granted.

ABRAHAMSE V. ABRAHAMSE.

Mr. E. R. de Villiers moved for leave to sue *in forma pauperis*. Applicant was the wife, who said her husband had deserted her.

A rule *nisi* was granted calling upon defendant to show cause why applicant should not be permitted to sue *in forma pauperis*, the rule being returnable on the 12th September.

***Ex parte* AUBET.**

Mr. Benjamin moved for an order authorising the Registrar of Deeds to register a certain mortgage bond.

The Acting Chief Justice, after hearing the petition, said that the order could not then be granted, but petitioner could renew the application if he got a report from the Master.

**MATABE V. FOSTER. { 1901.
Aug. 29th.**

This was an appeal from the decision of the R.M. of Oudtshoorn, prosecuted by the defendant in the Court below. He had been sued by the plaintiff (now respondent) for £11, being the purchase price of a certain horse alleged to have been bought by him at a public auction.

The summons (in the Court below) called upon the defendant (now appellant) to show cause for not having paid James A. Foster

(the plaintiff) the £11 aforesaid with interest at the rate of 8 per cent. per annum, reckoned from May 18, 1901, and 5 per cent. commission in terms of certain conditions of sale publicly read and exhibited at the sale above referred to. The summons proceeded to state that the said £11 was the price of certain goods sold and delivered by plaintiff to defendant at a sale by public auction held at Oudtshoorn on May 18, 1901, for account of H.M.'s Imperial Government, and which became due and payable on the day of sale, as per account hereunto annexed.

Wherefore the plaintiff prays, etc.

The R.M. gave judgment for the plaintiff, and stated his reasons as follows:

In this case the plaintiff sues the defendant for the sum of £11, being the balance of an account for certain horses alleged to have been purchased by the defendant at a public sale held by the plaintiff, as auctioneer on behalf of the Imperial Government, at Oudtshoorn on the 18th ultimo. The defendant pleaded the "General Issue," but it appears that the matter in dispute between the parties is whether the defendant is liable to pay to the plaintiff the sum of £11 for a certain mare which the plaintiff alleges was purchased at the said sale by one Schenck, as the agent of the defendant. It is admitted by the defendant that Schenck was so employed, and that Schenck did purchase certain horses at the said sale on his account, but he (the defendant) contends that only one mare was purchased for £11, and not two for £22, as specified in the account attached to the summons.

From the evidence of the plaintiff and his witnesses, I am convinced that Schenck did actually purchase two mares for £22, and that they were duly delivered to him, although he states he got only one. I am also convinced that it was through Schenck's own carelessness and indifference that one of the mares he purchased for defendant has disappeared (by some means at present not divulged), and as he was employed in the purchase thereof by the defendant, I am of opinion that the plaintiff is entitled to succeed in this action. The plaintiff having abandoned his claim for interest and commission, mentioned in the summons, the judgment of the Court is for him in the sum of £11 only, with costs.

The defendant now appealed.

After hearing Mr. Langenhoven in argument the Court dismissed the appeal, with costs.

The Acting Chief Justice, in giving judgment, said that plaintiff in the Court below

was an auctioneer, carrying on business at Oudtshoorn. On the 18th May last he held a sale of horses on behalf of the Government. These horses were sold either singly, in pairs, or in lots. Two mares were brought into the ring and were put up for auction at so much for each, taking both. They were bid for and knocked down to one Schenck. Schenck said immediately after they were knocked down that they were to be put down to Mr. Matare. Schenck said he attended the sale as agent for Matare. These two horses were, on being knocked down, delivered to the purchaser by the auctioneer, who said, "There are your horses; take them." The horses were then removed from the ring. Schenck going with them, and defendant Matare admitted he had received one of these horses. Later on Schenck bought four other horses, which were also put down on the roll to Matare. These horses he removed, and after the sale Matare and Schenck divided the animals between themselves. Schenck giving Matare a cheque for the horses taken by him, as all the horses had been put down on the auctioneer's roll to Matare's account. This, however, only concerned Matare and Schenck. On Matare's being sued, the question was raised as to whether in the first purchase one horse or two were sold. Plaintiff, his clerks, and other witnesses all said that two horses were sold at £11 each. Schenck was the only witness for the defendant, and he said that he only bought one of the two horses put up for sale. The Magistrate found by overwhelming testimony that two were sold. As far as delivery was concerned, the law did not require that the horses should be put into the purchaser's hands. The auctioneer had said the horses could be taken, and that was a sufficient delivery. In fact, that was the only way in which delivery had been made for the horses Matare admitted he had received. The Magistrate found that two horses were sold. The finding was amply supported by the evidence, and the appeal must be dismissed, with costs.

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

CILLIERS V. TULLEKEN. } 1901.
Aug. 30th

Landlord and tenant—Injury to property.

The tenant of a certain farm in the district of Victoria West was

sued by the landlord of the said farm for the value of a certain quantity of kraal manure, commonly used in the district as fuel. Defendant had removed nearly all this deposit, and had burned the remainder, including a large proportion which defendant alleged to be unfit for fuel.

Held, that as the value of the fuel destroyed was very problematical, and as defendant had made a substantial tender to plaintiff, judgment must be given for plaintiff for the amount of this tender only, together with costs to the date thereof.

The declaration set forth:

1. The plaintiff is Charles Andries Cilliers, of Laken Vlei, in the division of Victoria West, and the defendant is Johannes Petrus Jordan van Hoogenhouck Tulleken, of Nils-poort, in the division of Beaufort West.

2. The plaintiff is owner of the farm Laken Vlei, but the defendant was, at a date hereinafter mentioned, in occupation of a portion thereof called Ramfontein.

3. In or about the month of April, 1896, the defendant being then in occupation of the said portion of the said farm, wrongfully and unlawfully set fire to a certain valuable deposit of fuel, consisting of dung, which was in certain two kraals upon the said portion, and was plaintiff's property; in consequence thereof the kraals and the fuel therein were greatly damaged, and a considerable part thereof destroyed.

4. The value of the property destroyed as aforesaid is the sum of £209 4s.

5. All things have happened, all times have elapsed, and all conditions been fulfilled necessary to entitle the plaintiff to recover from the defendant the said sum of £209 4s, but the defendant neglects and refuses to pay the same or any part thereof, although he has been requested so to do.

Whereupon the plaintiff claims:

(a) The sum of £209 4s., with interest *a tempore moræ*.

(b) Alternative relief; and (c) the costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1 and 2 of the declaration.

2. In the year 1896 and thereafter the defendant was the lessee from one Lubbe, who was himself the lessee from the plaintiff, the owner of the portion of the farm Laken Vlei, known as Ramfontein.

3. On Ramfontein were two kraals for sheep, which kraals were old and unclean and inconveniently full of old deposits of dung, and had been therefore used for kraaling scabby sheep.

4. The defendant, as he lawfully might do as such lessee as aforesaid, proceeded to clean the said kraals and render them fit and convenient for use in connection with his farming operations, and lawfully removed and stacked certain quantities of the said dung which was fit for fuel and worth preserving, and he lawfully took and used some of the said dung which was fit to be used for manure in connection with agriculture on the said farm; and he lawfully burned and consumed some of the said dung for fuel, and lawfully set fire to and destroyed the remainder thereof, which was old and unclean and unfit for any useful farming purpose.

5. He says that the steps taken and acts done by him as aforesaid were lawful, reasonable and proper to be taken and done by him as lessee entitled to conduct farming operations on Ramfontein aforesaid.

6. In burning and destroying the remainder of the said dung as it lay in the said kraals, the defendant admits that through the absence of precautions on his part he caused damage to the walls of the said kraals by the action of heat, he denies thereby he caused damage in the sum of £209 4s. or any such sum.

7. During the occupation of Ramfontein by him considerable quantities of dung were again deposited by his sheep in the said kraals and remained for the use of the plaintiff.

8. The defendant is willing and tenders and offers to pay to the plaintiff the sum of £50 together with taxed costs to date, in satisfaction of all damages for which he may be held responsible.

9. Save as aforesaid he denies all allegations in paragraphs 3, 4, and 5 of the declaration.

Wherefore, subject to the said tender, he prays that the plaintiff's claim may be dismissed with costs.

Sir H. Juta, K.C., and Mr. Searle, K.C., for the plaintiff.

Mr. Benjamin and Mr. Gardiner for the defendant.

Charles Andries Cilliers, the plaintiff, said he was the owner of the farm in question. In 1896 witness held a sale of the farm stock by public auction, and Mr. Louw, the Scab Inspector, after having inspected the sheep and kraals, then declared the sheep to be clean, and that they could be removed. Lubbe and Tulleken were present when that declaration was made. Witness showed Lubbe and Tulleken all over the farm, took them to the kraals, and pointed out everything there was to see. Witness entered into a lease (produced) with Lubbe. Witness understood Tulleken was to be co-lessee with Lubbe. According to the lease, the place had to be given up in the same condition as it was when leased. On the portion of the farm leased by Lubbe to defendant (Ramfontein) there were two sheep kraals. All the manure in these kraals was good. In April, 1896, it was brought to witness's notice that manure had been burned, and witness communicated with Tulleken through Lubbe. Witness went twice to see Tulleken, but did not find him in. Witness had taken no steps until now, because there was a five years' lease, and he waited for five years to see if the kraal would be restored to the same condition as it was in when leased. The lease terminated in February, and witness took possession in March. He then examined the kraals. The walls were bad, some of the stones being cracked. Sixty-two to sixty-four yards of the wall would need rebuilding. The walls were piled walls. The usual practice in Victoria West was to pay so much per yard for putting up the wall. The cost per yard was from 2s. to 3s. Witness could not get the walls put up now for less than 4s. After having inspected the kraals, witness instructed Lubbe to write to defendant. Manure fuel was constantly sold in Victoria West. There was a good market for it. The manure sold at £1 per hundred cakes; it was sold for 14s. or 15s. when fetched from the farm. The difference between the quantity of manure left on Ramfontein by witness in 1896 and the amount he found there in March this year was sufficient to make forty thousand cakes of. There was no scab amongst his sheep on the farm when the lease was entered into. Witness had only claimed for the fuel at the rate of 10s. per hundred cakes. He claimed six guineas for the damage to the walls, and the remainder of his claim was for 40,585 cakes at 10s. per hundred.

Cross-examined by Mr. Benjamin: Victoria West was witness's market in 1896. Lox-

ton was now the market. Loxton was less than two hours away. Victoria West was eight hours distant. The carriage of these cakes to Victoria West would be 25s. per hundred. The village of Loxton had been established for two years. He did not know what the carriage would be from Ramfontein to Loxton. The manure was not a nuisance to farmers in witness's district in 1896. There were no sheep affected with scab on Ramfontein at the time of the sale. Ramfontein was then occupied by one Smidt, a bywoner, whose sheep were clean. Witness did not know that Tulleken and Gibson helped Smidt to hand-dress some of his sheep for scab. There were spots of scab in the district on two occasions, but witness never knew of scab on Ramfontein. No burning of stone kraals was necessary when there was scab. Witness had seen the regulations issued by the Government in the district of Victoria West in respect to the measures to be taken when there was an outbreak of scab. He had not seen a regulation which provided for the burning of kraals. The manure was valuable. Farmers were not glad to get anyone to take it from their farms. After it had accumulated for twenty-five years, it was still good. It did not rot, or deteriorate in any way. A Mr. Theunnissen accompanied witness when he inspected the farm in 1896, and when he went over the farm on taking it this year. He had not brought Mr. Theunnissen as a witness.

Re-examined: Farmers carted the manure themselves when there were no farming operations going on. There was no question of carriage.

Willem Jacob Louw said that in February, 1896, he was a scab inspector. He inspected the kraals and sheep at Lakenvlei belonging to Cilliers and Smidt, and found them clean. He made a declaration to this effect at the sale. Witness saw the fuel in the kraals at Ramfontein. He estimated that there would be about 35,000 or 40,000 cakes in the kraals when he inspected them.

Cross-examined: Witness also got a notice containing general regulations. He just saw the quantity of manure in the kraal, and did not dig down. He did not specifically say that Smidt's sheep had no scab, but he said that all the sheep on the farm were clean at the time of the sale.

By the Court: Witness happened to be at the sale because he was on his round of inspection. He did not take notice of the amount of manure in the kraal at the time of the sale, and he made his estimate from

what he recollected having seen before. He measured the kraals, and calculated in that way. He calculated that there were about three and a half feet of mest in the kraal, and allowed three inches for each cake of manure.

David Petrus Johannes Lubbe, a farmer residing at Lakenvlei, in the division of Victoria West, said that in February, 1896, he leased the whole property from Mr. Cilliers. He understood at the time that he and Mr. Tulleken hired the farm together, but as a matter of fact, the latter took a lease under witness. Some days after the sale, witness, Tulleken, and Cilliers went round and inspected the kraals, which were all in good order. Witness received a letter from Tulleken, asking him to measure up the kraals, etc., and give evidence in this case.

By the Court: Witness was subpoenaed by Mr. Cilliers to give evidence.

Examination continued: Witness was friendly with both the parties to this suit. He made the measurements and calculations mentioned in Mr. Tulleken's letter. When he inspected the kraals with Tulleken and Cilliers, he noticed that the kraals were full of manure to a depth of three and a half to four feet. After they took the farm, witness and Tulleken brought sheep on it. He noticed scab in some of Tulleken's sheep. There was also scab in witness's sheep. On the day of the sale, all the sheep on the farm were clean. Afterwards Tulleken burned the kraals, and witness, at the request of Cilliers, mentioned the matter to him, and said that everything had to be made good. Tulleken was angry, and said that witness must tell Cilliers that he (Tulleken) was not a Hottentot, and Cilliers could speak to him at the proper time. Witness estimated that there were between 37,000 and 40,000 cakes of manure of the usual size in the kraals. There was always a market for that kind of fuel at Victoria West. At the market the value would be about 17s. per 100 cakes, and on his own farm witness had been offered 10s. per 100 cakes. It was not the custom among the farmers in Victoria West to clean their stone kraals by burning them. The usual way was to clean them with dip. After inspecting the farm with Cilliers in March witness wrote to Tulleken saying that Mr. Cilliers was there, and had taken over the farm; that he was satisfied with everything except the kraals, and demanded compensation for the manure burned and stone walls destroyed by fire. Witness in the letter advised Tulleken to come over and settle the matter with Mr. Cilliers. Mr. Tulleken, in reply, said he

was afraid he could not get a pass from the military to come over, and asked what sum would satisfy witness.

By the Court: Witness did not reply to that letter.

Cross-examined: Witness was not present when the manure was dug up. Witness knew that after dipping the Scab Inspector had given permission to remove the sheep belonging to himself and Tulleken as clean.

By the Court: Witness had sold no mest during the five years he was on the farm, and since then he had only sold two loads of 300 cakes each.

Cross-examination continued: There was no mest left by Tulleken in the kraals when witness resumed possession of the farm.

Re-examined: When Tulleken left there was about an inch of mest in one kraal, and none at all in the others. Witness then took over Tulleken's portion of the farm, also for the remaining two years of the lease, and when that was up, at the end of the lease, there were about four inches of mest in that kraal, and none in the others.

By the Court: To prepare for sale the mest had to be cut into cakes, and then stacked and dried for three months.

Peter Johannes Smidt, a carrier, living at Loxton, in Victoria West district, deposed that he was at the sale at Ramfontein in 1896, and was well acquainted with the kraals there. He estimated that when Tulleken took over the portion of the farm there were about 40,000 cakes of manure in the kraal. There was a ready sale for cakes of manure at Loxton, and on the farm itself the cakes would be worth 12s. per 100. He could not say why the manure had been allowed to accumulate to such an extent without being sold. The manure was much used as fuel by brickmakers in the district. There would have been a ready sale for the manure when the lease expired in February.

Cross-examined: Witness did not measure the kraals to form his estimate of the number of cakes of manure there. He had not spoken with Louw, Cilliers, or any other person about the number of cakes. Mr. Cloete had asked witness to make an estimate, and witness had told him that his estimate was about 40,000. The town of Loxton was only established in 1899, but the cakes of manure would have been worth something even in 1896. At that time they would have had to take them to Victoria West, and then they would only get 22s. 6d. per 100.

Re-examined: If the manure was still there witness would be willing to pay from 10s. to 12s. per 100 cakes on the farm.

By the Court: I would take about two and a half days to carry the manure to Victoria West. He could take 300 cakes at a time.

Sir Henry Juta put in certain correspondence, and then closed the case for the plaintiff.

For the defence, Mr. Benjamin called Johannes Petrus Jordaan Tulleken, the defendant, who said that he entered into a sub-lease of the farm Ramfontein with Lubbe. He took possession of the farm on February 26, 1896, and brought his sheep there about ten days later. He found there were two kraals on the place, both fairly full of manure. He knew that to comply with the Scab Law he had to clean the kraals. He knew that previously there had been scabby sheep on the farm, having helped to hand-dress the sheep. To clean the kraal, witness set fire to some of the loose stuff, and this spread to the other kraal. Some damage was caused to the small kraal, about twenty-seven yards of wall, and what plaintiff wanted (2s. per yard), was fair. Witness employed two men, Gibson and Uys, to clean the kraal. These men cleared out the kraal from the gate until they came to manure fit to cake. The loose stuff they threw over the walls, and the cakes were placed on the walls. Nothing was thrown over the walls that was fit to make cakes, and nothing of which cakes could be made was left in the kraals. What remained was then spread over the kraals and burned. That was a proper and effectual way to clean the kraals. He was perfectly certain all the manure suitable for fuel was taken out of the kraals before the remainder was burned. When witness cancelled his lease, he left twice as much fuel on the walls as there was before he went there, and there were four inches of manure in the kraal.

By the Court: The cakes piled on the walls were not burned. The material in the kraals burned for five or six weeks.

Examination continued: Only a portion of the manure could be used as fuel. Witness did not know a farmer in the neighbourhood who ever sold a cake of manure. Witness did not sell any, but only used it for fuel in his house. He considered the manure rather a nuisance in the kraal. Witness had, without prejudice to his case, and rather than take the trouble and expense of coming to Cape Town, admitted that he had damaged the walls, and made a tender in writing of £50 to cover everything.

Cross-examined by Sir Henry Juta: He had not resided in the Victoria West

district before 1896, and had had no experience of farming in the district before then. The fuel was used at Loxton, where the price would be from 14s. to 16s. per hundred cakes. He had never bought at Loxton. Ramfontein was two hours' distance from Loxton. It did not pay to dig up the fuel, and take it to Loxton for 16s. Witness knew of no farm supplying fuel to Loxton. There was a kraal at Loxton, and the people there were still using the fuel in this kraal. From two to three hundred cakes could be put on a buck-wagon with ten horses. A journey to Loxton with this quantity would realise £2 5s. This would not pay for the expense and trouble. He estimated the damage to the kraals at £2 14s. He tendered the remaining £47 6s. to avoid a lawsuit. His having to come away from his farm might cost him £200. It was now the lambing season, and it was awkward to leave the farm. The manure was burning for five weeks. Witness left a lot of manure when he left the place. He understood that at the end of five years he had to replace the manure that was there when he took the farm. He was bound to replace the manure that was fit for cakes. If there was enough manure there to make 40,000 cakes he was obliged to leave this quantity at the termination of the lease. Witness's case was that there was not this quantity when he took the farm.

Re-examined: As witness used the manure left on the farm by plaintiff, he replaced it. He had never been asked to sell any of the manure.

John Rose Gibson said he was in defendant's service in 1896, and assisted in cleaning out the kraal. They removed all the cakes they could, and put them on the wall. None of the manure destroyed could be used for cakes.

Cross-examined by Mr. Searle: All the manure in the big kraal was rotten, and unfit for use. They could only make cakes out of the top layer of manure in the small kraal. Witness would say they took out about 3,000 cakes altogether from the small kraal, and from 50 to 100 from the big kraal. Some of the manure was thrown over the wall to be used on the land. The rest was burned.

Johannes Jacobus Bosman Uys said he helped Gibson to clean out the kraals. They cut out cakes out of all the manure they could.

Cross-examined by Sir Henry Juta: Witness did not know how many cakes were cut out of the manure in the

kraal. The manure in both kraals was of about the same quality. There may have been twenty or thirty thousand cakes taken out of the big kraal for all witness knew.

Abraham van Wyk Verster, of Beaufort West, said he formerly resided in the Victoria West district. He had been brought up as a farmer, and had had as many as eight farms in the Beaufort West and Victoria West districts. The manure would deteriorate if left long, and would become unfit for fuel. It would not pay to take the manure to Victoria West. The manure was rather a nuisance to farmers, who were always glad to have their kraals cleaned. They did not take into account any loss of manure. It was the custom to burn out the kraals.

Cross-examined by Sir Henry Juta : Witness farmed in Victoria West ten years ago. This was the only fuel the people had in the district. The price per hundred cakes of fuel in Victoria West at the time witness was there was from 12s. 6d. to 20s. Witness only got as much fuel as he himself wanted. He did not kraal his sheep much. He tried to keep his kraal clean, as every practical farmer would.

Mr. Benjamin closed his case.

Sir H. Juta, K.C. : The only question in this case is the amount of the damages. Defendant's original defence, viz., that he burnt the manure in the kraal to get rid of scab has been very wisely given up, for he piled some of the fuel cut from this scabby kraal on the walls of the kraal.

[Jones, J. : We have nothing to do with his motive.]

No; but the question is whether he destroyed our property unlawfully. I do not mean to say that he acted maliciously, but he certainly acted unlawfully. By the terms of the lease held from us, Lubbe could not sub-let, hence defendant was not really a tenant of the premises at all.

[Jones, J. : How is that issue raised ? For the purposes of this action it does not matter whether he was there rightly or wrongly.]

Then, to come to the measure of damages. Defendant himself admits that our witnesses (Louw and Lubbe) are truthful, upright men, and they say that there was enough manure in the kraals to make from 35,000 to 40,000 cakes. Defendant relies chiefly on the evidence of Gibson and of Uys, who flatly contradict each other as to the quality of the manure in the large kraal, and as to the quantity cut into cakes.

[Maasdorp, J. : Your witnesses only say that there was a certain quantity of stuff in the kraals, they do not say that it was all fit to be cut.]

They had not cut it and so could not speak to that. In a case like this the only question is, "whose witnesses are we to believe?" You cannot believe both Uys and Gibson, why then believe either of them, and if you do not, what becomes of defendant's case? Such evidence as theirs cannot be compared with that of men like Louw and Lubbe. Then it was shown that in Victoria West this fuel would fetch from 20s. to 25s. per 100 cakes. If it is so cheap as defendant would have us believe, and the farmers are so glad to get rid of it, why did not defendant collect the 40,000 cakes which we claim, and tender them to us, instead of making a tender of £50. He says he made this offer simply to keep out of a lawsuit.

[Buchanan, A.C.J. : At first he only tendered £15, by wire, on July 21, but increased his tender to £50 when he saw you were determined to go on.]

The declaration had already been filed when the £15 was tendered, and then, before we had replied, he increased the tender to £50 three days afterwards. Nothing had occurred to induce him to increase his tender. He well knew that the kind of fuel in question was the only kind to be obtained in the neighbourhood. The prices obtainable for it—20s. to 25s. per 100—showed that it was valuable, and that it might be sold either in Victoria West or in Loxton at a large profit. Lubbe had had an offer to take all he could supply at 10s. per 100. Defendant was admittedly a wrongdoer, and is therefore bound either to give plaintiff his property, or to pay for it.

Mr. Benjamin (for defendant) was not called upon.

The Acting Chief Justice : The declaration in this case alleges that the plaintiff is the owner of a farm called Ramfontein, and that the defendant was a for period of three years, from February, 1896, in occupation of a portion thereof. Although not stated in the declaration, it has been contended in argument that the defendant was in unlawful occupation of this portion, in that he was not the lessee, but the plaintiff himself said that though the lease was made in favour of one Lubbe, and that defendant signed as surety, he understood that the defendant was joint lessee. The declaration goes on to say that, while in occupation of the property, in April, 1896, the defendant

wrongfully and unlawfully set fire to a certain deposit of sheep droppings, which were valuable as fuel, and that by the destruction of this fuel and by injury to the sheep kraals, the plaintiff suffered damage to the extent of £209 4s. The plaintiff and his witnesses say that when this farm was let in 1896 there were two kraals upon it, in which there was a considerable amount of manure. These witnesses took the superficial extent of these kraals, and estimated from the depth of the manure in them that from 35,000 to 40,000 cakes of fuel could have been cut out of these kraals. This, however, is a mere estimate, and however truthful the two witnesses, Messrs. Lubbe and Louw, may be, they only give us an estimate of what they think the kraal might have contained. I have to some extent checked these figures by the superficial area of the kraals given, and I must say that on the data given this estimate seems to me uncommonly liberal. Against it we have the direct positive evidence of the defendant and the two men who worked with the manure, who tell us that the surface of the kraal was covered with loose material of no use for the purpose of fuel. One's own knowledge of the country is in accordance with this evidence, that the solid matter is underneath and the loose material on the top. The defendant and his workmen say that they removed this loose material, and then cut out as much of the solid material as they could, and stacked it on the walls of the kraal. This, at any rate, was saved, and there is no complaint in the declaration that this fuel had been wrongfully used, and it comes out of this case altogether. What the plaintiff complains of is the destruction of fuel by fire. Defendant and his witnesses say that there was nothing destroyed by fire but what was loose, rotten, and useless for fuel. They say that they threw a large quantity of loose manure over the walls of the kraal, and that this was afterwards taken away and used on the land, but there is no complaint whatever based upon the use of the manure for manuring the farm. What is solely complained of is the destruction of the valuable deposit of fuel. Now it is shown by the evidence that this fuel consists of hard cakes of sheep droppings, which had been trodden upon and consolidated or coagulated, and that unless it is so consolidated it is useless for fuel. The custom of the farmers is to cut this out in rough blocks of about 14 inches square by 3 inches thick, and to expose it on the kraal walls, and after it has been exposed to the atmos-

phere for a time it dries, and becomes valuable for fuel. Defendant in this case has tendered £50 and costs to date of the tender, which, he says, will amply compensate plaintiff for any loss sustained by the fire, arising from either loss of fuel or damage to the walls of the kraal. What we have to decide is what amount of damage was done by this fire. It is impossible, on the evidence, to say what, if any, amount of solid material, valuable fuel, was destroyed by the fire. I am of opinion that some must have been destroyed, but I am also of opinion that most of the solid material available for fuel was cut out by defendant before he set fire to the remainder. Plaintiff estimated that his prospective profits, if he had cut the fuel and taken it into town and sold it, would amount to a handsome sum, as he says he could have made a profit ranging from 10s. upwards per 100 cakes. The evidence which has been led, however, satisfies me that nothing like this profit could have been made out of this material. Plaintiff himself, when on the farm, did not sell any quantity of this valuable deposit. He used the fuel for himself, and only occasionally took a load to Victoria West, where he sold it for from 17s. to 20s. per 100 cakes, after carrying it all this distance from his farm to the town, some 50 miles. I think that, possibly, there was not care taken to get out every possible cake of solid material, and that some must have been destroyed, but I am quite satisfied on the evidence that the sum of £50 more than amply compensates plaintiff for any fuel that might have been destroyed. The correspondence shows that after the letter of demand and the filing of the declaration, defendant sent a telegram tendering payment of £15 and costs to date. He afterwards sent a letter showing his anxiety not to be brought into court, based upon loss of time, martial law, plague in Cape Town, etc. He said that he would rather pay than be forced into court, and consequently he increased his tender to the very liberal sum of £50, with costs to date. This was a substantial offer, and ought to have been accepted. If it had been a case of malicious injury to property the Court might have been inclined not to scrutinise too closely the value of the property destroyed, but there is no such allegation. The fire was made for the purpose of cleaning the kraal, and it took place as far back as five years ago, and an action is only now brought for what was done then. It is clear that if there had been sufficient fresh manure accumulated in the kraals at the expiration

of the lease, there would have been no complaint. There is no malice, and I do not think there is anything in the act of cleaning the kraals so wrongful that the Court should go beyond the actual loss. In this case I think the plaintiff will be amply compensated by the tender made; and judgment will therefore be given for the amount of the tender, £50, with costs incurred up to the 24th July (the date of the tender), plaintiff to pay all costs after that date.

Mr. Justice Jones concurred, and said that supposing an ordinary farmer in the Victoria West district were to be offered £50 for what would cover a superficial area, approximately the same as in this case, twenty by fifty, he would jump at it at once, and nothing would astonish him more than to be offered so large a sum for what he probably found the greatest difficulty in disposing of.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendant's Attorneys, Messrs. Scanlen and Syfret.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

LEVINE V. BLATT. { 1901.
Aug. 31st.

Mr. P. S. Jones moved for the final adjudication of defendant's estate as insolvent.

The defendant appeared in person, and, in answer to the Court, said that he was not insolvent, as he had book debts due to him in Johannesburg to the extent of £1,000. In addition he had left behind him £1,300 worth of clothing in Johannesburg at the outbreak of the war. That stuff had since been looted, but defendant, who was an American subject, had gone to the American Consul and had been told that he would be paid every penny as soon as the war was over. Defendant did not want to go insolvent; he had never been insolvent in his life, but Levine would not wait.

The Acting Chief Justice: I am afraid we cannot make him wait. It is very unfortunate for you, but you are one of those who must suffer.

Further questioned by the Court, defendant admitted that he had submitted to Mr. Levine a statement showing that there was a deficiency of £300 in his estate, but in that statement he had not included the Johannesburg money or goods.

The Acting Chief Justice said that defendant was apparently an honest man, trying to pay his debts, but circumstances over which he had no control made him unable to do so. It was hard on defendant, but Mr. Levine wished to have the law, and the law was on his side, so that although one could understand a man like defendant objecting to have his estate sequestrated, the Court must give judgment for the plaintiff.

An order for the final adjudication of defendant's estate as insolvent was accordingly granted.

WILSON V. SCOTT AND ANOTHER.

Mr. Wilkinson moved for provisional sentence on a promissory note for £230. The first named defendant (James Scott) was the principal debtor, and the second named (Daniel R. J. Heineman) the surety and co-principal debtor.

Provisional sentence granted as prayed.

BELLEVLIET PROPRIETORS V. COHEN.

Mr. De Waal appeared for the plaintiffs, and asked that this matter be allowed to stand over *sine die*, as it was probable that an arrangement would be come to.

Case allowed to stand over as prayed.

ILLIQUID ROLL.

HEPWORTH'S (LIMITED) V. W. A. RICHARDS AND SONS.

Mr. Russell moved for judgment, in default of plea, for a sum of £354 15s., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Granted.

CLUVER V. DE VILLIERS.

Mr. Howel Jones moved for judgment, under Rule 329d, for the sum of £48 7s. 6d., goods sold and delivered, £2 8s. 3d. being 5 per cent. for collection, and also interest at the rate of 6 per cent. from November 20, 1900.

Judgment granted as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr Justice. MAASDORP.]

PROVISIONAL ROLL.

HERMAN V. FRASER. { 1901.
Sept. 2nd.

Provisional sentence—Allegation of fraud—Variation of defence—Stay of execution.

Defendant, the Acting Commandant at Ceres, was sued on an I.O.U. for £500 given in consideration of certain scrip delivered to him by plaintiff.

Defendant pleaded that he had been induced to purchase the scrip by fraud, that he had returned it to plaintiff, and that the I.O.U. had been given merely as a receipt for the scrip.

Plaintiff's affidavit showed that he merely held the scrip for defendant.

When plaintiff had originally demanded payment, defendant admitted the debt but asserted that it was a condition precedent to payment that he should receive certain remittances.

Held, that as plaintiff had established a prima facie case provisional sentence must be granted, but in consideration of the circumstances of the country and defendant's absence on active service, execution was stayed till October 12th.

Mr. A. Upington moved for provisional sentence for £500 on an I.O.U., with interest *a tempore morae*, and costs of suit. The document also bore the numbers of certain share certificates.

Mr. Searle, K.C., appeared for the defendant.

The matter was previously before the Court, and was postponed, so that plaintiff

might have an opportunity of replying to an affidavit by defendant which had just been put in.

In his affidavit the defendant, Captain Charles Stewart Fraser, said he was a member of one of the Australian contingents, and was at present Acting Commandant at Ceres. While he was stationed at Cape Town the plaintiff was introduced to him by a brother officer, and represented himself to be a man of means and influence on the Rand. In the course of time the plaintiff informed defendant that he was interested in a very good going concern, which owned the rights appertaining to a valuable patent for refuse destruction, which he alleged was used upon every mine at the Rand prior to the outbreak of the war, and that every mine manager and mine owner had shares in this concern, of which he (plaintiff) was a director. The plaintiff assured defendant it was a very good thing, and that as he (plaintiff) was an Australian—so he said—he was willing to let defendant in on easy terms. Defendant stated that he had no funds available in South Africa, and that the few hundred pounds he might be able to invest could not be obtained until he was released from his military duties and had an opportunity to attend to his private affairs in Australia. From Cape Town defendant was ordered to Malmesbury, and plaintiff, upon learning this, stated that he was not anxious to obtain the cash at once, and should let the matter of payment stand over until defendant's military duties ceased and he could find an opportunity to attend to his private concerns. He added that it would be a mistake for defendant to allow that opportunity to get into such a good thing upon favourable terms to pass. Defendant declined to purchase, as he had no opportunity of verifying the plaintiff's statement, but plaintiff offered to leave the certificates with defendant, who was to have the right of buying them for £500 when he was satisfied about the genuineness of the concern, and he was also left to determine the terms of payment as soon as he knew that his military duties would allow him to attend to his private affairs. Plaintiff then handed defendant the scrip certificates, and as a receipt defendant gave him the I.O.U. now sued upon, as he said he required it in case anything should happen to defendant on active service. Accordingly defendant tore a leaf from his pocketbook and gave the receipt. That was in Cape Town whilst defendant was under orders to proceed to Malmesbury. Proceeding, defendant said in

his affidavit that whilst he was at Malmesbury he made inquiries, and soon discovered that plaintiff had grossly misstated and misrepresented the facts to him; that he learned that the affair was a swindle and that the scrip was valueless. Defendant further stated that he ascertained that about the year 1897 the plaintiff tried to place his venture upon the market, but failed utterly; the patent was of no value, and instead of being approved of and run after by mine owners, was condemned as of no practical use. As soon as he made these discoveries, defendant returned to plaintiff his share certificates, and asked him to return the I.O.U. The plaintiff still had the certificates, and defendant had received no value for the I.O.U. That document was handed to plaintiff on the clear understanding and conditions (1) that no sale was concluded until defendant had made inquiries, and had had an opportunity of satisfying himself regarding the genuineness of the venture, and (2) defendant was able to determine whether his military duties would enable him to make the necessary financial arrangements with Australia, and effect the purchase. Continuing, defendant said that it was impossible for him to leave his post at Ceres to attend to plaintiff's claims, and pay attention to litigation. He had declined to purchase, and had returned the scrip certificates, which were valueless. He was prepared, if the principal case was gone into, to prove that the plaintiff's representations to him were false and misleading, and that before the present war broke out, the concern to which these shares purported to relate was defunct, and was not then, nor was it now, a going concern.

In his replying affidavit plaintiff said that when he told defendant about the shares, the latter said that he would buy them, and would cable to Australia for a remittance, he having plenty of money there. As to the company to which the shares related, the Pneuma Patent Destructor Company, it was a going concern before the war broke out, and a number of leading mine managers, whose names he gave, held shares in it. Plaintiff never said he was an Australian, but he told defendant that he had lived in Australia for a number of years. Plaintiff denied that defendant ever said he would not be able to invest any money until he had been released from military duty. Plaintiff denied *in toto* paragraph five of defendant's affidavit, in which it was alleged that he (plaintiff) said he was not anxious to obtain the cash at once, and that

the matter of payment should stand over until defendant's military duties ceased, etc. Proceeding, the affidavit quoted correspondence in which defendant asked plaintiff to retain the scrip, as he had not yet completed arrangements regarding money, and had received orders to leave Cape Town. After further correspondence, defendant wrote on July 4, saying that it would be impossible for him to find £500 as at that amount he could not find £50, being absolutely dependent upon his pay; when he gave the I.O.U. he had no doubt about obtaining the money, but he was afraid now that he was oversanguine. Later on he again wrote saying it was impossible for him to raise the £500, and asking plaintiff, as he had the scrip, to return the I.O.U. Continuing, plaintiff denied that there had been any misrepresentation, or that the affair was a swindle and the shares valueless, the company having stopped work only on account of the war. In support of this he quoted a number of testimonials which had been received as to the value of the patent.

An affidavit of Frank E. Robinson, who stated that he was present at the transaction between plaintiff and the defendant, was read in corroboration of plaintiff's version of the proceedings, and also stated that the sale was an out-and-out one, and unconditional.

W. J. Steel deposed on affidavit that up to the outbreak of the war he had occupied the position of working manager to the Pneuma Patent Destructor Company, which was then a going concern, and he intended to return to his duties with the company as soon as he could.

Mr. Searle read the affidavit of Lieutenant A. Mawby, of the W.P.M.R., who said that after trial the patent was discarded as a dangerous nuisance, uneconomical, and worthless in every respect. To the best of his knowledge, in the month preceding the war no company was using the process, and the shares were of no value.

Mr. Searle, K.C.: There is a considerable conflict of evidence, but it is quite certain that the scrip has not been tendered to defendant.

[Buchanan, A.C.J.: It is not usual to let valuable scrip go out of one's possession until it is paid for.]

No, not valuable scrip, but this scrip was valueless. In this case plaintiff had nothing to sell.

[Buchanan, A.C.J.: Oh, yes, the property has been sold as a going concern.]

We have it on affidavit that the invention had been discarded before the war broke out

The shares are never quoted on the market, and there is no evidence that the company was working in 1899.

[Jones, J.: Can you show any misrepresentation or fraud?]

There is no evidence that the company was a going concern. It was very unlikely that any officer newly arrived from Australia would buy scrip for £500 if he knew nothing about the value of such scrip.

[Buchanan, A.C.J.: But in proof of this we have his I.O.U.]

He sent back the scrip, and it was accepted.

[Maasdorp, J.: He did not finally return it. He sent it back to plaintiff's custody until he should be able to pay for it.]

But in the meantime he found out that the shares were worthless. The invention had been discarded as a dangerous nuisance. The plaintiff does not even tender the scrip, and this is not a case for provisional sentence.

Mr. A. Upington (for plaintiff) was not heard.

The Acting Chief Justice, in giving judgment, said: This is an application for provisional sentence upon a liquid document, an I.O.U. for £500, and this document also bears upon it the numbers of certain shares, which are the consideration given for the contract. There was no doubt a transaction between the plaintiff and the defendant, in pursuance of which certain scrip was handed over, a most unusual thing if the shares were worth anything, before they were paid for, and an I.O.U. taken. The defendant states that this I.O.U. was given merely as a receipt, and that when he left town he returned the scrip, which was now in the possession of the plaintiff, while the latter states that he simply holds the scrip for the defendant. It might have been supposed that the plaintiff would have held the scrip all along, so I do not think that fact goes far one way or the other. But the defendant alleges that he was induced to enter into this transaction through fraud and misrepresentation. That is what he swears upon his affidavit. But such misrepresentation was not the ground set up originally when the demand for payment was made. Then the defendant said that he had not received his money from Australia, and he now avers that it was one of the conditions that he should not pay until he received the money. Even if there was such a condition, there must be a certain amount of reasonableness attached to it, and if the defendant was entitled to a reasonable

time, that time has now elapsed. Now, however, the defendant alleges that when he entered into this transaction, and this scrip was sold to him, there was fraud and misrepresentation. The correspondence, however, does not support this allegation. If there was any fraud or misrepresentation it will still be open to the defendant to give security and go to trial, and he can then set up the defence of fraud and misrepresentation: but following the usual practice of this Court when a *prima facie* case has been made out, provisional sentence must be given. In consequence, however, of the peculiar circumstances of this country, and the defendant being on active service, some time must be given during which execution will be stayed. Provisional sentence will therefore be granted as prayed, but execution stayed until October 12.

REHABILITATION

Mr. Gardiner moved, under Section 117 of the Insolvency Ordinance, for the rehabilitation of the insolvent estate of Arthur Rayment, a compromise having been accepted by the creditors. The certificate of the Master was attached.

Order granted as prayed.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. FOUCHE.

Mr. Sheil, K.C., moved for leave to sue the defendant by edictal citation for the sum of £236, part of the purchase price of certain lot of ground at Douglas, with £7 11s. fines, and interest and costs. The return of the sheriff officer showed that he had not been able to find the defendant, H. J. J. Fouche, who, it was stated, had gone away with the Boer forces. Defendant had occupied an iron room at Douglas, but during the occupation of that place by the Boer forces this iron structure was removed, so that service could not be made there.

Leave was given to sue by edictal citation, to be published once in the "Government Gazette" and once in the "Diamond-field Advertiser"; rule to be returnable on October 12.

MABERLY AND OTHERS V. { 1901.
WOODSTOCK MUNICIPAL { Sept. 2nd.
COUNCIL.

Costs—Taxation.

Applicants had moved for an order compelling respondents (1) to make certain alterations in the voters' roll (2) To admit the public to committee meetings of the Council. (3) To allow rate-payers to inspect certain books and other documents.

The Court had granted an order as prayed with regard to the two latter prayers. With regard to the first the applicants were not wholly successful. The Court had granted its order with costs. The Taxing Officer had disallowed all costs connected with the unsuccessful part of the application.

Held: (1) That if neither of the parties to a motion was altogether successful, the Taxing Officer should allow to each party only costs incurred with regard to the claims on which such party had succeeded provided that these claims were clearly distinguishable from the others in litigation. (2) That in the present case it was the intention of the Court to award to applicants the entire costs between party and party of the former application.

(3) That costs must not be unnecessarily increased by briefing documents, copies of which can be obtained in a cheaper way.

This was a motion for review of taxation of a bill of costs in connection with a motion in which certain ratepayers at Woodstock brought an application before the Court with regard to the framing of the voters' roll of that Municipality, but in which there were also two other questions raised, viz., with regard to the public being admitted to meetings of the Municipal Council in committee, and their right to inspect certain books of the Council. On these last two questions

the applicants were successful, but no order was made with regard to the voters' roll.

Sir Henry Juta, K.C., appeared for the applicants, and Mr. Searle, K.C., for the respondent Municipality.

Sir Henry Juta said that it would be remembered that the original motion was one of very considerable importance, and took a considerable time to discuss, there being argument on a great number of points, but eventually, while making no order as to the voters' roll, the Acting Chief Justice, in giving judgment, said that applicants had good grounds for coming into court in view of the careless way in which the roll was made out, and especially in regard to the rights they claimed as members of the public; consequently the Court considered that respondents should be ordered to pay the costs. It was contended by applicants that this order was meant to cover the whole of the costs, but the taxing officer had disallowed certain items connected with the unsuccessful part of the application.

In his report the Taxing Officer said that the plaintiffs contended that the order for costs was intended to include all the costs of the motion, but he took it that the order gave the applicants their costs only in so far as they succeeded, and following the usual practice, he disallowed all costs connected with the unsuccessful part of the application.

Mr. Searle, in the course of his argument, referred to the heavy costs for a motion, viz., £31 odd, and submitted that in any case there were two items which ought not to be allowed. These were £7 3s. 4d. for copying the voters' roll annexed to Dr. Maberly's affidavit for service, and £8 3s. 4d. for briefing the roll for counsel. He pointed out that another copy of this roll had been supplied at a cost of 30s.

Sir Henry Juta said he was informed that when his attorney asked for another copy of the roll to attach to his brief he could not get it, and consequently it had to be copied.

In giving judgment, the Acting Chief Justice said that in matters which came before courts of law the general principle was that the successful party was entitled to have his costs. Matters frequently came before the Court in which neither party was altogether successful, and in these cases the Court had frequently indicated, and the Taxing Officer had followed the principle, that where two or more claims were made which were clearly distinguishable, and applicant failed in certain of these claims and succeeded in others, the Taxing Officer should only allow

that part of the costs relating to the claims on which the party was successful. That was a sound principle. The question in this case was rather whether that principle was applicable. In the case which came before the Court, applicants complained of certain acts done by the Municipal Council, and made various prayers for redress in consequence. They were successful in their application, though not as to all the remedies they sought, and the Court intended that the applicant's success should carry the costs of the whole application. The Taxing Officer had therefore mistaken the intention of the Court in giving the order it did, with costs. The Court would not, however, go into the different items, but would express an opinion that in dealing with the costs the Taxing Officer should allow so much of the costs of the whole proceedings as would be properly taxable between party and party. Some of the items disallowed by the Taxing Officer seemed to have been disallowed on two grounds. First, on the general principle that they were applicable to part of the proceedings in which applicant was unsuccessful. Secondly, that there were certain items which were objectionable in themselves. He (the Acting Chief Justice) need not now specify them. The Taxing Officer must go through the bill of costs, and look at these, but he should not disallow any simply because they related to any prayer upon which applicant was unsuccessful. He (the Acting Chief Justice) thought it might be laid down as a general principle for the guidance of the Taxing Officer, that when Municipal Regulations and voters' lists could be obtained in book form, there was no necessity for their being briefed. The annexing of a copy of the voters' roll to the affidavit served on the Council seemed to be unnecessary. *Prima facie*, it seemed to be necessary that counsel should have a copy. Whether this could be obtained in a cheaper way was a matter for the Taxing Officer to decide. If it could be, he would allow a reasonable charge; if it could not be obtained, he must allow what was fair and reasonable, according to the usual scale adopted in taxing costs. As to counsel's fees, the Taxing Officer would now take into consideration the fact that all the costs of the application were awarded to applicant. The bill would be referred back to the Taxing Officer with the direction to allow so much of the costs of the whole proceedings as should be properly taxable be-

tween party and party; costs of the application to be paid by the Council.

Mr. Justice Jones concurred, and said that this was not the first action in which the Supreme Court had severely commented upon briefing a document which could be obtained in a very much cheaper way.

Mr. Justice Maasdorp also concurred.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorneys, Messrs. W. E. Moore and Son.]

ERLANK V. WESSELS. } 1901.
} Sept. 2nd.

Leave to sue *in forma pauperis*—Income.

•Where an application for leave to sue *in forma pauperis* had been opposed on the ground that applicant's future rights in certain property would realise more than £10,

Held, that as it was disputable whether applicant possessed any such alleged rights, and as they would not in any event entitle her to receive more than £45, the prayer of the petition must be granted.

This was a motion to make absolute a rule *nisi* granted to petitioner, giving her leave to sue *in forma pauperis*. Petitioner lived at Sterkstroom, and she wished to institute an action against defendant for the sum of £5,000, for breach of promise and for seduction.

Petitioner, in her affidavit, said she was possessed of nothing save her wearing apparel. Affidavits were filed in support of this allegation.

Respondent alleged that under the will of her parents, applicant had an interest in certain property, which she could sell, and which would realise more than £10. The will appointed the survivor of the parents the heir to the property. There was a codicil which provided that after the death of the survivor, the property should be held by the testators' children, and kept in their possession until each and all became settled in life, after which time the property was to be sold by public auction, and the proceeds to be divided among all the children, share and share alike. There were eleven surviving children in addition to applicant, and the property was worth, according to the Muni-

[Jones, J.: Why does Act 40 of 1892 (section 2) allow a widower to marry "any female related to him in a more remote degree of affinity than the sister of his deceased wife"? The words "any female" are very wide.]

The object of the Act was to grant a permission to a certain class of people, such permission being in derogation of the common law. It must, therefore, be interpreted very strictly.

[Maasdorp, J.: You say in derogation of the common law, but the Political Ordinance allows a man to marry his wife's sister's child.]

[Buchanan, A.C.J.: It seems that as long as a man does not marry an ascendant or descendant by affinity, he may marry anybody.]

No, see *Van Leeuwen* (1, 5, 13). There is a relationship of affinity between a wife and the blood relations of the husband.

[Buchanan, A.C.J.: But two brothers may marry two sisters, and a man may now marry his wife's niece.]

Sir H. Juta (in reply): It is impossible to arrive at legal rules on these questions of affinity by any logical process. All we can say is that what is not prohibited is allowed, and if a marriage is once allowed between persons related in the second degree, it must be allowed between all persons related in some further degree, unless it is expressly prohibited.

Cur. ad. vult.

Postea (September 23).

The Acting Chief Justice, in giving judgment, said: This is an application upon notice, for an order authorising and instructing the officer acting as Resident Magistrate for the district of the Cape to grant a special licence in the ordinary course, authorising the marriage of the petitioner with the widow of a brother of petitioner's father. In support of the application, it has been contended, firstly, that such a marriage is not prohibited under our common law; and then, secondly, that even if formerly there had been such a prohibition, it was removed by the Legislature of this colony by Act No. 40, 1892. As to the first ground, there undoubtedly exists great uncertainty as to what was the law of Holland in earlier times, but the Political Ordinance of the 1st April, 1580 (*Groot Placaat Poek*, vol. 3, p. 502), is now considered as a statutory declaration of the degrees of relationship, both of consanguinity and of affinity, within which marriage is not permitted. The general rule is that marriage is forbidden between

persons related within the fourth degree. Dealing with the question of affinity, the statute sets forth a number of cases in which marriage is prohibited, none of which is the specific one in question here. There is a direct conflict of opinion among Roman-Dutch Law commentators whether the list of prohibitions stated in the *Placaat* is intended to be exhaustive, or whether it is only illustrative. It is true that the 8th section mentions the cases prohibited after using the word "namentlijk" (i.e., namely), but the statute goes on in subsequent sections to give other instances of prohibition. For instance, the 11th section deals with the converse of this case. It enacts: "Nor may a man marry the widow of his nephew, that is, with the widow of his brother's or sister's son, nor with the widow of any of his brother's or sister's descendants. And likewise, no woman may marry the surviving husband of her niece, that is, with the widower of her brother or sister's daughter, nor with the husband of any of her brother's or sister's grandchildren or descendants." It will be noticed that part of this section extends the prohibition beyond relationship within the fourth degree. The ground upon which it is so extended is not stated in the *Placaat*. The reason is probably founded on some such ground as is given by *Van Leeuwen* in the *Censura Forensis* (1, 13, 15), where he says: "The rule that in the collateral line marriage can take place between persons in the fourth degree is further limited so as not to apply where either of the parties is *in loco parentis* to the other. For I cannot marry the granddaughter or great-grand-daughter of my sister or brother, albeit she is related in the fourth or further degree, for to her I am *in loco parentis*." This explanation, however, does not cover the whole of the instances mentioned in the 11th section, nor would this legal fiction extend with us as a prohibition in the case under consideration. *Van Leeuwen* is one of the jurists who favours the view that the *Placaat* did not forbid this marriage. In section 20, of the chapter above cited, he says: "It has been at times questioned whether marriage can take place with the daughter of one's deceased wife's sister, or the son of one's deceased husband's brother, for this case is not within the express terms of the written law; and on different occasions it has been decided that such a marriage is good." He mentions that dispensations were frequently given for such marriages, but he goes on to state that as

the result of a consultation between the Senate of the Supreme Court and the Theological Faculty of Leyden University in 1626, such dispensations were condemned, and it was resolved that they should not in future be granted, on the ground that, although not expressly prohibited by the States-General, these marriages should be considered as included under the general language and within the spirit of the ordinance. *Voet*, on the other hand, states expressly that such marriages are prohibited, giving as his authorities the Mosaic law, the 11th section of the Placaat, and *Coren*, who, in his *Observatien*, expresses the same opinion. The *Dutch Consultations* contain various opinions on both sides of the question, so that it cannot be said that there is anything like a consensus of authority on the subject. On the whole, however, as far as I have been able to follow up the question, it would seem that the balance of opinion among Roman-Dutch jurists is in favour of the prohibition extending to such marriages. Consequently, if the question was to rest on common law alone, I would not feel justified in granting this application. But the position of persons related to each other only by affinity has been greatly affected by the Marriage Law Amendment Act No. 40, 1892, which, by section 2, made it lawful for any widower to marry the sister of his deceased wife, provided such sister be not the widow of a deceased brother to such widower, or to marry any female related to him in any more remote degree of affinity, save and except any ancestor *cf.* or descendant from, such deceased wife. This enactment cuts away the general rule that prohibition extends up to the fourth degree, as far as affinity relationships are concerned. That there is a distinction to be drawn between such relationships and those of blood has always been recognised in law. As *Van Leeuwen* points out in section 22 of the chapter cited: "It is not the rule that prohibition of marriage is as wide in regard to affinity as it is in regard to kinship; for although my kinsfolk are my wife's, and her's mine, and although my kinsfolk are also her connections by marriage, and her's mine, it does not follow that the grounds for prohibiting marriage is the same in kinship and in affinity. Further, we must note that my kinsfolk and hers are united by no bond of affinity, nor forbidden by any prohibition to marry each other. Thus a father and son may marry a mother and daughter; brothers may marry sisters, I your sister and you mine, for we are not, properly speaking,

connected in affinity, nor on that ground does there exist any prohibition in sacred or profane law." Our statute law now prohibits a widower from marrying any person who is an ascendant or descendant of his deceased wife; but, with the exception of such wife's sister, who is also a widow of a deceased brother, it allows him to marry his deceased wife's sister, who is a person related by affinity, in the second degree, or any female who stands in any further or more remote degree. It is true the second section of the Act, No. 40, 1892, makes it lawful for a "widower" to marry those related to him by affinity, but *a fortiori*, in construing a statute like this, which has for its object the removal of disability, the provisions of the Act should be held to extend to a man who had not been previously married, and who therefore had not himself created the tie of affinity. Otherwise this anomaly might arise, viz., that of two brothers, one a widower and the other a bachelor, the widower would be permitted to marry within the fourth degree of relationship by affinity, while the bachelor would not. I would rather adopt a course similar to that followed by *Voet*, and test the question by seeing whether or not the prohibition existed in the converse case. It is significant that the statute does not limit the release from prohibition to those related to a man only through his deceased wife, but generally makes it lawful for him to marry any female related to him in any more remote degree of affinity than that of sister-in-law. It is said that the Act was inartistically drawn, and that the intention of the framer of the law was much more restricted. But we can gather the intention only from the words used in the section. If, therefore, as the Act stands, it removes the restriction against intermarriage between a widower and his niece by affinity only, she being a female related to him in a more remote degree than his sister-in-law, on principle it should be held that it also permits the marriage of a widow with her nephew, to whom she is related by affinity only. That is the relationship which exists in this case, and therefore in my opinion the applicant is entitled to the order prayed.

Mr. Justice Maasdorp concurred.

The Acting Chief Justice said that Mr. Justice Jones fully concurred in this judgment also, and the application would therefore be granted as prayed.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

BIDDULPH V. ADCOCK AND NORTON. { 1901.
Sept. 2nd.

Mr. Solomon moved for an order authorising the appellant to prosecute an appeal from the decision of Mr. Justice Vintcent in the High Court of Southern Rhodesia. The appeal should have been set down by August 23, but the records arrived a day too late for the case to be set down by the stipulated date. Respondents consented to the order asked for. Counsel said the amount in dispute was £9. This was below the appealable amount, but Mr. Justice Vintcent had given leave to appeal. The case was one of fact.

The Court granted leave, the Acting Chief Justice saying that if only a question of fact was involved, and only £9 was in dispute, no leave to appeal ought to have been given. The appeal was ordered to be prosecuted the first week in the November term.

GREWAR V. WEIL.

Mr. Benjamin applied for a postponement of hearing, on account of inability to get certain necessary witnesses.

Mr. Searle, K.C., appeared for the respondent (plaintiff in the action).

The case was put down for Monday, the 11th November, by consent, with leave to either party to apply for a commission in the meantime. Costs were ordered to be costs in the cause.

Ex parte BELL (OTHERWISE KNOWN AS BOLDMAN), MARRIED IN COMMUNITY OF PROPERTY TO WILLIAM BOLDMAN.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to register a certain deed of transfer.

Granted.

Ex parte RIFFELL.

On the motion of Mr. Benjamin, leave was given to mortgage certain property.

Ex parte TONKIN, IN HIS CAPACITY AS EXECUTOR TESTAMENTARY OF THE ESTATE OF THE LATE ABDOL SLYMAN, ALIAS ABDULLAH SLEMMAN.

Mr. Langenhoven applied for an order authorising the Registrar of Deeds to cancel a certain mortgage bond.

An order was granted as prayed for, subject to there being no objection by October 1, after publication of notice in the "Government Gazette" and "Cape Times."

M 3

KANNEMEYER V. HAVINGA.

On the motion of Mr. Searle, K.C., leave was given to sue by substituted service, publication to be made once in the "Government Gazette," and once in a paper circulating in the Wodehouse district.

SALFELD V. SALFELD.

Mr. Russell applied for leave to sue by edictal citation. Defendant, the husband, was last heard of in London in June, 1900. His parents lived in Hanover, Germany.

The order was granted, personal service, if possible, to be effected, failing which notice to be published in the "Daily Telegraph" and in the "Government Gazette," notice to be also posted by registered letter to the residence of defendant's parents.

MUSGRAVE V. MUSGRAVE.

Mr. Close applied for leave to sue by edictal citation.

Granted, personal service to be effected, the rule being returnable on the 15th November.

Ex parte THE SOUTH AFRICAN CONFERENCE OF THE SEVENTH DAY ADVENTISTS.

Mr. Close applied for a rule nisi authorising the transfer of certain property to be made absolute.

An order was granted in terms of the Registrar of Deeds' report.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

MOSSEL BAY BOATING COMPANY V. BRINCK, MASTER OF THE "MARIE JOSE." { 1901.
Sept. 3rd.

Salvage—Amount.

There are three requisites in cases of salvage: (1) That the vessel was in danger or distress; (2) That the salvors rendered assistance; (3) That their efforts were successful. In determining the amount to be paid as salvage the Court will consider: (1) The

*enterprise shown by the salvors ;
 (2) Their skill ; (3) The risk to
 which they exposed themselves ;
 (4) Time occupied in the salvage ;
 (5) The risk to the ship salvaged ;
 (6) The value of the property
 salvaged*

*In this case the Court found that
 most of these conditions were
 present and awarded £1,000. The
 value of the ship, cargo and
 freight was between £8,000 and
 £9,000.*

This was an action brought by the Mossel Bay Boating Company against James Neilsen Brinck, master of the barque Marie Jose, and as such representing the owners, to recover the sum of £2,000 for salvage services rendered to the vessel on the 27th June, 1901. The declaration alleged that the barque was lying at anchor in Mossel Bay on the 27th June, where she had discharged part of her cargo of wheat, when a strong south-east wind blew, causing a high and dangerous sea. The barque lost her anchorage, and drifted, and was in imminent danger. The manager of the company, with a crew, proceeded in a small boat to the company's steam launch, the St. Blaize, which they reached. They then proceeded to take the launch to the vessel, and by means of an anchor and warp, saved the barque, and rendered salvage services. The work was done with great danger and damage to the launch. The defendant, in his plea, said that the sea was not a dangerous one. The barque did not lose her anchorage, but drifted her anchors. The launch came out in response to a signal. He denied that there was imminent danger, but said that the company rendered services at a time when the barque was in difficulties, and for these services he tendered the sum of £500.

Mr. Searle, K.C. (with him Mr. Close), for plaintiffs; Sir H. Juta, K.C. (with him Mr. Currey), for defendant.

Mr. Searle explained that the barque was lying about a mile from the shore, in the usual berth for sailing vessels. She had broken her principal anchor, and they had put down a third one, but she drifted for about half a mile towards the coast. The launch was a small vessel of about 90 tons. A claim was first made for £1,000, but the amount was subsequently increased to £2,000..

Henry Richard Steel said that he had served the greater part of his life at sea, and had been manager of the plaintiff company for five years. Before that he was second manager of the boating company at Port Elizabeth for 28 years. The Marie Jose was in Mossel Bay on the 24th June, when she began to discharge. She was anchored about a mile from the jetty, at the usual anchorage for sailing vessels. On the night of the 26th a wind arose from the south-east, right in from the sea. During the night the port captain gave instructions to take the rocket cart. Witness was up several times during the night. The tug St. Blaize was a vessel of about 90 tons, and was used for carrying passengers and for towing in the company lighters. The gale increased, and the sea was high on the morning of the 27th. Witness watched the Marie Jose, and the Port Captain signalled to the vessel that they had lost an anchor. No reply was made. This was at about eleven o'clock. She was drifting then, and after noon she began to drift more. At about 1.30 the Port Captain asked if the vessel wanted assistance, and no reply was made at the time. The vessel was shipping seas at bow and stern. Witness saw her sheer, and thought she had parted both her anchors. Witness then went off with four other men in the dinghy. They had great difficulty in getting to the tug, on which were the engineer and a stoker. When on the tug, witness noticed an affirmative signal flying from the vessel in reply to the Port Captain's signal as to whether they wanted assistance. The tug shipped very heavy water. They got to the vessel between two and half-past two. Witness spoke to the captain when about 30 yards off, and asked if he wanted assistance. The captain said that he (the captain) could do nothing, that his windlass was gone, that the springs to ease the anchor chains were gone, and that he had no more chains. The tug's steering-gear was broken, but they shackled it together, and came up alongside again. Witness asked the captain whether he should get him an anchor and warp. The captain said he had nowhere to fasten it to, but witness told him he could fasten it to the foremast. The captain said that it was no good to go and get an anchor and warp; that the ship would be ashore before the tug returned. Witness went to get an anchor and warp, and when they returned the sea was rougher. The tug was not adapted for run-

ning out anchors. Witness took out an anchor weighing 30 cwt. and a cable. The tug remained under the ship's bows while the warp was heaved on board and made fast. This was dangerous, as the warp might foul the propeller. When the warp was made fast, witness went ahead, and the tug's anchor held the ship. At about 5.30 witness returned to the shore. There were three extra men on board when the tug returned with the anchor, etc., to the vessel, making a crew of ten. The next morning the captain was brought ashore. The wind had then gone down, but there was plenty of sea. Later, witness and the Port Captain went aboard the ship. The windlass was broken, and useless. The ship was riding on the warp. The warp was damaged by chafing, and was made useless. The value of the warp was £70. The tug took back its anchor and chain, and restored the anchor to the ship. Witness ran a great risk, and was at one time afraid of having all hands washed overboard. The cost of the tug was between £3,000 and £4,000; witness could not get another like it for £5,000. On the 29th June a claim was sent for £1,000, and an offer was made by witness, through the attorneys, to settle the amount by arbitration. Witness had not then consulted his directors. On the 2nd July a claim was made for £2,000. A steam trawler in the bay of about 150 tons parted her chain on the morning of the 27th, and went out to sea. This was the Undine. The only other vessel in the bay was a small steam trawler, the Thrasher, which dragged a long distance, but was brought up by the aid of a spare anchor. If the Marie Jose had gone ashore it would have gone on to the sands or the reef, and would have become a total loss. There was no lifeboat at Mossel Bay.

Cross-examined by Sir Henry Juta: Certain charges had been paid by defendant (receipts were produced). The first cost of the St. Blaize was about £3,500. There had been alterations to it which cost £1,000. The ship commenced to drag at about 12 o'clock. Between this and 1 o'clock she drifted about 300 feet or more, and then held. At 2.40 the ship had two anchors down. Witness thought she was then fast. Witness went down to the Thrasher at about 2.30. On going to the Marie Jose, witness asked the captain if he could do anything. The captain said he had no more anchors, and witness said he would fetch one. If the captain of the vessel wanted an anchor he could have signalled to the shore for one. Witness was away in

the tug for about an hour and a half, when they went to fetch the anchor and warp. In witness's opinion there was no occasion to take the crew off the ship when the tug went for the anchor. There had been no anchor run out during the five years witness had been at Mossel Bay. The danger of fouling the propeller was common to every tug towing in a dirty sea. Witness understood everything the captain said from the ship. Witness used the tug to tow the Sverre from a position near the shore some time ago. There was another launch, the Undine, there, and the St. Blaize was only assisting. The Sverre was worth £16,000. The amount paid for both tugs' services to the Sverre was £500.

Re-examined by Mr. Searle: There was no danger to the tugs on the occasion of the Sverre drifting. Witness was of opinion that the St. Blaize would have been ashore in another hour.

Thomas Taylor Wood, manager of the City Milling Company, said that his firm imported a good deal of wheat from Australia. The price here would be 17s. 3d. per 200 lb., delivered at their stores. Their selling price would be about 18s., or 18s. 3d., per 200 lb. The value on board the ship in Table Bay would be 17s. 3d., less 4s. duty and 6d. landing charges—that was, 12s. 9d. per 200 lb.

Cross-examined: The price varied considerably. On June 20 the ruling price in Cape Town was practically the same as now. At Mossel Bay the value would be very much the same, perhaps about 5s. per ton higher.

Re-examined: The freight would be higher to Mossel Bay than to Cape Town.

John Little Dryden said that for the last five years he had been Port Captain at Mossel Bay. Before that he filled a similar position at the Kowie for thirteen years, and previous to that again he was twenty-seven years at sea. On June 26 a wind sprang up from the south-east, and witness sent the captain of the Marie Jose the daily weather telegram, warning him to look out for a blow. The wind freshened, and witness had the rocket brigade out all night. During that time it blew strong and squally. At six o'clock in the morning witness dismissed the rocket brigade, as the men were all volunteers, and had to go to their work. In the morning the Marie Jose was riding heavily, and between ten and eleven o'clock the chains of one of the two anchors snapped. Witness signalled to the ship to that effect, as so far as he could see through

his telescope there was no one about the deck, and he thought they might not have noticed it. The ship dragged a little now and then during the morning. He saw those on board let go a third anchor later on. The Undine also parted her moorings, and went out to sea. When witness signalled to the Marie Jose he got no answer, but saw men at work. The vessel dragged about twice her own length, and witness signalled again, asking if she required assistance, and after some time got an answer in the affirmative. On the chart produced witness had marked the spot where the Marie Jose first anchored, and where she brought up. If the vessel had not been brought up she would have gone ashore on the rocky coast, at a place called Voorbaai, about two miles from the jetty. There were no appliances in the way of lifeboats, etc., there. At the rate the vessel was drifting she would have been on the beach between one and two hours from the time she was brought up. Witness thought there was considerable danger to the tug St. Blaize from the heavy sea which was running, and breaking over the little vessel now and again. There was also danger from the anchor, which might have knocked a hole in the St. Blaize. The tug could not get very close to the vessel, which was shipping seas fore and aft. It was broken water all over the bay that day. The service rendered by the tug was one requiring a considerable amount of skill. At the request of the captain, witness afterwards went on board the vessel to make a survey, and he made the report (put in) as to the damage the ship had sustained. The following night, June 27, witness again set a watch, as it was blowing hard and squally. The wind went down about midnight, but next morning the sea was still running high.

Cross-examined: In his journal witness did not mention the dragging of the vessel during the afternoon, but the captain himself would admit that the vessel dragged six cables' lengths. There was always a certain amount of risk when a tug was towing, but on the day in question there was a tremendous risk to the St. Blaize. There was very little risk in towing, in the English Channel, even in dirty weather. There they were pretty handy with the craft, which were specially built for the work. They were also pretty handy with the craft at Mossel Bay. Witness suggested to Mr. Steel that the tug should go out to the assistance of the Marie Jose, but he did not urge that being done.

Re-examined: When witness spoke about it to Mr. Steel the latter did not seem inclined to go. Taking into consideration the small size of the tug, that it was only 19-horse power, was not fitted for the work, and was uninsured, it was rather risky work.

Ben Eddy, the captain of the tug St. Blaize, said he had been at sea twenty-seven years. He had been four years at Mossel Bay, previous to that two years on one of the tugs at Port Elizabeth, and previous to that again he was in the coasting trade in the Channel and North Sea. On June 27 the south-easter was one of the worst witness had seen in the Colony, and the sea was heavy. Witness went out to the vessel the first time with seven men, and the second time with ten men. His ordinary crew was five, but on this occasion he required all ten men. There was a considerable danger of the tug swamping. All the crew were washed about the deck except witness, who was at the wheel on the bridge. He saw Mr. Steel washed right along the deck; in fact, he was afloat. There was danger of the fires being put out, as there was plenty of water going down the stoke-hole. It was one of the most dangerous services witness had been on, and he had been out with lifeboats more than once. The first time they went out to the vessel witness saw the steering gear of the vessel broken. Afterwards they got alongside. Mr. Steel asked the captain if he could render the vessel any assistance, and the captain said he could do nothing, as he had no more anchors or chains. Mr. Steel said he would bring him an anchor and warp, but the captain said he had nothing to fasten it to. He also said his vessel would be ashore before the tug could reach him with the anchor and warp. At that time the vessel was drifting at a rate that witness believed would take her ashore inside of two hours. When the tug returned with the warp and anchor there was again considerable danger. The tug returned to the jetty just before dark. The wind freshened up to half-past ten o'clock that evening. Witness saw the Marie Jose afterwards, and noticed that she had not moved an inch after the warp and anchor had been taken out. Next day they went out and brought the captain ashore.

Cross-examined: Witness was not interested in the salvage to any extent whatever. He was paid a monthly salary, and as to this salvage he had made no arrangement whatever with the boating company. He knew nothing about a bonus, and there was no arrangement.

Sir Henry Juta: But you consider yourself entitled to something?

Witness: That's another thing.

Cross-examination continued: Witness had never before taken out an anchor to a ship in weather like that. He had seen as bad weather in the North Sea.

Re-examined: Witness had never since he had been on the coast seen the sea so sharp as it was on that date.

James William Carter, one of the crew of the tug St. Blaize, said he had been brought up in Mossel Bay. The day they went out to the Marie Jose the weather was worse than ever he had seen it there. In witness's opinion there was a danger of the small tug being swamped. He saw Mr. Steel and a coloured boy washed along the deck, and the water going down into the engine-room. Witness corroborated as to the danger in getting the hawser on board the vessel. It was the most dangerous service witness had ever been engaged in. Witness corroborated generally as to the conversation between Mr. Steel and the captain of the vessel. He also gave evidence as to the work of getting the warp aboard the ship.

Wm. Bowden, a shipwright, said that he had seen the barque Marie Jose the day after the storm. The damage done to the windlass could not have been repaired unless castings were brought from Cape Town. The captain of the barque said he could not wait for that. The captain told witness the day after the storm that he would have gone ashore if he had not got the anchor and warp from the St. Blaize.

Cross-examined by Sir Henry Juta: The St. Blaize would be worth about £5,000 at present. It was the worst weather he had ever seen at Mossel Bay.

John McMillan said he had been twenty-five years in command of vessels. For the last thirty years he had been chiefly in these seas, and for the last three years he had lived at Mossel Bay, for which port he held a pilot's certificate. He was now the master of the Undine. On the 27th June the Undine was lying inside the anchorage at Mossel Bay. Bad weather set in on the 26th, and on the morning of the 27th witness's chain, which was about the same as that of the Marie Jose, broke. Witness had full steam up, and went out seven or eight miles to sea. He went out at about two o'clock, and came back to the bay at about 4.30, expecting that the Marie Jose would be ashore by that time. He thought he might be of assistance to the vessel. The

Marie Jose was hanging on to the warp from the St. Blaize. Witness saw that the vessel was safe, and then went out again to sea. The sea in the bay was too rough for him to anchor. The ordinary ship anchors would not hold. He had had a very great knowledge of Mossel Bay, and had never seen heavier seas than there were on the 27th June. Witness's vessel was completely buried when at anchorage, and she was in a smooth place compared to where the Marie Jose was. The service of the St. Blaize to this vessel was accompanied with great danger. Witness would not have attempted it. The captain of the Marie Jose told witness he would pay the claim of Steel for £1,000. Brinck also said that had it not been for the service of the St. Blaize the vessel would have gone ashore. There was no doubt about this.

Cross-examined by Sir Henry Juta: Witness could have done nothing if the ship had gone ashore. If Steel had not rendered service, witness could, if he could have got the warps on board, and if the vessel was still afloat, have towed the Marie Jose to a place of safety. The danger in regard to the Sverre was about the same as in this case. Witness was dissatisfied with the payment in the Sverre case.

Re-examined: It was possible to put the warp on board.

By the Court: Witness could not have lowered a boat to take the warp near to the vessel, as in the case of the Sverre, nor could he have gone with safety sufficiently close to the vessel to throw a line on board. The only means of getting a warp on board would have been to send a buoy.

Mr. Searle put in certain correspondence, and said that plaintiffs represented the value of the barque, cargo, and freight to be £9,725, and the defendants some £2,000 less.

Sir Henry Juta called,

Arnold Wm. Spilhaus, who said he was consignee of the Cape Town cargo. The total value of the cargo on the Marie Jose was £4,128, and of the freight, £1,113.

Cross-examined by Mr. Searle: He reckoned the value of the wheat at 12s. 6d. per 200 lb. The Mossel Bay cargo was about 1s. 6d. more.

James Neilsen Brinck, master of the Marie Jose, said he came into Mossel Bay before the 27th, and discharged certain of his cargo. On the morning of June 27, witness had two anchors out, and at about twelve o'clock the starboard anchor parted. Witness then put out a third anchor. In spite of

that the vessel dragged. At about two o'clock witness saw the signals on shore, asking if he wanted assistance. Witness did not reply at once, as he thought the anchors would get a grip when the vessel went into shallower water. A few minutes afterwards witness signalled that he wanted assistance, and the St. Blaize then put off from the shore. The tug came to within about forty yards of witness's vessel. Witness told him he wanted assistance, and Steel asked if he should bring an anchor and warp. Witness shouted that the Marie Jose might be ashore before he returned with the anchor and warp. He, however, signalled Steel to fetch them. The vessel then was not in imminent danger. In about three-quarters of an hour or an hour, the St. Blaize returned. There was no difficulty in getting the rope on board. There was no danger to the tug, or to witness or his crew. The warp was easily pulled up and fixed round the mast. The vessel continued to drift until the warp got tight, and then they held on. They were then riding with three anchors, two of their own and the one the tug brought. The anchor the tug brought weighed about twelve hundredweight, not half the size of witness's anchors. He was sure it did not weigh thirty hundredweight.

By the Court: Yet this small anchor held your ship?

Witness: It would never have held it alone.

Examination continued: After that the wind began to go down, and at midnight there was no wind at all. There was no imminent danger to the ship. Witness did say to Mr. Steel that it was no use going back for an anchor, because he might be ashore before they got back, but he said that in sarcasm, because he was astonished, seeing that it was half an hour after he signalled before the tug came out, that they did not bring anything with them. Before the tug brought the anchor and warp they had drifted six cables. He thought they would have drifted two cables more before the wind fell, and ten cables more before they would have been in imminent danger. At any rate it would have been a matter of hours before they would have been in imminent danger. He never gave anyone to understand that £1,000 would be paid for salvage. The first he heard about the claim for £1,000 was when he got the letter on June 29. He might have said to Captain Steel the day after he got the letter that he would negotiate with his people. He never said to anyone that he would pay

£1,000. That was a matter for his owners. The tug going forward with the anchor was not, in witness's opinion, dangerous. The ship was about three-quarters of an hour from the nearest shore when the other anchor was let go, and with the wind he would have had to drift more up the bay.

Cross-examined: There was a fairly heavy sea on the night of June 26 and morning of June 27, and the sea remained pretty strong until the night of the 27th. Witness did not signal that he wanted an anchor. The first thing he heard the captain of the tug say was his asking what he could do for them. Witness did answer that his windlass was broken. When he asked if witness wanted an anchor, witness answered: "It is of no use; by the time you get back the ship might be ashore." He did not think then the ship was in great danger, as it was only drifting slowly. They were not in a bad way, but he signalled because something might happen. He wanted to save the ship and cargo going ashore. Witness had never been in tug service himself, but he had been in difficult positions before. He had lost a ship before. That was the first time he had been in Mossel Bay, and he did not know about the bay. He never told the shipwright and Mr. McMillan that if he had not got that anchor and warp, his vessel would have gone ashore. He never said to McMillan that he was quite willing to pay £1,000. The damage his vessel sustained at that time cost £400 at Cape Town to repair. The tug did its work very well and with great credit. They were as sharp in returning as they could.

Re-examined: He did not reckon there was any difficulty about the work.

[By Mr. Justice Jones: Before the tug arrived witness had done all he could, and the vessel still drifted, but slowly.]

[Mr. Justice Jones: But you say in your protest that after a quick consultation with your mates, to save the ship and cargo you signalled for assistance. If the ship was drifting so slowly, what was the necessity for a quick consultation?]

Witness: I don't know; I didn't mean that.

Marthinus Thomsen, the first mate of the Marie Jose, said he held a master's certificate. On June 27, in Mossel Bay, one of the cables parted, and they put down another. Then the captain signalled the shore, and the tug came, and Captain Steel asked what the captain wanted. Afterwards the tug went back, and brought out an anchor. There was, in witness's opinion, no danger in bring-

ing out the anchor. The rope was got on board the first throw. At that time there was no danger to the people on the ship, nor to the people in the tug, so far as witness could see. The weather got better after the anchor was let go. Before then the vessel was dragging slowly. He could not say whether the ship would have gone ashore, but seeing that the wind dropped soon after they got the anchor, he did not believe they would have dragged so far as to go ashore.

Cross-examined: Witness had never had anything to do with tugs and taking anchors out to ships. The captain had a consultation with witness as to signalling the shore, and witness thought they should do so. It was to save the ship from going on shore that they decided to signal for assistance.

Sir H. Juta closed his case.

Mr. Searle, K.C. (for plaintiffs): I take it that in all salvage cases the first consideration is the danger to the vessel saved. In this case the ship's log (written up at the time) shows that the vessel was in great danger. Captain Steel and the other master both say that the vessel would have gone on shore if a hawser had not been put out. The master of the tug says that doing this was a most dangerous service. Captain Brinck says it was a very easy matter, but what made it seem easy was that the service was so well and skilfully performed. Dryden and McMillan both said that they would not like to do a thing like that. Defendant's counsel wishes to put this salvage service on the footing of ordinary towage, but this is no question of towage. Risk run by the salvors—skill displayed in performing their work and success attending that work, the three chief elements in estimating salvage services—all these were present in this case. The salvors took their lives in their hands, and it is now for the Court to appraise their services. The master now takes up the position that the wind decreased at midnight, but the service was rendered between 4 and 5 p.m. In about three hours the vessel had dragged half a mile. She was rapidly drifting on to the rocks, and if a ship once gets on the rocks in Mossel Bay she very seldom gets off again. This Court has held that people who render salvage services should be liberally rewarded. In the case of *The Papanui*, £1,000 was claimed for salvage services, and £500 awarded. In that case the salvors had not exposed themselves to anything like the danger that they had incurred in this case. Then there is the case of *Blackburn v.*

Mitchell (7 Sheil, 362). There the ship and cargo together were worth only £6,000, and £1,000 was awarded to the salvors, although they had not run any great risk. In the present case the vessel was all but ashore on a dark and stormy night, and we have to consider (1) the large value of the ship; (2) the danger in which she was placed; (3) the risk incurred by the salvors. All these considerations should induce the Court to give a liberal reward for the salvage. See *The Petunia* (2 E.D.C., 271 and 394), and *The Blairhoyle* (12 S.C.R., 387).

Sir H. Juta: I have never yet heard of a salvage case in which (according to the salvors) the danger both to themselves and to the ship saved was not very great. In the case of *Blackburn v. Mitchell* a ship had an anchor and a warp taken out to her, and the salvors were awarded £800. On that occasion two ships, one of them worth £14,000, were employed and assisted in the salvage.

[Maasdorp, J.: What conclusion do you draw from that?]

Two tugs which cost in all £20,000 got less than £1,000. On the very night referred to in the pleadings in this case one tug went out with an anchor and warp, and was satisfied with a yet smaller sum. And yet on the same night two tugs go out and made the master sign for £2,000. Then again, when did this vessel get into danger? Surely when the cable parted at 11.30 a.m. or 12 noon. The danger was less in the afternoon than in the morning. The master of the *Undine* came back in the afternoon, and the cable had parted at 11.30 a.m. There could be no question of the "hurried consultation" deposed to by one witness between 11.30 a.m. and 2.30 p.m., and the danger could not be so imminent if nothing happened in these three hours.

[Maasdorp, J.: The consultation may have been hurried, even if it was short.]

[Jones, J.: And the master of the tug thought that if they did not make haste they would not get back in time to save the ship.]

It is absurd to suppose that the crew of the tug went out merely for the purpose of asking what they could do. The master did not think there was any danger either to the ship or to life. It is absurd to say that a man can look at a vessel drifting for three hours and then go and ask what she wants. In this (as in most salvage cases) the salvors exaggerated the risk at which the services were rendered, and the danger to which the vessel saved was exposed. In order to main-

tain a claim for salvage it is necessary to show that the ship was in real danger. It was not so in this case. The master of the *Undine* was quite prepared to tow the vessel out, and she would not have been lost in any case. Then as to the danger to the salvors, they only brought out an anchor, and for this they ask £2,000. The ship and cargo are worth only £7,600. In this case the danger has been much exaggerated. If the sea had been as heavy as was represented the salvors could not have gone off in a dingy. As to the risk of fouling the propeller, that is a risk which must be undertaken by every vessel which tows. See *The Blairhoyle*. In that case the cargo was worth £22,800, and the Court said that a tender of £1,000 was ample. In the case of *The Lief* the ship was worth £7,600. She was towed from Cape St. Francis to Port Elizabeth. She was derelict. The tug was worth £10,000, and yet the Court awarded only £1,000 for salvage.

Mr. Searle in reply.

The Acting Chief Justice: This is an action brought by the Mossel Bay Boating Company against the captain and master of the barque *Marie Jose*, as representing the owners of the barque. It is alleged that this barque was lying at anchor in Mossel Bay on the 27th June, when, through stress of weather, she got into a dangerous position; that she signalled for assistance, and was rescued from this position by plaintiffs, and the plaintiffs consequently claim £2,000 salvage. On the pleadings, the defendants do not deny that salvage was rendered, and they tender the sum of £500, which they consider to be a sufficient remuneration for the services rendered. In argument, however, it has been stated that the services rendered in this case were not proper salvage services. There are three requisites in cases of salvage. The first is the fact that the vessel was in danger or distress; the second is that the salvors rendered assistance; and the third is, that their efforts were successful. If the vessel is not in danger or distress, then no salvage is rendered; and in such a case, as remarked in the course of argument, remuneration is given on the basis of work and labour done. Even if the vessel is in danger, and the salvors render assistance, unless the assistance so rendered is successful in saving the vessel and cargo, then no salvage, as such, can be claimed. As to the first question: Was the vessel in danger on this occasion? When we look at the evidence, we

find all the witnesses, including the master himself, agreeing in this fact: that on the night of the 26th there was a strong gale. The wind and weather was such that the Port Captain of Mossel Bay thought it advisable to call up the volunteer rocket brigade, and to have them ready to give assistance in case of necessity. The master, in his own report, states that the wind rose, and that on the 27th there was a very heavy sea running. Some of the witnesses from Mossel Bay say they never saw a worse sea running in Mossel Bay. This may or may not be to some extent an exaggeration, but we have the master of the vessel himself saying in his protest that the wind was very high, with seas breaking over his ship, and that even after the wind decreased, there was running a very heavy sea. He says that a great quantity of water was shipped over the bows of the barque. There were three vessels in Mossel Bay on this occasion, viz., this barque (the *Marie Jose*), the trawler *Undine*, and the small tug *Thresher*. The wind and sea were such as to cause every one of these vessels to part either from their anchors or their moorings. This is very strong evidence that there was something very abnormal in the state of the weather on that occasion. This vessel, the *Marie Jose*, was anchored in the usual anchorage, about a mile out from the coast; the *Undine* was very much closer in to the shore; while the *Thresher*, a smaller vessel, was still closer in, under the lee of the breakwater, yet they all three parted. I therefore think it is beyond dispute that the weather on this occasion was very bad. Then did this bad weather cause danger to this vessel? What occurred is this. The barque was riding at anchor with two anchors out during the morning of the 27th, when one of the anchor chains parted. It was an anchor with 100 fathoms cable out—a long range of cable—but notwithstanding this, the cable parted, and the ship began gradually to drift. The captain says he had a third anchor on board, and that he shackled the remaining cable to it, and ran it out as far as possible. He therefore had two anchors down, but the ship still drifted. He then says that after that he had a quick consultation—that might be a short consultation or a hurried consultation, but I think that what it means is this, that after all these endeavours did not stop the ship from drifting, he had a short consultation with the mates, and the conclusion arrived at was that they were in imminent danger,

and must call for outside assistance. The captain says that with a view to saving the ship and cargo, they decided to signal for help. They did not exactly signal for help, but the people on shore who had been watching, before this signalled "Do you want assistance?" and the ship answered "Yes," and thereupon the tug went out. Now, after the ship had parted her cable and let down the second anchor, she drifted, before the tug came out, fully six cable lengths, that is about half a mile, nearer the shore than she was before. Those who are acquainted with this part of the coast, and who watched the vessel drift, those who are interested in this case as well as those who are not, are positive in their evidence that in a short time, from one hour to an hour and a half to two hours at the outside, she would have been on the reef or beach, and would have been a total loss, with all her cargo and freight. There was nothing to save her. Under these circumstances, she was clearly in imminent danger. She was saved from that imminent danger by the plaintiffs in this case, whose tug went out, at very great risk, and managed successfully, after going out a second time, in passing a cable, which, after being made fast, was let go, and this anchor so supplied enabled the ship to hold on, so that she rode out the storm and was saved. Here then was imminent danger, assistance rendered, and rendered successfully, and the ship and cargo and freight saved, so that all the requisites required for salvage were present in this case. Then comes the question we have to consider: what amount of salvage should be paid. I quite agree with Sir Henry Juta that in these cases the Court has always laid it down that the Court encourages reasonable tenders being made, and several cases have been cited where the Court has given judgment for the amount tendered in such cases. The tender in this case was £500. We must look at the circumstances surrounding the case, to ascertain whether this was a sufficient encouragement to persons to run risk to save vessels, and whether this was a sufficient reward for the services rendered. One of the main elements was enterprise on the part of the salvors. In this case there was enterprise. There was only this small tug in the bay, and she was not fitted for the purpose—not a powerful tug, such as are kept at Cape Town and Port Elizabeth for the purpose, and fit to go out in the bay in any weather—but notwithstanding this great want of suitability on the part of the tug, it was taken out by these persons.

They ran risks in doing so in these high, tempestuous seas, the tug being almost swamped, the people on deck washed about, and a risk of the engine fires being put out. There were ten people on the tug risking their lives to save these people. Here, therefore, we have enterprise—the tempestuous weather, the salvors risking their lives, and the vessel in imminent danger, in such danger that had this assistance not been rendered, there is no doubt on the evidence but that the vessel would have gone ashore on the beach, and would have been lost. As to the skill of the salvors, it has been said that some landmen were picked up to assist on board the tug, but whether landmen or not, they certainly managed to save this ship in tempestuous weather, and although the steering gear of the tug was carried away, they managed to carry an anchor out to the ship. As to the time occupied, that is not always a very important element, but there was a considerable time during which these people's lives were in peril. Then we come to the value of the property saved. The value of the ship and cargo saved has been variously estimated, but we may take it as a fair estimate that the value of the ship, cargo, and freight amounted to between £8,000 and £9,000. Then there is the value of the tug, which is worth between £4,000 and £5,000. The actual loss to the plaintiffs was only that of the warp, which was worth £70, and there was the cost of repairs to the tug. This is not like some cases which have been cited, where the danger was not imminent, but only probable. We have here imminent danger, a substantial amount of property, and considerable enterprise on the part of the salvors, and I therefore think this case requires more liberal treatment than the tender in this case would give. A very fair amount, and one which would not be too extravagant or too generous, would be to allow in this case £1,000, and for that amount judgment will be given, with costs.

Mr. Justice Jones concurred.

Mr. Justice Maasdorp concurred, and, in the course of a brief judgment, said that the services of the tug had been rendered under circumstances of extreme danger and with great skill, and as the remuneration should be on a generous scale, £1,000 was not too much. One of the men employed on the tug was asked in the witness-box what his expectations of reward were, but his lordship thought that whatever were the expectations of those on the tug, it would not be difficult to

arrive at the conclusion that under the circumstances they ought to receive some very substantial acknowledgment for the services rendered by them for the plaintiffs in this case.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendant's Attorneys, Messrs. Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice, and the Hon. Mr.
Justice JONES.)]

MCKENZIE AND CO. V. JOHNSON. } 1901.
 } Sept. 4th.

Stevedore—Master of ship—Agreement with third persons.

Plaintiffs sued defendant in his capacity of Master of S.S. Volage for payment for services rendered and work done as stevedores in discharging cargo from the said ship at Cape Town.

Held: (1) *That the Master was acting within the scope of his authority in contracting with plaintiffs for the services aforesaid although the owners of the Volage had agents in Cape Town.*
(2) *That no contract entered into between plaintiffs and a third person, whereby plaintiffs may have bound themselves to discharge the said cargo could be set up as a defence to the contract sued upon; unless (possibly) defendant could show that such third person had already paid plaintiffs for the said work.*

The declaration was as follows:

1. The plaintiff is a landing, shipping, and delivery agent, carrying on business in Cape Town. The defendant is the master of the S.S. Volage, and as such, represents the owners of the said steamer.

2. On or about February 1, 1901, and at Cape Town, the parties entered into a contract whereby, in consideration of the pay-

ment of 1s. 6d. per ton, the plaintiff undertook to discharge the cargo in the hold of the said S.S. Volage, then lying in the Docks, Cape Town, that is to say, to remove the said cargo from the said hold to the ship's rail.

3. The plaintiff performed his part of the said contract, and so removed 3,257 tons, for which he was entitled to receive £244 5s. 6d., but he claims £244 4s.

4. All things have happened, all times have elapsed, and all conditions have been fulfilled to entitle the plaintiff to claim the said sum of £244 4s., but the defendant refused to pay the same or any part thereof, and on February 13, 1901, the said ship was, by order of this honourable Court, attached *ad fundandam jurisdictionem*, and was subsequently released from such arrest upon the sum of £350 being lodged to secure payment of the plaintiff's claim.

The plaintiff claims: (a) The sum of £244 4s., with interest *a tempore moræ*; (b) alternate relief; (c) costs of suit.

The defendant's plea was as follows:

1. The defendant admits that the plaintiff is a landing, shipping, and delivery agent, carrying on business in Cape Town, and says that the plaintiff is also a dock agent, authorised by the Harbour Board of Table Bay to carry on the business of the dock agent in all its branches in conformity with the regulations of the said Board and the custom of the port, and in the plaintiff's capacity as such dock agent, he undertook and carried out the discharge of the steamship Volage of her cargo of coal in February, 1901.

2. The said steamship Volage was chartered by charter party of date November 28, 1900, by the Director of Navy Contracts, for and on behalf of the Lords Commissioners of the Admiralty, and her cargo of coal was consigned to the Senior Naval Officer of this station, and the charterers specially undertook and agreed in terms of the said charter party that the cargo should be discharged at the average rate of not less than 150 tons per working day, the time to commence in accordance with the custom of the port, and demurrage to be paid at the rate of fourpence per ton per day beyond the time allowed for discharging, all of which the plaintiff was aware.

3. In accordance with a certain contract between the firm of William Anderson and Company and the representatives in this colony of the Lords Commissioners of the Admiralty, the said firm undertook and agreed for consideration thereby provided to receive or tranship coal from Government

colliers discharging in Table Bay or the Docks, and acting under the said contract; the said firm, as agents for the charterers and assignees, appointed the plaintiff, pursuant to an arrangement or agreement, the terms whereof are not known to the defendant, to discharge the cargo of coal from the said steamship Volage in the Docks.

4. In respect of all the work done and services rendered by the plaintiff in and about discharging the cargo of the said steamship Volage, the plaintiff acted as dock agent for and on behalf of the charterers and assignees, and not for and on behalf of the owners of the ship, and the firm of Carroll, Browne and Co., who were and are, as the plaintiff well knew at the time of discharging the said cargo, the agents of the ship in this port, and the only persons who could enter into such contract as is alleged in the declaration, so as to bind the owners of the ship, did not enter into any agreement with or give any instructions to the plaintiff to render such services or do such work on behalf of the owners of the ship.

5. The defendant specially denies that he entered into the contract alleged in paragraph 2 of the declaration, but he admits that the plaintiff claimed that the ship was liable to pay the cost of discharging the said cargo, and that he, the defendant, consented to pay whatever the ship might be legally responsible for; but he says specially that he neither did nor could, without reference to or consent of the aforesaid agents of the ship in this port, enter into any contract as alleged so as to bind the owners of the ship, and that he at no time promised to pay the sum of £244 4s. or any sum.

6. He admits that the plaintiff did discharge the cargo of coal, that he refused and refuses to pay the sum claimed or any part thereof, and that the ship was attached, and, upon security given, released, as alleged in paragraph 4 of the declaration, but he denies the other allegations in paragraphs 2, 3, and 4 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

In his replication, the plaintiff said that he was a dock agent authorised by the Harbour Board, and that by the Harbour Board regulations only one dock agent was permitted to land and receive cargo from one ship, such dock agent to be appointed by the agents for the consignees. He admitted that he landed and received the goods for the consignees, and said that for these services rendered he had been paid. It was no part of his duty as dock agent to bring the cargo

out of the hold to the ship's rail. This work was done under the agreement set out in the declaration. He denied paragraph 2 of the plea and said he was not aware of it. He denied that he knew Carroll, Browne and Co. were the agents of the ship, and said that instructions to do the work were given by defendant as master of the ship.

Sir H. Juta, K.C. (with him Mr. Upington), appeared for the plaintiff, and Mr. Searle, K.C. (with him Mr. Close), for the defendant.

Mr. Searle said that the defence was that McKenzie and Co. were appointed by the charterers, and that defendant never made the agreement with plaintiff covering discharge. The defendant's contention was that the contracts with the Admiralty were intended to cover, and did cover these charges.

Andrew Ritchie McKenzie, the plaintiff, said he carried on business as a stevedore, a dock agent, and a forwarding agent. As dock agent he worked under the regulations of the Harbour Board, by whom he was appointed, and according to the custom of the port. Witness's duties as dock agent began at the ship's rail, where he received the cargo. The ship had to deliver it there. Stevedoring consisted of breaking cargo, bringing it up, and putting it over the rail. Many ships, as, for instance, those of the Union-Castle Line, did their own stevedoring. If witness did stevedoring and acted as dock agent he made different charges. The former he charged to the ship, the latter to the consignees. In May, 1900, the Volage was here before. Witness then did the stevedoring, and was paid by the captain. There was no special agreement then.

Mr. Searle objected to evidence as to what occurred last year, on the ground that it was not evidence in this case to say what took place last year under a different contract.

Witness said the charter party was the same.

Mr. Searle said the captain was not there to state what took place in 1900.

The Acting Chief Justice said the Court thought that the evidence was admissible, as proof of the custom which defendant himself pleaded.

Continuing, witness said he had been connected with the Docks since 1876. He made an arrangement for dock agency and for working on board troopships with Anderson and Co. This arrangement was shown in the letters.

By Mr. Searle: Witness's bills were headed, "Landing, Shipping, and Delivery Agent." The Union-Castle Line em-

ployed people to do stevedoring at so much per ton. A special plant was required for stevedoring. Witness had a contract with Anderson and Co. for transshipping and discharging Admiralty colliers. In this case witness had charged defendant for discharging (counsel put in the account). By this he meant stevedoring. The lowest charge for taking coal from the ship's rail to town was 3s. 6d. His contract with Anderson and Co. was for 3s. 6d. On the 21st November witness undertook to transship from Government colliers to steamers in the Bay, including placing in bunkers and trimming, if necessary, for 4s. 6d. Transshipping was more expensive than taking from the ship's side to convey to a store. There was considerable trouble to put it into the bunkers and to trim. Mr. Dent was witness's representative at the Volage in this matter.

Re-examined: The usual charge for stevedoring was 1s. 6d.

Wm. Dent said he was in plaintiff's employ in February last. He boarded the Volage when she came in, and made an agreement to discharge the ship at 1s. 6d. per ton. Witness explained that this was for taking the cargo out of the hold. The captain agreed, saying that if it was 7s. 6d. he would have to pay it.

By Mr. Searle: Before the ship came in witness saw Mr. Carroll, and asked him if he had seen the captain. The ship was then in the Bay, coming in. Witness did not know that Mr. Carroll was agent for the ship. Mr. Carroll may have told witness that he was agent. Witness may have said that there was going to be trouble about the discharging of the coal. Witness knew that there would be trouble about the discharge before he saw the captain. He knew that the ship took up the position that, by the charter, they were free from charge for the discharge of the ship. Witness was not told by Mr. Carroll that the captain of the vessel could not enter into an agreement, as they were the agents. This witness was certain of. Witness told the captain that, unless the captain agreed to pay the 1s. 6d., they would not put a shovel in the cargo. The captain agreed to pay. The captain did not say he would pay all he was legally responsible for. He said it would be as well to see Carroll, Browne and Co.

Re-examined: Witness went on board in order to make the captain understand that they would not put a shovel in the coal unless he gave them their rate for discharging the cargo.

By the Court: Witness was now with the Union-Castle Co. Witness had had experience at Home. The custom was that the ship put the cargo over the side.

The evidence of Alfred John Williams, taken on commission, was read, as follows:

I am manager for the firm of William Anderson and Co., shipping agents, of Cape Town. I have had thirty-five years' experience of the shipping business in Cape Town, and am intimately acquainted with the custom of the port. When a ship arrives in port the first thing to be done is to discharge it, invariably by stevedore. With regard to colliers, the work of the stevedore is to fill coal into bags out of the ship's hold. They fill the bags in the hold with shovels, hoist it up, and convey it to the ship's side, where the ship's responsibility ceases. I am not sure whether the Currie Company does its own stevedoring, but with that exception every other shipowner employs stevedores. (Mr. Searle objected to this evidence on the ground that it is evidence of custom, and that there is no custom alleged in the declaration, the action being merely founded on a contract.) The work of the stevedore ends when he has put the coal over the ship's side. That constitutes the discharging of the coal. The next person who takes up the cargo is called a landing agent. Landing agents are the same as dock agents. It is not part of the dock agents' business to do the work of stevedores, but they do undertake it at special charges. The duties of dock agents as dock agents are to receive from ship's slings and convey to store and deliver the same. Sometimes the same person will act as stevedore and dock agent, but he makes a separate charge—one is paid by the ship and the other is paid by the merchant. (Mr. Searle's former objection applies to the last two answers.) The ordinary charge of stevedores was 1s. 6d. a ton of 2,240 lb. up to May 1; since then 1s. 6d. per 2,000 tons. (Mr. Searle objects.) In the case of the Volage, we were not the consignees. We were instructed by the Admiralty to receive and deliver her cargo. We entered into an arrangement with McKenzie. It was like a standing order; there was no written agreement. Our arrangements with regard to the Volage were as per letter produced. McKenzie acted under that letter. By our arrangement with McKenzie he has not to do the stevedoring work. (Mr. Searle objects as the contract must speak for itself.) He has never done stevedoring work on our account under that contract. Under this contract he receives from the ship's

slings and conveys to any place he is told. For this work we pay him, but not for the stevedoring. I may say that for thirty-five years we have never paid for stevedoring work. It is either done by the ship's crew or the captain pays the stevedores for doing it (Mr. Searle objects to this evidence, as being evidence of custom.)

Cross-examined by Mr. Searle: William Anderson and Co. and the Admiralty have a contract relating to vessels arriving in port contained in the three letters produced. It was subsequently extended by a later letter of the 14th June, 1900. The contract with Mr. McKenzie has reference to the Admiralty contracts. The letter of November 2 also relates to the same matter. When the arrangement with the Admiralty was entered into a form of charter party for colliers was submitted to me, and I went through it carefully. But I have not seen the form charter party in the case of the Volage. I think the charter party is in the form submitted to me. There are dock agents who both discharge and receive from the ship's slings, but they are paid separately for it. McKenzie is both a dock agent and a stevedore. McKenzie and Mellish are the only two who do all the discharging work. When they do stevedoring work they are paid separately. By "all the discharging work" I mean the stevedoring work, for which the ship pays, and the receiving from the ship's slings, which the merchant pays. When the Volage arrived I had nothing to do with discharging the cargo—only to receive it. I did not instruct McKenzie to discharge the cargo, but to receive it. I gave special instructions in this case to McKenzie. They were verbal. I gave special instructions in this case because of information received from Messrs. Carroll and Browne. Before the ship arrived I saw one or other of the partners in Carroll and Browne. I did not see Johnston at all.

Re-examined by Sir Henry Juta: To the best of my knowledge, only Mellish and McKenzie do stevedoring work, and none of the other dock agents, as far as I know. The special instructions I gave McKenzie were to receive the cargo of the Volage from the ship's slings. I did not know the firm of Carroll and Browne personally before this. They have not, to my knowledge, ever been down to my office with reference to coaling, but they have with reference to accounts. I am positive that some one representing the firm of Carroll and Browne saw me about the coaling of the Volage.

This concluded the evidence for plaintiff.

Correspondence having been put in, Mr. Searle called,

Ambrose Michael Carroll, partner in the firm of Carroll and Browne, ship brokers, landing and forwarding agents, and dock agents, Cape Town, said that in December, 1900, the firm was appointed to act as agents for the Volage. The ship lay in the Bay for some time after its arrival, as there was no berth for it. Witness had a letter from England, and afterwards saw Williams about the question that was raised. Witness subsequently saw Mr. Dent, who said that he had heard there was going to be a fuss about the Volage discharge. Witness had previously told Dent that he was agent for Messrs. Christie and Co., the owners of the Volage. He told Dent that the owners had given instructions not to pay for discharge, as it was included in the freight, and other Admiralty vessels had not paid. Dent asked that the captain should be sent to him, and witness said the captain could make no contract, and that witness's firm was the agent, and had been instructed not to pay. Witness had before this seen copies of letters between McKenzie and Anderson, and Anderson and the Admiralty. He relied upon the two letters of the 3rd and 22nd November, as relieving the ship from responsibility for payment for discharge. Dent did not afterwards communicate with witness.

Cross-examined by Sir Henry Juta: Some weeks afterwards another Admiralty ship came in, which was also under the terms of the two letters alluded to. McKenzie said he would not put a pick in the cargo unless they paid, and a special agreement was made.

Re-examined: Mr. Browne settled that claim.

[By Mr. Justice Jones: Witness thought that in this case the Admiralty was paying for the stevedoring; that it was included in the 4s. 9d.]

Mr. Searle said that was all the evidence he was prepared at present to call. He had intended to have the evidence of the captain of the vessel, but unfortunately the captain was not here, and on a previous occasion an application for a postponement, to enable them to get that evidence, was refused.

[The Acting Chief Justice: I see the case was set down for June 24.]

Sir Henry Juta: Oh, yes, my lord; there has been postponements time after time, the captain being like the "Flying Dutchman."

Mr. Searle said that when the dispute arose on February 15 a letter was written

by Messrs. Van Zyl and Buismine to the plaintiff's attorneys, saying they would like to have the declaration before the captain left Table Bay. That was with a view to getting the evidence of the captain. Again, with the same object, on February 20 a letter was written asking for the declaration as soon as possible; but still the declaration was not filed until March, and by that time the captain had left. If the declaration had been filed when the request was made, the captain's evidence could have been taken on commission, which they could not do on a summons. If their lordships thought that the evidence that the captain said he would pay, required rebutting, he would ask for a postponement.

[The Acting Chief Justice: What do you now apply for?]

Mr. Searle said he would formally apply for a postponement, so that the captain's evidence might be taken, on the ground that the captain was unable at present to be here, and that his evidence was material.

[The Acting Chief Justice: And you cannot say where he is, or what steps have been taken to find him?]

Mr. Searle said their latest information was to the effect that he was expected back in England shortly.

The Acting Chief Justice said this action was commenced by the arrest of the ship on February 13. Summons was issued, and then the declaration was filed on March 4, so that there was no unreasonable delay on the part of the plaintiff. Afterwards the case was set down for trial in the May term, but postponed, and the trial fixed for a day in June. It was again postponed, and set down for the present date. Now after the evidence had been heard, there was an application for a further postponement. There were not sufficient grounds for a further postponement, there being no allegation that an endeavour had been made to get the captain's evidence. An application for postponement having already been granted, the Court was not prepared to grant a further postponement.

Sir H. Juta, K.C. (for the plaintiffs): The two questions in this case are: (1) Whether the master of the ship could contract on behalf of the ship, seeing that the owners had agents in Cape Town; and (2) whether stevedoring is included in the contract of discharging a vessel. As to the first point, there is no doubt that, as an ordinary rule, the master of a ship is in the position of an

agent for the owners, and as such can contract on their behalf. It is true that defendant's owners had their agents in Cape Town, but that fact does not deprive the master of the ship of his common law rights to enter into a contract on behalf of his vessel. He was bound to have the vessel discharged, and was surely entitled to enter into a contract for the purpose of having this work done.

Mr. Searle, K.C. (for defendants): The master could not enter into a contract for the purpose of having his vessel discharged, in face of the fact that the owners had their own specially-appointed agents in Cape Town; and then there is the further question as to whether stevedoring is included in a contract for discharging a vessel. I submit it is not.

The Acting Chief Justice, in giving judgment, said: The plaintiffs carry on business in Cape Town as stevedores, landing agents, and forwarding agents, and in their capacity as stevedores they allege that they made a contract with Captain Johnson, the master of the S.S. Volage, as representing the master and owners, to break bulk and deliver on the rail the cargo of that ship on her arrival in Cape Town in February last, and that this work should be paid for at the rate of 1s. 6d. per ton. The account for the work done amounts to £244 4s. There is no dispute that the work was done, or as to the amount. The defence set up is: firstly, that the captain had no right to make this contract, and that he denies having made this contract; and, secondly, that McKenzie, the plaintiff, had entered into a contract with the Admiralty which bound him to do the work for the Admiralty and not for the ship. As to the contract being entered into, the plea says that the captain agreed to pay the plaintiff whatever the ship might be legally responsible for. It is true that it is pleaded that as the owners had agents in Cape Town, the master had no authority to enter into this contract, but I should certainly say that it was within the scope of the captain's authority to have his ship discharged. The other defence is that by a contract between W. Anderson and Company, as representing the Admiralty, and McKenzie, the latter undertook to discharge these ships at the expense of the Admiralty. Such an agreement between third parties, if it existed, could hardly be set up as a defence to the contract sued upon, unless, indeed, it might be considered that it would not be honest or fair for McKenzie to claim from

the defendant for the work done if it could be shown that he had already been paid by the Admiralty for that work. But the representative of Anderson and Co. denies that there ever was such an agreement or that there has been any agreement with plaintiffs for this work. Defendants' agent says the agreement appears on the letters which passed between plaintiffs and Anderson and Co. and the Admiralty. Now, looking at the correspondence, we find that in a letter of November 2, 1899, the plaintiffs entered into a contract to receive from colliers discharging in the Docks, and convey to the stack or store, at the rate of 3s. 6d. per ton. They also undertook to carry from the stores to the Admiralty vessels at 3s. 6d. a ton, and further, in addition to convey on board, place in bunkers, and trim, at 2s. 6d. per ton. By the letter of November 22, 1899, plaintiffs undertook to tranship coal from Government steamers to Admiralty steamers, and including placing in bunker and trimming, if necessary, at 4s. 6d. per ton. The agents for the ship, Messrs. Carroll, Browne and Co., say that by this contract McKenzie and Co. undertook also the work of stevedoring or discharging ships which brought coal. Looking at the evidence given, and at these letters, I am not inclined to think that McKenzie and Co. undertook by these letters to do such stevedoring work as was done for defendant. Besides, it seems rather ridiculous that McKenzie and Co. should enter into a contract to do such work, because many ships do their own stevedoring. It is pleaded that by the charter party this ship was entitled to have demurrage for delay in discharging, and it was alleged in the plea that by the charter party the Admiralty undertook to do the stevedoring for the ship, but there is no correspondence or evidence to support this contention. As far as the plaintiffs are concerned, I think the utmost they undertook to do was the transshipping, and not the stevedoring. Judgment must therefore be given for the plaintiffs as prayed, with costs.

Mr. Justice Jones concurred, and said that, looking at the terms of the contract which was entered into, there was absolutely no defence. One could not help knowing from all one had seen in connection with the delivery of cargo in this and other ports that stevedoring was quite a different thing to dock agency, yet here it seemed to be set up by the defence that the two were exactly the same work.

[Plaintiffs' Attorneys, Messrs. Silberbauer, Wahl and Fuller; Defendants' Attorneys, Messrs. Van Zyl and Buissinne.]

MURRAY V. COLONIAL GOVERNMENT. { 1901.
Sept. 5th.
„ 6th.

Negligence—Loss of child—Injury to property.

Plaintiff's child had been removed in a plague ambulance from his residence to the Cape Town Plague Camp by the sanitary authorities, on the ground that she was then suffering from bubonic plague. Shortly after her reception at the camp aforesaid the child died. Plaintiff's house was disinfected by order of the said authorities. For the space of 14 days, he was thereby deprived of the use thereof, and on resuming occupation he found some of his property damaged and other articles thereof missing. Plaintiff contended that the child had contracted bubonic plague during her removal to the said plague camp, and claimed damages (1) in £500 for the loss of his child; (2) for £350 for loss of beneficial occupation of his house for 14 days, for damage done to certain of the articles therein and for loss of others. A jury found for the defendant Government on the first claim, and for plaintiff on the second, for £150 damages. The Court granted plaintiff his costs.

This was an action for £850 damages, instituted by George Murray against the Colonial Secretary, as representing the Government. The declaration alleged (1) that the plaintiff resides at No. 2, Sligo-terrace, Prestwich-street, Cape Town. The defendant is the Colonial Secretary, and as such represents the Colonial Government, and is sued in his capacity as Colonial Secretary.

2. On or about the 20th February, 1901, the plaintiff's child, aged two years, became ill. On the following day Dr. Gregory and others, acting as the agents and servants

of the defendant in that behalf, and by his orders, did, against the will of the plaintiff and his wife, negligently, wrongfully, and unlawfully put the plaintiff's said wife and child into the plague van, together with plague-stricken patients therein, and therein did unlawfully move the plaintiff's said wife and child to the Uitvlugt Plague Hospital, although they were not suffering at the time from plague.

3. Before so placing the child in the said van, Dr. Gregory, on behalf of defendant, promised the plaintiff that the child should not come in contact with anyone, either infected or suspected of being infected with the plague. Nevertheless, the child was put in a plague van, together with patients suffering from plague.

4. In consequence of the said wrongful acts of the defendant and his agents and servants, the said child caught the plague and died thereof.

5. On or about the 22nd day of February last the plaintiff and three of his boarders, his servant, and his two other children, were wrongfully and unlawfully and against their will removed to the Contact Camp by the defendant's agents and servants, who were employed by the defendant for that purpose.

6. Immediately before the wrongful acts stated in paragraph 5 hereof the said last-named agents and servants of the defendant, or some of them, promised the plaintiff and undertook, on behalf of the defendant, being authorised thereto by him, that the defendant would take charge of the plaintiff's house and all the effects therein contained during the plaintiff's absence, and that the defendant would compensate him for any loss or injury thereto.

7. The defendant, by his agents and servants, wrongfully took and kept possession of the plaintiff's house and effects therein during fourteen days, and wrongfully deprived the plaintiff of the occupation and use thereof. Upon so doing it became the duty of the defendant carefully and safely to keep the same whilst he retained possession. Nevertheless, the defendant neglected his said duty, and negligently damaged and caused and permitted to be damaged and lost much of the plaintiff's said property and effects, contrary to his said duty in that behalf.

8. By the wrongful acts hereinbefore expressed the defendant has unlawfully put the plaintiff to much suffering, expense, and loss, viz., £850, which the plaintiff has demanded, but which the defendant has wrongfully and unlawfully refused and still refuses to pay. The plaintiff claimed £850 and costs.

The defendant filed the following plea:

1. He admits paragraph 1 of the declaration.

2. On or about the 20th February, 1901, the medical adviser of the plaintiff, Dr. Horsfall, reported to Dr. Gregory, then acting as Medical Officer of the Colony, duly appointed in that behalf as an officer in the ministerial division of the defendant, that the plaintiff's child was ill with symptoms of bubonic plague, and thereupon the said Dr. Gregory, with the said Dr. Horsfall, examined the said child, and came correctly to the conclusion that the child was suffering from bubonic plague.

3. Thereupon, on the same day, upon information given by the said Dr. Gregory to the officials of the Town Council of Cape Town, steps were taken by the latter to remove the said child, together with its mother, who was not ill, but was in charge of her child at her own request, to the Plague Hospital at Uitvlugt, but, in fact, the said officials did not carry out the request of the said Dr. Gregory duly given in accordance with his promise made to the plaintiff's wife, that she should be sent with the child in a separate ambulance to the said hospital, but sent her with the child in an ambulance in which another patient suffering from bubonic plague was at the time conveyed.

4. Forthwith, after arrival at the said hospital, the child was examined, and the disease was at once diagnosed, and proved to be bubonic plague, from which it was suffering when removed as aforesaid, and of which it subsequently unfortunately died though tended and treated at the said hospital.

5. The defendant specially says that there was no wrongful or negligent conduct on his part or on the part of any of his servants or agents as alleged in paragraphs two and four of the declaration; he specially denies that the said child died in consequence of any act on his part or of his servants or agents, and save as in paragraphs two, three, and four of this plea set forth, he denies all the allegations in paragraphs two, three, and four of the said declaration.

6. As to paragraph five of the declaration, the defendant denies that the removal of the persons therein mentioned to the contact camp was wrongful and unlawful, as therein alleged, and says that such removal was lawful and necessary in order to prevent the spread of the bubonic plague, and was lawfully carried out by the servants and agents of the Town Council, acting upon lawful information and directions by the aforesaid Medical Officer of Health.

7. He denies all the allegations of fact and conclusions of law contained in paragraphs six and seven of the declaration, save that he admits that the plaintiff was by reason of his lawful removal to the contact camp, unavoidably deprived for the time mentioned of the use and occupation of his house and effects, which were taken possession of for purposes of disinfecting and cleansing.

8. The necessary disinfection and cleansing of the plaintiff's house and effects was carried out in part by the officials of the Town Council, and in part by persons employed by the defendant, and the defendant is willing to accept responsibility to make payment for such loss or damage as was in fact sustained by the plaintiff to his house and effects, either in consequence of his removal and absence from his house, or in consequence of such disinfection and cleansing.

9. The plaintiff has claimed £500 from the defendant in respect of the death of his child, and the defendant makes no tender of any sum in that respect, but in respect of the further sum of £350, which the plaintiff has claimed by way of damages to his house and effects, the defendant tenders £100, together with taxed costs.

10. Save as above he denies the allegations in paragraph eight of the declaration.

Wherefore, subject to his tender, he prays that the plaintiff's claim may be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Searle, K.C., and Mr. Wilkinson, appeared for the plaintiff; Sir Henry Juta, K.C., and Mr. Sheil, K.C., for the Colonial Government.

Mr. Searle, in his opening statement, detailed the circumstances under which the damages were claimed. Mr. Murray was living in Cape Town in a house in Prestwich-street last February. On the 20th February one of his children became ill. He sent for a doctor. A doctor came, whose name plaintiff understood to be James, but it afterwards appeared that his name was Horsfall. He was not plaintiff's usual doctor, who apparently was not to be found at the time. Dr. Horsfall saw the child, but did not seem to know exactly what the matter was. He appeared to think that it was enteric fever. Later on, the same day or the next day, the doctor again came, accompanied by Dr. Gregory. They examined the child, and told plaintiff that they did not know what was the matter with it, but Dr. Gregory said the child

would have to go to the Plague Hospital at Uitvlugt until they found out what was the matter with it. Mr. Murray objected very strongly to that. The jury would remember that this was early in the days when the plague started. There were no regulations then in force, but regulations were afterwards made. Mr. Murray objected to the child being taken away; but Dr. Gregory said he would promise him that the child should not come into contact with anyone suffering with plague until they found out what was the matter with it. Plaintiff, however, still objected; but Dr. Gregory said that it was the law, and plaintiff yielded. After midday on Thursday, the 21st February, an ambulance drove to Mr. Murray's residence. Plaintiff noticed that there were people in the wagon, but did not pay much attention to that fact. The wagon drove off, and Mrs. Murray and the little child, who was two years of age, were taken away. Mr. Murray noticed in the paper next day that a man suffering from plague had been taken away from Cape Town to the Plague Hospital on the previous day, and he then discovered to his horror that his wife and child had been put into the wagon with this man, who afterwards died, together with two other persons. The next day the officials of the Town-house or the Government—it did not affect this case which—came up to the house of the plaintiff, and said that all the people from the house must be removed. The people in the house at the time were Mr. Murray, his servant, two other children, and three boarders. There were six boarders living in the house, but some of them happened to be out at the time. This second wagon came on the Friday to take away the persons in the house. Mr. Murray protested very strongly against being taken away. He had no time given him, and had to go very hurriedly, after locking up the place. He pointed out to the man in charge, a person named Smidt, the difficulty of leaving the premises like that at such very short notice. Smidt said: "Never mind; we will be responsible for everything. You will find everything all right when you come back." When Mr. Murray reached the camp he saw Dr. Mitchell. The child died on the Saturday morning at the Plague Hospital. Portion of the damages claimed in this case was for the death of the child, which plaintiff alleged was occasioned by the child being taken in this way, and actually put, contrary to the promise made, in the van with a person suffering

sold some of them for a mere song. He did not know of his wife selling any. He worked in Amsterdam-street, storing timber. That was next to Messrs. Purcell, Yallop and Everett's place. He took on storing jobs. That was his occupation. He was paid by the load. He had had his present contract with Purcell, Yallop and Everett since September. He had worked for W. and G. Scott before September. He could not say what was his balance when he finished with Scott. All his papers had been burnt. When Dr. Gregory came and saw his child, witness asked him if the child had plague. Dr. Gregory said he could not say what was the matter with the child, but she would have to be removed to Uitvlugt temporarily. It was not correct to say that Dr. Gregory told witness in the passage, after seeing the child, that there could be no doubt she was suffering from plague. Witness did not know that twenty minutes after the child arrived at the hospital the bubo was pierced and a bacteriological examination made, which proved it to be a case of plague. On going back to the house, he was not admitted. He did not know that that was because the disinfection had not been completed. He found half a dozen men lounging about and smoking. They had nothing to do. They did not seem like disinfecting the place. He locked his boxes before leaving for Uitvlugt, and took the keys with him, because he did not trust the people who had taken charge of the house. But the proper authorities could always at any time have had the keys for the asking. There was no necessity to force the cases open.

Re-examined by Mr. Searle: He was always in constant employment. He often had more work than he could do. The prices in the account were, in his opinion, fair and reasonable. A lot of the clothing was home-made, knitted, and woollen work, on which he had put a fair value.

Mary Murray, wife of the plaintiff, deposed that she had gone through the schedule of goods with her husband, the schedule detailing the claim. All her clothing was destroyed when she returned to the house after the disinfection. She had been unable to wear any of the clothes since. She had had to buy everything new. She had to send someone down town for a dress, because there was nothing in the house. Her clothes were shrunk and burnt. She tried some on, but they would not meet on her. When she came out from Scotland she brought twenty pairs of socks for her

husband. All the underclothing and the household effects detailed in the list were correctly stated. The beds and the furniture were ruined. When she returned to the house everything was filthy. It looked dirty enough to give one plague. The child got ill on the Wednesday morning at eight o'clock. Dr. Horsfall called during the day. He prescribed for the child. The next day Dr. Gregory and Dr. Holsfall called together. They were not sure it was plague. Dr. Gregory said when they were being taken to the camp that they might be back that night. She took a change of clothes with her. The child died on the Saturday.

Cross-examined by Sir Henry Juta: She had about four good dresses and six old ones when she left for Uitvlugt. When she came back two were missing. The clothes were shrunk and discoloured, owing to the disinfecting treatment.

Re-examined by Mr. Searle: She was always receiving clothing and house linen from Scotland.

[By the Foreman of the Jury: She took neither her rings nor her watches to the camp. She only took the two rings she was wearing at the time, but not the keeper mentioned in the schedule.]

Fred. Dallas, called, deposed that he was a joiner. He lodged with the plaintiff last February. He went there in last August or September. The house was well found, and thoroughly clean from top to bottom. In February, when the ambulance van arrived, he went to a house two doors away. He did not go to the camp with the others. The next day they came to the place where he worked to take him away, but he refused to go. He stayed in town, and went to lodge at another place. When the disinfectors had finished with the house, the place was in a filthy condition. The floors and ceilings and walls were all stained with some fluid. The place was turned upside down. Everything was in confusion. A chest of drawers and boxes had been forced open and broken. In the kitchen everything was in a filthy state, all the crockery and utensils being very dirty. The panel of the walnut sideboard in the dining-room had been scorched out. Upstairs a trunk had been forced by cutting out the lock; in fact, everything in the house had been forced. There were a lot of hats crushed into a box, and simply and absolutely spoilt. The whole of his personal property in the house was either destroyed or missing.

Everything in the house had been treated in the same way. All the leather goods seemed to have been subjected to very fierce heat. If allowed to drop on the ground, they broke. Many things were missing. He had himself seen one of the men put his foot on a silk hat to force it into a basket.

Cross-examined by Mr. Sheil: In February there were six boarders at the house, including himself. There were three engine-drivers, two clerks, and himself, a joiner. When he came back to the house there was a strong putrid smell in the house. It was caused by damp clothes being heaped together, and by dirty water. He found no liquid disinfectant in the house, only some formaline tabloids.

[By the Foreman of the Jury: There must have been damage done in the house to the extent of £300. The damage to Mr. Murray's effects separately would be about £250.

Arthur Thomas Noaks, tally clerk in the Union-Castle Company's service at the Docks, said he had lodged with plaintiff. He was taken along with the others to Uitvlugt. He came out of the camp on the 5th of March and went to the house on the 7th. He must emphatically endorse what had been said by the previous witnesses as regards the condition of the house on their return. Everything in the house had been destroyed, either by some fluid or by some process of disinfection. Smidt, the official in charge of the house, gave an undertaking to Mr. Murray in witness's presence that he would be responsible for everything in the house.

Cross-examined by Sir Henry Juta: His trunk was absolutely empty when he came back. He found one or two articles in different rooms. It was practically nothing.

John Pitkeathly, ironmonger, Cape Town, said that on the same day that plaintiff returned from the camp he fetched witness. Witness went through most of the rooms. He said that boxes were broken open and the leather bags cut so as to get at the lock. The lamp in the hall was smashed, the wardrobe door was broken open, and some of the beds were up and some down on the floor. The kitchen walls had been coloured. The whole place was in great confusion. Witness did not wait for things to be opened and examined. The clothes, etc., were lying in heaps on the floor.

Joseph Violet, printer, 3, Sligo-terrace, deposed that while Mr. Murray was away at the camp he noticed a man and woman in plaintiff's yard early one morning. He

shouted to them, and they went away. At about four the same morning witness heard a smash of glass. He afterwards found that Murray's window had been smashed. Someone had got into the house. Witness informed the police, and after that the place was watched. Before that witness had seen no one watching the place.

Cross-examined: The goods taken away, if the statement of losses were true, would have filled a cart. Between the breaking of the window and the examination of the house two hours elapsed.

Mr. Searle closed his case.

Sir Henry Juta called

Dr. James Alexander Ferriss Bell, who said he was engaged in supervising the disinfection of houses during the plague. The first time witness saw plaintiff's house was on the 14th March, when he took charge of the disinfection. He divided the goods into three classes. The soft goods were taken to the New Somerset Hospital for disinfection. The crockery, etc., was disinfected on the premises. Some goods were destroyed. This included some old matting and clothes, the latter of which were filthy and greasy (engineer's clothes, apparently), and past cleaning. Clothes like these harboured infection more than anything else. Some old straw hats, not worth sending to the disinfectors, were also destroyed. The lot was not worth more than 3s. or 4s. Some window-hangings were destroyed. These were not worth more than the hats, and were not worth washing or disinfection. Nothing was destroyed worth washing. The linoleum was taken up for the purpose of washing and disinfecting. A solution of Jeyes's fluid was used for the oilcloth and metal goods. This did no harm whatever to the goods on which it was used. The crockery was washed with corrosive sublimate. Apart from opening things which were locked no damage was done during disinfection. The walls were washed with corrosive sublimate, and it was impossible to avoid injuring the paper. Curtains had to be removed from their hangings. As much as possible, witness avoided damage. Nothing was wilfully broken.

Cross-examined by Mr. Searle: Before the 4th March the house had been disinfected with formaline. This was the most powerful disinfectant known. The walls had also been sprayed before witness took charge. Witness was not at the house all the time the disinfecting was being carried out. He made visits. Inspector Smidt and four men carried out the

work. The curtains destroyed were print hangings. Witness had no knowledge of a panel of the sideboard being burned out. This must have been done before the 4th March, as witness only used one formaline lamp, and this was not used near the sideboard. Witness was only engaged in plague work for 2½ days. He only did this and two other houses. There were some rough men engaged in disinfecting, but they were instructed to use every care, and as far as witness knew they did. The hats found in the basket were those which had been preserved and disinfected. The clothes ordered to be destroyed were taken to the quarry and burned. Witness could not say whether an inventory was taken of the goods destroyed. Clothes were disinfected as a rule by a process of steaming. This was more effective than formaline for the purpose. The letter written by plaintiff was probably referred to witness a couple of weeks after its having been written. The men were commencing to take down the bedsteads when witness went away. Witness had disinfected in cases of scarlet fever at Home.

Re-examined: Witness, when he went to the place, gave instructions to the men, and afterwards visited the house and saw whether the instructions were carried out. No goods were destroyed that were good for anything.

Dr. Alfred John Gregory, Principal Officer of Health for the Colony, said that in February he was Acting Principal Officer. Dr. Horsfall made a report to witness, and witness accompanied him to Murray's house, at about 12.30 on the 21st February. They both examined the child. It had all the clinical symptoms of plague. Witness diagnosed the case as plague, and he had no reasonable doubt in his own mind that it was plague. The other doctor agreed. The mother was upset, and asked if she could not go with the child. Witness consented.

I did not tell Murray that I did not know what was the matter, and that, until you found out, the child must be removed to the hospital? I said that there was very little doubt that it was plague, and that they would do everything to make his wife as comfortable as possible. I afterwards went to the Sanitary Department of the Town-house, and gave definite instructions to remove the child and its mother in a special ambulance. I said nothing about having the law at my back. I have had a good deal of experience of plague in Cape Town.

Judging from my experience it was possible for the child to have caught the plague while in the van, but utterly impossible to have developed plague while there.

The child was taken on the Thursday, and died on Saturday morning. If a patient free from plague caught it on Thursday, is it possible for death to take place on Saturday morning?—Not to my knowledge or experience.

Supposing that on the Thursday afternoon, within half an hour of the patient being taken from the van, the bubo was pierced and found to have all the bacilli, could it possibly have contracted the plague and developed these symptoms in two hours?—Not to my view, and not according to the best authorities. The shortest period of incubation is two days. It generally takes from three to five days. There is one doubtful authority, who says thirty-six hours, but that is the lowest.

But it is absolutely impossible to develop in two hours?—Yes.

Witness said the child was buried at the Government's expense.

Cross-examined by Mr. Searle: You went on Thursday?—Yes.

What did you consider the child was suffering from?—I made up my mind that the child was suffering from plague.

If so, why did you promise Mr. Murray that his child should not come in contact with anyone who had plague?—I said they should go out in a separate van.

Why did you promise to keep them from anyone with a suspicion of plague?—I promised that they should go in a separate van in order that it should allay their own objections.

Did you tell Mr. Murray that until the child got to Uitvlugt and you found out what was the matter, she should not be brought into contact with plague patients or suspects?—I never said anything of the sort. I said that they should go out in a separate ambulance, and that they should go into a separate tent.

Surely that was done with the intention of ascertain whether it was plague? Was there any intention to ascertain?—I went immediately to the telephone, and issued instructions to Dr. Mitchell to make a bacteriological examination. This was done in all cases.

Witness said that Mr. Murray made general objections to the removal of the child. He did not say that the child should not go out until it was ascertained that it was plague.

Witness gave instructions to have a separate ambulance.

Mr. Searle: It would be a most improper thing to send a person suspected of plague in the same van as a patient?—Yes, most decidedly.

And a very risky thing?—It would not be very risky, but there would be a certain amount of risk, and it would therefore be improper.

And it would be very risky?—It all depends on the case. If it were a pneumonic case it would be very dangerous; if bubonic, it would not be very dangerous.

There have been cases during the later part of the epidemic where people have died with plague in a short time after showing symptoms?—Oh, yes. People died in a few hours after manifesting symptoms, but that is not a few hours after getting the disease. There must be a certain period of incubation.

Supposing a very young child developed plague, it might die in a very short time?—It depends upon the form of plague. It would not die quickly of plague in the bubonic form, but it would in the septicæmic and pneumonic forms.

There is no definite certainty how long it is in the system before manifesting itself?—It is fairly certain what is the minimum time, which is two days.

Mr. Searle pointed out that Professor Simpson had referred to one case of incubation within thirty-six hours.

Dr. Gregory said that this was a septicæmic case. In this form of plague, the germ circulated in the blood, and the whole of the body was affected. Patients with the pneumonic form also died rapidly, but in bubonic there was, in the first place, only a local centre of infection in the glands, and this child died from bubonic. This he saw from his own observations.

Mr. Searle: That is in Cape Town?

Witness: Yes. Witness said no one could be absolutely certain from the clinical symptoms, but one could be morally certain. Witness did not see the child again after it was removed to Uitvlugt.

Mr. Searle: Wasn't it a curious thing to allow the mother to stay with the child, when it was known that the child had plague?

Witness replied that the mother asked to be with the child. There were a considerable number of cases in which mothers went out with their children. This child was two years old.

Mr. Searle: There is a good deal to learn about plague, doctor?—Not more than

some other diseases. We know less about leprosy, for instance.

But there is a great deal to learn. In the winter, when the wind dropped, didn't you expect to have an increase in the plague?—I am not prepared to say. I don't think I ever offered an opinion.

Mr. Searle: Why did you not take the contacts away before?

Dr. Gregory said that this was rather an administrative question. This was the first European case, with the exception of the man at the Docks who first caught the disease. There was provision for contacts, but this was not a case they could rush.

By the Court: Witness did not carry out a bacteriological examination at the premises. The bubo was painful, and he wished the child removed, so that the examination could be made more easily than in the room from where the child was taken. Had he (Dr. Gregory) had any doubt as to its not being plague, he would have satisfied it by making the bacteriological examination then.

Dr. James Alexander Mitchell said he had been in charge of the Plague Camp since the 19th February. He was at the camp when plaintiff's child arrived. Witness made a bacteriological examination. He first made a clinical examination, and found all the clinical symptoms. The result of the bacteriological examination showed plague bacilli to be present in very large numbers. It was absolutely impossible for the child to have become in this condition since it left the house. Witness's experience was that the period of incubation was from three to five days. During the early days of the outbreak, they could not get nurses. At the time the child was brought in, there were only two nurses, and in some cases mothers were allowed to nurse their children. Witness thought it was a case of carelessness to send Mrs. Murray and the child out in a van with a coloured man, and he said something to that effect to Murray. When Murray came out witness told him the child had plague.

Cross-examined by Mr. Searle: There was no real absolute certainty about the period of incubation. Experiments had been tried on a guinea pig, and the period was shown thereby to be between three and five days. The bacilli had also been tried on gelatine, and there had been no appreciable sign of growth for forty-eight hours. Witness objected to a European child with plague being sent even with its mother. The coloured man taken in the van

with the child was suffering from bubonic plague. He recovered. Witness did not think that there were five people in the van. He was not, however, prepared to say there were not.

Re-examined: There was no danger caused to the child by putting it with a plague patient. Witness thought it should not be put with a coloured man.

His Lordship: Can there be any possibility at all of the child catching plague in the van?

Witness: There can be no doubt upon it.

His Lordship: That is a positively settled point?

Witness: That is a settled point. For plague to develop to the degree which it reached in this child was perfectly impossible in two hours.

Geo. Frederick Smidt, sanitary inspector, was called. He said that the goods returned from Somerset Hospital agreed with the inventory of those sent there for disinfection. Witness noticed a dress suit was discoloured and creased. No wilful damage was done, and there was no negligence as far as witness knew. No complaints were made by witness's supervisors. A few things in the nature of crockery ware might have been accidentally broken. Murray made inquiries of witness as to his wife's watch. Witness told him where the jewellery had been put, and Murray went in. On his coming out witness asked him if it was all right, and plaintiff said: "Yes, as far as I am concerned." Large quantities of goods could not have been taken away without witness's knowledge. Witness saw that a window was broken, and a board put up. He thought it was an accident, and was not told, nor were there any indications that the house was broken into. Had large quantities of goods been taken, witness would have noticed it next morning. Witness had been sanitary inspector since the beginning of the year.

Cross-examined by Mr. Searle: Witness had not had experience as a sanitary inspector before the present year. Witness did other houses in the same way as he had done this one for about a month afterwards. Witness could not say what goods were taken to the quarry and destroyed. He made no inventory of these. Witness could not say how many articles there were in the jewellery box.

Re-examined by Sir Henry Juta: Witness placed no value on anything destroyed. Murray made no complaint as to jewellery being missing.

James Veitch, superintendent of the Somerset Hospital, said that a great quantity of clothing, etc., was disinfected at the hospital during the plague. The disinfecting was carried out under witness's personal supervision. The disinfecting process had no injurious effect on ordinary clothing, unless the clothing was dyed and the colours would run. It did injuriously affect leather and furs.

Cross-examined by Mr. Searle: When there were coloured dresses, they did not steam them, but sprayed them with corrosive sublimate. This was not injurious to clothing.

By the Court: Ten minutes, dry air was applied after the steam. The clothing could not be scorched by this. The bundles were not examined before being put into the chamber. They were brought by the men and put in. The men had strict instructions not to put any leather, furs, or ladies' dresses in the bundles. There might have been some of these in the bundles. If there were ladies' coloured dresses put in, the goods near which they were placed would be discoloured.

Herbert Thomas Kirkman, Government Valuator, said he went to plaintiff's place in July, and examined the furniture. Witness described the damage then visible to the furniture, and gave an estimate (put in) of this damage. In estimating the damage, he had, if anything, erred on the side of liberality, as he felt sorry for the man. Witness estimated the damage at £7, which Murray had placed at £25.

Witness was cross-examined at length as to the various items on the statement put in.

James Valentine Booth Colley, plumber and sanitary engineer, said that on the 5th March he took over charge of the disinfecting operations in plaintiff's house from Dr. Bell. He saw the clothing after it was returned from the hospital. The dress skirt was lined with leather, and this had been scorched. It was practically ruined. The other clothing was all right, and only required ironing, and washing. While witness was there the men used every care in disinfecting the furniture. Witness went through the house after the disinfection. The bedsteads were all right, with the exception that one leg was broken, and a few castors and knobs missing.

Cross-examined by Mr. Searle: Witness saw a good many things after they were returned from the plague hospital. He did not examine everything. Witness never went to the house to

see what damage was done. He went to see how the men were working. He was at the house on the 5th, 6th, and 7th March.

Mr. Sheil, K.C., read the evidence of Wm. John Ritchie Simpson, taken on commission, which was as follows:

I am a doctor of medicine, and a Fellow of the Royal College of Physicians. I have had considerable experience of bubonic plague in Bombay, Calcutta, and Poonah, and also in Cape Town. The outbreak in Poonah was a very serious outbreak. I came to the Colony at the request of the Imperial Government on a commission to inquire into the cause of enteric fever. In February, 1901, my services were retained as adviser to the Colonial Government in connection with the outbreak of bubonic plague, which position I shall hold till the 31st of this month. It would be impossible for a child which was placed in a conveyance in which there was a plague patient to contract bubonic plague within two or three hours afterwards. I mean that symptoms could not develop within that period. In my experience two days has been the shortest period of incubation, but there is a case recorded of incubation within 36 hours. The system now adopted for dealing with bubonic plague is for the sick person to be removed to the hospital, the other inmates of the house being removed to some isolated place for segregation. The latter persons are generally styled "contacts." The house is then disinfected and thoroughly cleansed, with everything in it, and after the contacts have been kept for a period of not less than twelve days, they are permitted to return to the house if it has been completely cleansed, unless in the interval a case has occurred among the contacts. This system was adopted in Cape Town, and it proved successful. There have been three cases in the last three weeks. The plague is practically stamped out.

Cross-examined by Mr. Wilkinson: I attribute the stamping out of plague to the system adopted. In India I was Health Officer for Calcutta. I practised as a specialist in sanitary work. This embraces all epidemic diseases. I was over a year in India during the prevalence of plague. If a person were placed in a van with a plague patient, there would be no great risk. The risk would not be as great as in the case of a house, as plague is, to a large extent, a house infection. Both the house and the patient are infected, but the danger is greater from the house. There is practically no risk of infection from a patient, unless you are nursing him under very bad conditions.

The worst of bad conditions would be to nurse a patient who remained in a house where he had contracted the plague. Plague is contracted by the importation into the body of plague bacilli. These bacilli only leave the body when the patient is suffering from pneumonic plague, and spits up "sputum" containing them. They may also leave the body in the stools when a patient is suffering from septicæmic plague. I never examined the deceased child, Violet Murray. In the case of bubonic plague, when the buboes break externally, the plague bacilli are discharged in the "matter." It is not known how long the plague bacilli retain their germinating power after leaving the body. If a person is placed in an infected house, he may get plague within four to twelve days. The smaller an infected room the more liable an inmate would be to get plague. In the case of small-pox, in which the infection is diffusible in the air, the risk of infection from a van used for conveying patients would be enormous; but in the case of bubonic plague, the infection not being aerial, the risk would be small, but there would be a risk. In the case of a house there is house infection, proceeding from rats and vermin and personal infection; in the case of a van there is personal infection only. A person in a room may contract plague by touching infected articles, etc., or from the bite of vermin. A person cannot take plague by inhaling the breath of an infected patient, unless *sputum* was coughed out and infected the healthy person. The bacilli do not float about in air, nor can they pass out with breath. I have not proved this personally by experiment. If I had a patient who I was not certain was suffering from plague, I should not consider it proper to place him with a plague patient. I have never done so. The period of incubation averages as a rule from four to six days. A common symptom of all forms of plague is intense headache, fever, giddiness, staggering feet, swelling of the glands (which may be small or large), accompanied with pain of the glands. After death there is nothing perceptible to the eye to show that the patient had died of plague, unless the glands are very much swollen. By this I mean, without opening the body.

Re-examined by Mr. Sheil, K.C.: In the bubonic form, for bacteriological testing, small quantities of the contents of the glands are taken out and placed on the microscope, stained, coloured, and examined by the microscope. The bacilli are rendered

visible in this way, and are easily recognisable, and no other disease than plague shows them.

(Signed) W. J. SIMPSON.

Before me, (Signed) B. Upington, Commissioner.

In summing up, his lordship said that the plaintiff in this case made two claims in his declaration. One of these was in respect of damages suffered by him for the loss of his child, and the other was in respect of injury caused to and loss of his goods. For the death of his child he claimed £500; for the damage and loss of goods, £214—and both these losses were alleged by him to have been caused by the negligence of the defendants. Now it seemed to him that in this case there was no room for sentiment at all, apart from their feeling of sympathy for Mr. Murray for the loss of his child. But in spite of that, a good deal of sentiment had been introduced, and this the jury must disregard. The ground upon which the plaintiff made the first claim was that the death of the child was caused by defendants through their negligence. If the plaintiff had failed to prove this, then the case fell away upon that first ground. What the jury had to decide was this: Was the child suffering from plague before it left the house of its father? If it was, then the case of the plaintiff was absolutely at an end upon that point, because the plaintiff had alleged that it was because of the negligence of the Government that the child contracted the disease from which it died. If the child were already suffering from plague when it was taken from its father's house, then the negligence of the defendants could have nothing to do with the subsequent death, because they were not charged with having negligently treated a child suffering from plague. Dr. Gregory had told the jury that the child was most undoubtedly suffering from plague when removed. He had made a clinical examination, and he had absolutely no doubt in his mind. Now were the jury prepared to doubt his opinion? The child was taken to the camp, and within four or five hours it was otherwise examined and found to be undoubtedly suffering with plague. If it was so suffering, could the disease have been contracted on the journey from the father's house to the hospital? They had had three men of the greatest experience before them, who said this was utterly impossible. If that opinion had been doubted by plaintiff, what did the jury think he ought

to have done? Should not he have called other medical men, and through their evidence, have questioned the evidence of these doctors? Were the jury going to take it upon themselves to say that the opinion of the three best men in the country was wrong? If once they came to the conclusion that the child had plague before it left the house, then the question as to how it was taken to the camp fell away. He dare not anticipate that they would throw out that portion of the case, but if they had any ground upon which they might find that the child had contracted plague in the van, then, as a matter of law, defendants would be responsible for that, and if they caused the death of the child, the father could claim damages. As to the other part of the claim, he would leave it in the hands of the jury. It was not a question of whether there were damages. Defendants stated on their pleadings that they were prepared to pay for damage caused by the removal of Mr. Murray from the house, and by the disinfecting of the house. The only question was what was the damage caused by his removal and by the disinfection. Plaintiff put in his claim, and the Government put in certain reasons why that claim should not be allowed in its entirety. It was a matter of the amount of the damages, and the jury would consider whether the £100 tendered by the Government was sufficient for the loss under the circumstances, or whether Mr. Murray had made out a claim for more. Some of these articles had been in use for a time, and if the jury thought they were claimed upon the value of new articles, and that this should not be allowed, they could reduce the claim. They need not go through it and assess the value of each item, but they could reduce the whole claim by something if they thought it was too high. The question was whether they would allow £100, or something between that and £214.

A jurymen asked if the tender of £100 was made with costs.

His lordship said that it was. The question of costs, however, did not concern the jury.

The jury retired, and after a brief absence announced that they found for defendants on the first claim, and for plaintiff for £150 damages on the second.

Judgment was entered for plaintiff for £150 and costs.

[Plaintiff's Attorney, J. J. Michau; Defendants' Attorneys, Messrs. Reid and Nephew.]

SUPREME COURT

(FIRST DIVISION.)

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice JONES.]

Ex parte STRATFORD. { 1901.
Sept. 6th.

On the motion of Mr. Sheil, K.C., Mr. James Stratford was admitted as an advocate of the Supreme Court, and took the oath of allegiance.

Ex parte MARAIS. { 1901.
Sept. 6th.
„ 12th.

Habeas corpus—Military authorities.

Applicant had been arrested by the military, and lodged in the gaol at Beaufort West. The affidavit of the Officer Commanding the Cape Colony district did not state the cause of the arrest.

The Court granted an order calling upon the gaoler to return to the Court, on the 12th instant, the authority under which he detained the prisoner. On the return day the Court refused petitioner's application, as it appeared that the gaoler was acting under the orders of the military, and not in his civil capacity. The Court will neither interfere with, nor in any way recognise the action of the military authorities in martial law districts.

This was an application for an order calling upon the General Officer Commanding the Lines of Communication to show cause why the petitioner, a resident of Paarl, now confined in Beaufort West gaol, should not be released. The petition was as follows:

1. The petitioner is a notary public of this honourable Court, an enrolled agent of the Court of the Resident Magistrate for the Paarl, and a duly licensed auctioneer, and carries on business as such at the Paarl.

2. On Thursday, August 15 last, the petitioner was arrested in his office at the Paarl aforesaid by the Chief Constable of the Paarl, who stated that he was acting under instructions from the military authorities. The petitioner demanded to see the warrant for his arrest, but the Chief Constable stated that he had no warrant, and did not know the cause of the arrest.

3. The petitioner was thereupon lodged in the gaol at the Paarl, and detained there till Sunday, August 18 last.

4. At about ten o'clock in the evening of that day, one Lieutenant McCauseland came to the gaol and ordered the petitioner and certain four other Dutch inhabitants of the Paarl similarly confined there, to be ready within ten minutes to go with him.

5. The petitioner and his fellow-prisoners were thereupon removed from the said gaol under mounted military escort to Lady Grey 1 ridge Station, whence they were conveyed by rail to Beaufort West.

6. On arrival at Beaufort West they were lodged in the gaol, where they are still detained in custody.

7. On or about August 21 last, the petitioner and his fellow-prisoners addressed to the Commandant of the Beaufort West district the letter hereunto annexed, marked D. and in reply thereto received the note endorsed on the back thereof.

8. The petitioner and his fellow-prisoners have not, since their said arrest, been brought before any Magistrate or Judicial Tribunal to be charged with the commission of any crime or offence, nor are they detained in custody under the authority of any lawful warrant.

9. The petitioner submits that his arrest and imprisonment, which have been carried out by military violence, without any warrant, and without any cause assigned therefor, are in violation of the fundamental liberties of subjects of His Majesty the King, secured to them by numerous solemn engagements.

Wherefore the petitioner humbly prays that your lordships will be pleased to order his immediate liberation and discharge, or otherwise that your lordships will be pleased to make such other order in the premises as to your lordships shall deem meet.

The letter referred to in this affidavit was as follows:

Beaufort West Gaol,

21st August, 1901, 3 p.m.

His Honour the Commandant, Beaufort West.

Sir,—May we approach you, with the view of allowing Mr. D. F. Marais to have an

interview with you on our joint behalf. In asking this of you we cannot refrain from drawing attention to the fact that one of our number has now been in gaol for fully nine days, and the rest for seven days, yet hitherto no charge has been laid against any of us. Kindly favour us with a reply.—We have the honour to be, sir, your obedient servants.

(Signed) A. B. de Villiers, P. son., D. Thom, J. H. Myburgh C. G. Thom. D. F. Marais, military prisoner.

The Commandant's reply to the letter was: "I will receive no deputation."

Mr. Currey then read the following affidavit by Mr. Johannes Gerhardus van der Horst, of the firm of Van der Byl and Van der Horst, attorneys:

1. I am an attorney of this honourable Court, and a member of the firm of Van der Byl and Van der Horst, the attorneys for the above-named petitioner.

2. We have been instructed by the petitioner to apply for his liberation and discharge under the circumstances set forth in the foregoing petition.

3. All the allegations contained in the said petition are true and correct, to the best of my knowledge and belief.

4. On the 20th August last we sent, on behalf of the said petitioner and one of his fellow-prisoners, to the General Officer Commanding Lines of Communication at Cape Town, a letter, copy of which is hereunto annexed marked A, but we have received no reply thereto.

5. An application was made by Mr. A. R. Truter, an attorney of this honourable Court, practising at Beaufort West, and a Justice of the Peace for the district of Beaufort West, to the military authorities, for leave to visit the petitioner in gaol for the purpose of having the petition to this honourable Court signed, but such leave was refused, as appears from the letter annexed.

Mr. Benjamin read the following affidavit by General Wynne, Officer Commanding Lines of Communications, Cape Town: In the Supreme Court of the Colony of the Cape of Good Hope.

In the Matter of the Petition of David Francois Marais, of the Paarl.

I, Arthur Singleton Wynne, C.B., Major-General, Commanding the Cape Colony district, make oath and say:

1. I have perused copies of the petition and supporting papers presented to the Court, and the notice of motion signed by the attorneys for the petitioner.

2. I have caused inquiry to be made from the commandants and those in charge of the districts referred to in the petition, and have ascertained that there is a *prima facie* case made out against the petitioner Marais, and each of the other persons whose names are mentioned in the documents.

3. From the inquiries, it appears that there are military reasons why the petitioner and the others should be removed and kept in custody.

4. The petitioner and those with him will be formally charged as soon as possible, and either acquitted or detained in custody, in accordance with the verdict arrived at upon the inquiry that may be held by a military court.

5. Owing to military exigencies, I am not prepared to state at present what charges there are against the petitioner and the others, but the matter has my most serious attention and consideration.

Sworn at Cape Town on this the — day of September, 1901.

Before me,— —, J.P.

Mr. Currey, for the petitioner, said that the main point in this petition was that a British subject had been lodged in gaol without any warrant being issued and without any formal charge being made. It was said that a *prima facie* case had been made out against Marais and the others, but that was no reason why they should be lodged in gaol, detained, then hurried away from the town in which they lived to another town, without any charge being made. The General said that the charge would be laid as soon as possible. But these men had been in gaol for three weeks, and "as soon as possible" might mean any time. No time was specified. Therefore it was claimed that the military should produce the man in court.

The Acting Chief Justice: Is he in civil custody?

Mr. Currey said he was in the civil gaol in Beaufort West, but he was arrested, removed, and detained by the military. Since the outbreak of hostilities in 1899 there had been various applications made to their lordships in regard to acts done under martial law, and their lordships had set out with some preciseness what was the position of the Court in the matter. But this application differed entirely from the other cases, notably from those of Fourie, Naude, and Becker. In the other cases a specific charge had been made; in the present case there was none. Therefore, in the eye of the law petitioner was innocent. It was not

sufficient to say that there was a *prima facie* case.

The Acting Chief Justice: The principle we have laid down is that we will not recognise anything the military do under martial law.

Mr. Currey: But your lordships will not go so far as to say that you have no jurisdiction in the martial law area?

Mr. Justice Jones: That is not the question.

The Acting Chief Justice: Suppose the Court makes an order, who are we to rely upon to see it carried out?

Mr. Currey: The Court.

The Acting Chief Justice: But suppose the military refuse to carry it out, by what means is it to be enforced?

Mr. Currey: That will be for the Court to decide.

The Acting Chief Justice: Yes, that is just the point. The Court cannot place itself in a false position. We cannot act under sufferance of the military.

Mr. Currey: But the Court advertises that it is going to open in Paarl. That will be under sufferance of the military. Paarl is under martial law.

The Acting Chief Justice: We have not advertised that we are going to sit in Paarl. If we go, we go under the proclamation of the Governor, and not by permission of the military.

Mr. Currey: You accept a military pass.

The Acting Chief Justice: No, we do not. We will not take a military pass. We will go under the Governor's proclamation.

Mr. Justice Jones: Who has the custody of these prisoners?

Mr. Currey: The military.

Mr. Justice Jones: How do you arrive at that? Marais was arrested by the Chief Constable of Paarl.

Mr. Currey: Yes, but under authority of the military. Proceeding, he suggested that the military should be called upon to show cause on the 12th why the prisoners should not be released from custody.

Mr. Benjamin: We admit that he is in the custody of the military.

Mr. Justice Jones: Where do you get that from?

Mr. Benjamin: From the affidavit of the General Officer Commanding. Proceeding, he quoted from the affidavit, and then pointed out that the Court had repeatedly laid it down, from the case of *Vaude* onwards, that the Court would not interfere

with the operation of martial law. Therefore he submitted that no order should be made.

The Acting Chief Justice: Has notice of this been given the Attorney-General?

Mr. Currey: The Attorney-General disclaims any lot or part in the matter.

The Acting Chief Justice said this was an application made to the Court for an order calling upon the military authorities to show upon what grounds the petitioner, David Francois Marais, of the Paarl, was detained in custody. The petition and the affidavits and the replying affidavit did not fully state the cause of the arrest, or the circumstances of the country, but it was common knowledge that the arrest took place under martial law, and that the petitioner was arrested by the military. But the petition goes on to show that the prisoners were confined in the gaol at Beaufort West. The Beaufort West gaol is a civil establishment, the gaoler is a civil officer. He would therefore be called upon to return to the Court on the 12th inst. the authority under which he detained the prisoners. The action of the military in the matter would not at this stage be dealt with. The Court was not going to make an order unless they had the civil power behind them to carry it out. Notice of the order would have to be served on the Attorney-General.

Postea (September 12th).

Mr. Currey appeared for the petitioner; Mr. Searle, K.C., appeared for the military authorities; and the Attorney-General, with whom was Mr. Ward, appeared in response to notice served upon him.

Mr. Currey said it would be remembered this matter was before the Court on September 6, when the Court ordered the gaoler at Beaufort West to return to the Court on September 12 the authority upon which he detained the petitioner, and also that notice of these proceedings be served on the Attorney-General.

The Attorney-General said that, on the notice being served on him, he had obtained some information as to the facts as set forth in the affidavits, which he proceeded to read.

The first affidavit was as follows: I, Peter Kuypers Albertyn de Vos make oath and say: That I am Acting Chief Clerk to His Majesty's Attorney-General of the Colony of the Cape of Good Hope. That in my capacity as such I have on this 11th day of September, 1901, received certain documents, from which it appears as follows: That J. R. M. Dalrymple Hay, Lieutenant-Colonel and Com-

mandant of the district of the Paarl, did, on August 15, 1901, request John Frederick Hunt, Chief Constable of the Paarl, to apprehend and arrest certain persons, to wit, Carl Thom, David Thom, A. B. de Villiers, and D. F. Marais, junior. That the said John Frederick Hunt asked the said J. R. M. Dalrymple Hay to give him a written authority to effect the arrest. That on August 15, 1901, the said John Frederick Hunt received from one Lieutenant J. R. Smiley, Staff Officer at the Paarl, in the presence of the said J. R. M. Dalrymple Hay, Lieutenant-Colonel, Commandant of the district of the Paarl, a document signed by the said Lieutenant J. R. Smiley, for and on behalf of the said J. R. M. Dalrymple Hay, authorising him, the said John Frederick Hunt, to arrest and lodge in gaol the above mentioned persons. A copy of this document is hereunto annexed, marked A. That at the same time the said Lieutenant J. R. Smiley did, in the presence of the said J. R. M. Dalrymple Hay, Lieutenant-Colonel, tell the said John Frederick Hunt, Chief Constable, to carry out the order. That the said John Frederick Hunt did thereupon, on August 15, 1901, personally arrest A. B. de Villiers and D. F. Marais, junior, and instruct one Sergeant Colley to arrest Carl Thom and David Thom. This the said Sergeant Colley did. That it further appears from the documents above referred to that on August 15, 1901, one John James Nye, acting in his capacity as the gaoler of the Paarl gaol, did receive and lodge in the Paarl gaol the said A. B. de Villiers, the said D. F. Marais, junior, the said Carl Thom, and the said David Thom, on an authority from the said Commandant, which was handed to him by the said Chief Constable John Frederick Hunt.—(Signed) P. K. A. de Vos.

The annexure A referred to in the foregoing affidavit was as follows: Authority is hereby given to arrest and lodge in gaol the following persons: Carl Thom, David Thom, A. B. de Villiers, and D. F. Marais, junior.—(Signed) J. R. Smiley, Staff Officer for Commandant, Paarl, August 15, 1901.

The second affidavit was as follows: I, Pieter Kuypers Albertyn de Vos, make oath and say: That I am Acting Chief Clerk to His Majesty's Attorney-General of the Colony of the Cape of Good Hope. That in my capacity as such, I have, on September 11, 1901, received from the Resident Magistrate of Beaufort West, a telegram, of which a copy is hereunto annexed, marked A. That the warrant referred to in the

affidavit of Henry Risk, gaoler in charge of the Beaufort West gaol, is hereunto annexed.—(Signed) P. K. A. de Vos.

The telegram referred to in the above affidavit as an annexure marked A was as follows:

(Telegram, dated 11th September, 1901.)

From Resident Magistrate, Beaufort West, to Secretary, Law Department. (Clear the line; very urgent.)

413. September 11. Your 4,666. Affidavit begins: Henry Risk, duly sworn, states: I am gaoler in charge of gaol, Beaufort West. On the 19th of August, 1901, at 6 p.m., a sergeant and four privates brought Messrs. D. F. Marais, A. B. de Villiers, W. H. Myburgh, D. Thom, and J. C. Thom to the gaol, the sergeant stating that he had brought the persons named from Lady Grey Bridge, district Paarl, with instructions to lodge them in the gaol here. Upon being asked if he had any warrant or papers for the detention of these men, he replied, "No." I then searched the men, and admitted them into the "awaiting trial" yard. On Sunday, the 8th inst., I received the warrant hereunto annexed from the Commandant, Beaufort West, setting forth the charge preferred against them, upon which they are still detained in gaol.—H. Risk, Gaoler. Sworn before me at Beaufort West this 11th day of September, 1901.—Charles Dirk, J.P. Affidavit ends. Prisoners were brought before Commandant on the 9th inst., but nothing apparently was done, and they are being remanded by him from day to day.

The warrant of commitment referred to in the gaoler's affidavit was as follows: Warrant of a commitment for examination—District of Beaufort West: To the Gaoler of the Beaufort West Gaol—These are to command you to receive into your gaol the body of (1) F. Marais, (2) D. Thom, (3) C. Thom, (4) A. B. de Villiers, (5) W. A. Myburgh, all of whom are charged with contravening Martial Law Regulation, paragraph 14, section 2, of May 1, 1901, who are hereby recommitted for examination, and to keep the said persons as named above in your custody until brought before me, on the 9th day of September, for the purpose aforesaid.—Given under my hand, at Beaufort West, this 8th day of September, 1901,—(Signed) W. A. Geullos, Capt., District Commandant.

The Acting Chief Justice: Do you say the petitioner is in your custody or in the custody of the military?

The Attorney-General said they were in the custody of the gaoler at the request of the military. The practice ever since the war began had been in districts where martial law prevailed, to receive the custody of persons on such warrants as had been read, and he was prepared to defend the practice. The warrant of the Commandant, or any responsible officer, had been recognised by the gaolers as a sufficient warrant. The gaoler held such persons on behalf of the military.

The Acting Chief Justice: Then do I understand, Mr. Attorney, that you make a formal return that the gaoler holds the petitioner as an officer under the control of the military, acting on the instructions of the military authorities in a district in which martial law prevails?

The Attorney-General: Yes, my lord.

Mr. Currey (for petitioner): The Court cannot be satisfied with the statements in the documents read by the Attorney-General. Applicant was arrested on the 15th, he was kept in prison till the 18th, and on the 19th he was taken to Beaufort West. There was no warrant against him, and no charge had been made. The man was not lodged in gaol by legal warrant. He had been taken to the gaol by a sergeant and four privates. The sergeant admits that he had no warrant, and the gaoler ought not to have received him. The so-called warrant was issued on the 8th inst., two days after the order of Court had been given, and this so-called warrant was good only for 24 hours. Further, the charge gives no place or date; it is simply stated that petitioner had been guilty of contravening a martial law regulation; we are not told what the regulation was, and there is no evidence to show that this regulation applied to the Paarl district. But even if martial law is in force in the Paarl district, is the Court thereby debarred from making full inquiry into whether the acts done thereunder are proper and necessary. See judgment of Solomon, J., in *Queen v. Bekker*, and of Maasdorp, J., in *Queen v. Fourie*. The proclamation of martial law does not suspend the power of this Court. The necessity for martial law must be proved to the satisfaction of the Court. See judgment of De Villiers, C.J., in *Re Kok and Balie* (Buch., 1879, p. 45), and judgments of Solomon, J., and Maasdorp, J., in *Naude's case*. Necessity is the sole justification for the proclamation of martial law, and it rests with this Court to apply that test. See judgments of Solomon, J., in the cases of *Bekker* and of

Fourie. What tests then will the Court apply in deciding the question of this necessity? The Paarl was not at the time of this proclamation the seat of war, insurrection, or rebellion. It has not been invaded; the Magistrate's Court is open, and the Circuit Court is to sit there in a week or two. There is no similarity between the state of Beaufort West as described by Jones, J., in *Bekker's case*, and the Paarl. There is no present necessity for martial law in the Paarl. If the Court can deal with ordinary cases brought before the Circuit, why cannot it deal with this case? Instead of its being allowed to do so, the man was hustled off to a place 300 miles away as soon as the date of the sitting of the Circuit was announced. The man is illegally detained, and it is for the Court to order his liberation.

Mr. Searle, K.C. (for the military authorities): When the rule *nisi* was asked for in this case it did not appear at whose instance accused was imprisoned. In *Naude's case* and in *Bekker's* (10 Sheil, 443) the Court refused to liberate persons confined in civil gaols by the military authorities. The affidavit of the General in Command states that it is necessary to have martial law and to remove the prisoner to Beaufort West. My learned friend has referred to the present condition of the Paarl, and doubtless the Circuit Court will sit there, as it has done in many other martial law districts. *Fourie* and *Bekker* were detained by the civil gaoler as in this case. I could quote from martial law regulations to show what regulations these persons have contravened. It is No. 14, section 2 (inciting persons to take up arms).

Mr. Currey (in reply): This case is not at all analogous to that of *Bekker* and of *Naude*. They had both been charged with high treason, and convicted. No justice of the peace was available. Here the prisoners were not charged with any crime; they have been imprisoned for 28 days without trial, and a gross and violent interference with the liberty of the subject has been committed.

The Acting Chief Justice, in giving judgment, said that the applicant in this case was being detained in the gaol at Beaufort West, and when that fact was brought to the notice of the Court, the gaoler, as a civil officer of the law, was immediately called upon to return to the Court his justification for the detention of this prisoner in custody. It now transpired from the affidavit of the gaoler, and especially from the return made by the Attorney-General in court, that the

gaoler who has the custody of this person holds him as an officer under the control and acting upon the instructions of the military authorities in a district in which martial law prevails. The gaoler is not acting as a civil official in this case, but as a military official. Both the Attorney-General and the military authorities justify the detention on that ground. The Court had repeatedly discussed the question of martial law, and it had been consistently laid down that necessity, and necessity alone, justified the proclamation of martial law. But when that necessity had been once established, and martial law had been proclaimed, those who said that the necessity for it no longer existed, were required to put before the Court sufficient evidence upon which the Court could so decide. In the previous cases which had come before this Court, and of which the Court could now take judicial cognisance, it had been demonstrated beyond all reasonable doubt that the necessity for martial law existed in the district where this person was detained, and that this necessity was very urgent. It was true the man had been removed from the district of the Paarl to Beaufort West; but in the district of the Paarl martial law was also in existence. The Court had not now to discuss the question of whether there had originally been a necessity for the proclamation of martial law in the Paarl. That question was not raised, and there was the fact that this district, which was surrounded by disturbance and unrest, still remained in the hands of the military. However, the applicant was no longer in the Paarl district. If he had been, and the question had been put before the Court for consideration, the Court might have considered whether the necessity for martial law existed there or not. Where martial law existed, and the country was under control of the military authorities, and the Crown had entrusted to its military authorities the duty of preserving peace and order and securing the lives and property of the people in the district, the Court had laid down that while martial law authority was paramount, the civil authority would stay its hand, and would not interfere with the action of the military. Mr. Currey had urged upon the Court to consider the charge upon which this person was arrested. Here again the Supreme Court had consistently said they would not recognise any charge brought by the military authorities, and decide whether or not it justified the detention of the accused. If it did do so, the Court in some cases would have to justify the military

authorities, and in other cases would not. By so doing, the Court would be recognising the acts of the military authorities, and in the very essence of things the Court could not regard as legal any act done by the military authorities, who were of necessity acting outside the rules of law, which alone the Courts could recognise. The military authorities must act on their own responsibility, and as they could not ask the aid of the Court, so also the Court would not interfere with them in the discharge of their trust, while the military authority was supreme in a district. But afterwards, unless any act which might be questioned was covered by an Indemnity Act, the Court would inquire and would rectify anything done contrary to the law of the country. The application could not be granted, on the ground that the Court would not exercise jurisdiction over persons who were under the control, and in the custody of, the military authorities in districts in which martial law had necessarily been proclaimed. When the proper time came, the Court would inquire into any cases brought before it, and unless the military authorities could justify their conduct according to law, the Court would vindicate the law; but that time was not the present. The application must be refused.

[Applicant's Attorneys, Van der Byl and Van der Horst.]

LAMPART V. UNION-CASTLE, 1901.
STEAMSHIP CO., LTD. { Sept. 6th.

Passenger's contract—Lost luggage
—Limitation of liability.

On the back of tickets issued to passengers by the defendant company was a statement that they would not be answerable for any luggage brought on their vessels unless the passenger in addition to his passage money should pay a certain small fee to the Company, and place the luggage under their care. Further, that they would not be answerable for more than £10 in case of the loss of any one package unless its value was declared when so given into their custody. Attention was called to this notice by certain words printed on the face of the ticket. Plaintiff, who was unable to read, missed

a certain box on arriving at Cape Town by one of the Company's ships, now sought to recover its full value. The box had not been delivered into the charge of the Company's servants.

Held, that as the above conditions were reasonable, and had been sufficiently brought to plaintiff's notice, he could not recover.

This was an action for the recovery of £63 16s., being the value of a trunk and its contents, belonging to the plaintiff, and alleged to have been lost by the defendant company.

The declaration was as follows:

1. The plaintiff is Nathan Lampart, of Cape Town. The defendant is the Union-Castle Mail Steamship Company (Limited), which is a joint-stock company, duly registered in this colony.

2. On or about August 28 last plaintiff made an agreement with the said company by its duly-appointed representatives in England, whereby, in consideration of the sum of £10 10s., which was duly paid by plaintiff, for a steerage ticket, the defendant company undertook, *inter alia*, to convey the said plaintiff, with his luggage, by their steamship Avondale Castle from London to Cape Town.

3. Plaintiff, on or about the 31st August, embarked on said steamship with his luggage, amongst which was a certain box containing personal effects and documents belonging to him. Plaintiff delivered the said box into the special and exclusive care and custody of defendant, and the box was duly numbered and labelled, as required by the said defendant company, the said company undertaking, as part of the agreement referred to in para. 2 thereof, to re-deliver the box to plaintiff on the arrival of the vessel in Table Bay.

4. Plaintiff, on arrival in Table Bay, and on divers occasions since then, has demanded from the defendant the delivery of the said box and its contents, but defendant has wrongfully and unlawfully failed to make such delivery of the box or contents or any part thereof.

5. The value of the said box, with the personal effects therein, is £63 16s.

Wherefore plaintiff claims:

(a) An order calling upon defendant to return to plaintiff the aforesaid box, with its contents; or, failing compliance therewith by defendant,

(b) Judgment for the sum of £63 16s., value of the said box, with the personal effects therein as aforesaid.

(c) Alternative relief.

(d) Costs of suit.

The defendants filed the following plea:

1. Paragraph 1 of the declaration is admitted.

2. Paragraph 2 is also admitted, subject to the matters hereinafter pleaded.

3. The agreement in the second paragraph set forth was entered into by plaintiff and defendant company, in terms of certain conditions. The said conditions were printed upon the ticket issued to the plaintiff by the defendant company, and plaintiff received the said ticket, and became a passenger by the said steamship, subject to the said conditions.

4. The third of the said conditions contained the following provision: "Each adult passenger is allowed to take 10 cubic feet of baggage free of freight, and children in proportion to the amount of the passage money paid for them as compared with the rate for adults. For all baggage in excess of this allowance a charge will be made of 2s. per cubic foot. The owners will not be liable for the baggage of passengers embarking in their ships where no special freight is paid for the same. It is to be understood, and is hereby agreed to by the person holding this ticket, that the owners will not be liable in any way for the baggage of passengers embarking in their ships unless the passengers choose to pay 1s. per cubic foot for all baggage put under the owners' charge (in addition to the extra charge of 2s. per cubic foot for extra baggage), in which case the packages are to be labelled and numbered and a receipt given for them on shipment, and should a passenger require any of the packages so labelled during the voyage he is to relieve the owners of their custody and liability for the delivery of the same. The liability of the owners is to be limited to £10 for each package, as provided by the Carriers' Act, unless a higher value is declared at the time of the shipment, in which case a special rate will be charged."

5. Plaintiff, on or about August 31, 1900, embarked upon said steamship Avondale Castle with the box referred to in the declaration, but no special freight was paid in respect of the said box; nor was the value of the said box or its contents declared at the time of shipment.

6. Upon arrival in Table Bay of said steamship, said box was duly delivered by the servants of the defendant company to Messrs. A. R. Mc-

Kenzie and Co., who are the dock agents appointed by the Harbour Board under their regulations, framed by the Commissioners in terms of Act 36 of 1886, and as such are dock agents appointed on behalf of plaintiff for the purpose of receiving the said box.

7. Defendant company denies that it is liable in any way to plaintiff in respect of the said box, or its contents, or any portion thereof.

8. Save as above, the defendant company denies all the allegations in paragraphs 3, 4, and 5.

Wherefore, etc.

The plaintiff's replication was as follows:

1. Plaintiff admits that the ticket issued to him by defendant company has printed upon the back of it certain clauses, which purport to be the terms, conditions, and regulations upon which passengers and their baggage were to be conveyed by the S.S. Avondale Castle, and he admits that the said alleged terms, conditions, and regulations, as so printed, include the clause set forth in paragraph 4 of the plea.

2. Plaintiff specially denies that the clause set forth in paragraph 4 of the plea was ever brought to his attention before he landed in Cape Town, nor was he aware of the existence of said clause, and he denies that the provisions of the said clause formed part of the contract between plaintiff and defendant now sued on.

3. Plaintiff admits paragraph 5 of the plea.

4. Plaintiff has no knowledge of the correctness or otherwise of the allegations in paragraph 6.

Save as above, and save in so far as the plea contains admissions, plaintiff denies all allegations of fact, etc.

Mr. Close appeared for the plaintiff, and Mr. B. Upton for the defendant.

Nathan Lampart, called, deposed that he was the plaintiff in this case. He was trading in Cape Town as a tailor. In August of last year he was in England. He had gone from Johannesburg to England. He was returning, because he thought he would be allowed to go back to Johannesburg. He got the ticket produced in court from the Union-Castle Company's office in London. He handed it to the steward on the ship, who, some days later, handed him the ticket. He was told nothing at the office about the conditions. Witness could not read English. He did not know that there were certain conditions about the baggage, nor was he told of them. He went on board on September 1, and took his luggage. It consisted of an

American trunk. It was named and labelled. He handed the trunk to the officer on board. The officer said it was all right. Nothing was said about excess luggage. The box was put down in the hold. They did not ask him to make any declaration, nor to pay any excess freight. During the voyage the box was taken out twice, once near Tenerife, and once near St. Helena. The ship was the Avondale Castle. She arrived in the Bay on September 23. A tug came out, and the officer said that all passengers for Cape Town must return to the shore with the tug. Plaintiff asked the officer for his box. The officer replied, "You can't expect me to give you your luggage to-day; you had better call to-morrow." He was anxious to have his luggage, because the following day was a Hebrew festival, and he wanted his clothes. The next day he went to the Docks, and was told that no luggage had been landed from the Avondale Castle. He waited about at the landing place, and during the day a tug came from the boat. He waited from 9.30 a.m. until 3.30, when the tug arrived. His box was not amongst the baggage. He looked carefully for it, then went to the Customs-house and searched again, without success. He left the Docks at 6.30. Next morning he went down to the Docks again, and then to the Union-Castle offices there. No tug came that day. In the evening he went off to the ship and saw the officer who had had charge of his box. The officer replied that he did not know anything about it; he could not help it. He went to the captain, and the captain told the officer to look around the hold. Plaintiff went with the officer, who simply opened the hatch and flashed a lamp around, but as the place was packed with goods, they could not see it. The next day he was again at the Docks. Eventually witness went to McKenzie to see if he perhaps knew of the box. He did not. He made numerous inquiries elsewhere, but without avail. The total value of the articles and the trunk was £63 10s.

Cross-examined: Witness did not read his ticket, as he could not read or write. He did not know that the ticket set forth his rights. He thought the ticket was simply to go on board. He had never lost luggage before. The clothes in the box were nearly all new. Some he had only worn twice, and some he had never worn at all.

Re-examined: Witness never received any notification from anybody to the effect that his luggage had been discharged from the Avondale Castle, lying in the Bay.

Further questioned by Mr. Upington, witness said that he had not since he had been in Cape Town been a partner in a cleaning and dyeing business. He could sign his name, but that was all, and he had signed his name to a document, but he could not say what he signed.

By Mr. Close: He could do no more than write his name, and could not read.

By the Court: All these things were in one box.

Frank Robb, the secretary to the Table Bay Harbour Board, deposed that there was a clear distinction in the Docks regulations between cargo and passengers' baggage, as delivery of the latter could only be made to the passenger or a baggage agent authorised by him.

By the Court: There was nothing in the regulations compelling a passenger to hand over his baggage to an agent, or compelling the company to have an agent. The tug that went out to the steamer belonged to the Harbour Board, but it was hired by the company for the occasion, and the company had for the time being the control, and so forth, of the tug, although it was worked by the Board's employees.

This closed the case for the plaintiff.

For the defence, Mr. Upington called

John George Coleman, who said he was now second officer of the S.S. German, and in the employ of the defendants. In September last he was second officer of the Avondale Castle, and as such, was in charge of all the passengers' luggage. He kept a tally-book of the luggage received and discharged. The book produced was the one he kept on that voyage. He remembered the trunk in this case. During the course of the voyage plaintiff required his trunk once or twice on the voyage. There was a baggage day once a week, when passengers could get up any baggage which had been labelled "Wanted on voyage." On the arrival of the Avondale Castle in Table Bay she was unable to get into dock, and passengers who wished it were, along with their cabin luggage, sent ashore the same day. The hold luggage was sent ashore the following day and witness quite distinctly remembered seeing plaintiff's trunk put into the lighter.

This concluded the evidence.

Mr. Close, in argument, said that it was perfectly clear that the goods in question were in the custody of the defendants, and as carriers they were bound to deliver them to the plaintiff at the end of the voyage, or to pay their value, viz., £63

10s. It was also clear that all the goods claimed for were distinctly passengers' luggage. The defence set up by the company was threefold. The first was that they said they were free from liability, because of a special contract entered into with the plaintiff. In the second place, they said they delivered the goods to plaintiff, and in the third place, that the goods had been delivered to McKenzie, plaintiff's agent. As to the third line of defence, there is a wide distinction under the Dock regulations between baggage agents and dock agents. A baggage agent may or may not be employed, but if he is employed at all, he is employed by the owner of the baggage. A dock agent is appointed by the Harbour Board. Plaintiff had never employed McKenzie, and therefore it is no defence to say that the box was delivered to McKenzie, or that it was put into the lighter. The really serious part, however, of the defence seems to be based on the terms of the contract with plaintiff, as expressed on the ticket. Is a ticket then anything more than a voucher for payment? The question was discussed in *Parker v. S.E. Railway Company* (2 C.P., 416). In that case it was held that conditions on the back of a railway cloak-room ticket were not binding on a passenger unless they were in some way or other referred to on the front of the ticket. The case was carried on appeal to the House of Lords, and their lordships held that the question whether plaintiff had read the notice on the back of the ticket should have been left to the jury, and that the main question was whether the company had done everything that could reasonably be expected to bring the notice to the knowledge of the plaintiff. In the case of *Richardson v. Rowntree* (Ap. C., 1894, p. 217), the principal points of the case were said to be: (1) Did the plaintiff know that there was printing on the back of his ticket? (2) Did he read it? (3) Did the company do everything reasonable to bring it to his notice? In *Richardson v. Rowntree* Lord Ashbourne stated that greater care was necessary to bring a notice to the knowledge of third-class passengers (who are presumably people of little or no education) than was requisite to direct the attention of first-class passengers thereto. This case is not on all fours with that of *Streatham v. Union-Castle Company* (1 E.D.C., 315). In that case one Milstead had taken the ticket as agent for Miss Streatham, and the Court assumed that as her agent he had read the conditions of the contract on the back of the ticket. In this case there is evidence that plaintiff knew nothing about the conditions. Looking to the

class to which he belonged, the company did not do what they ought to have done to bring the conditions to his knowledge.

[Jones, J. : What do you say about *Jones's* case?]

I am coming to that. Even supposing that the conditions on the back of the ticket are binding on plaintiff, the contract is one to carry him by the *Avondale Castle*. As a special contract it can apply only to that vessel, for such a special contract might be very strictly interpreted. If the goods were lost or damaged on the lighter the restriction would not apply.

[Buchanan, A.C.J. : Suppose the goods had been dropped into the sea?]

That would have been from the *Avondale Castle*; and would have fallen under the conditions on the ticket. Again, by articles 4 and 5, each third-class passenger may carry 10 cubic feet of luggage free of charge. There is no evidence to show that plaintiff had more than 10 cubic feet. The passenger is not bound to pay on the 10 cubic feet. Even if the conditions on the ticket do apply to the 10 cubic feet, the company must prove that there has been a loss or damage before they can free themselves from liability. The company are bound to measure the goods. *Jones v. Union Company* (1 Juta, 138).

[Buchanan, A.C.J. : If the company say that they will not be liable beyond £10, will not that protect them?]

No, it is for the company to ask the passenger to declare the value of his baggage.

[Buchanan, A.C.J. : Would the company be liable if the luggage were under the control of the passenger?]

I would not say that.

[Buchanan, A.C.J. ; On what principle would you draw the distinction?]

See *G.W. Railway Company v. Bunch* (13 Ap. C., 31).

Mr. B. Upington (for defendants): The terms of the contract between plaintiff and defendants are set forth on the ticket. All authorities agree that a carrying company can limit its liability, even as against its own gross negligence. The case of *Jones v. Union Company* does not apply. The clauses under which we disclaim liability are far wider than the clauses of the contract were in that case. The main point of plaintiff's argument is that he had no notice of the conditions, but see *Acton v. Union Company* (73 L.T., 158). There Russell, L.C.J., would not allow the case to go to a jury. There the company had limited their liability, just as in the present case. I leave the Court to say whether sufficient reference is made to the back of the ticket, and will

simply deal with the question as to whether the company brought the terms of the contract to plaintiff's notice. A man cannot be allowed to take advantage of his ignorance. Again, there was nothing to show the company that the plaintiff could not read. The company did all that ordinary business people could do to put plaintiff on his guard. The face of the ticket bore a statement printed in red letters referring to the back. If a reference to a railway company's bye-laws on one of their tickets is sufficient to cause a man who (perhaps in great haste) purchases a ticket to be bound by those laws, surely this man, who had his ticket for three days before he embarked, could be held to have known what was on the ticket. *Richardson v. Rowntree* is not in point. There the House of Lords simply refused to disturb the finding of a jury on a question of fact, because it was supported by evidence. *Stretton's Case* (1 E.D.C., 315) is quite on all fours with this case. As to the contract holding good only while the trunk was on the *Avondale Castle*, there is good authority for holding that where the limitation of liability is so wide it extends to the whole time the goods are under our control. As to the last point, we have a contract under which we are not liable for the default of our servants. We cannot now trace the box. It has been lost or stolen: if the latter, we are certainly not liable. *Harris v. G.W. Railway Company* (1 Q.B.D., 515). In *Acton's Case* it was impossible to say what had become of the box. The company's special contract would be useless if they had to show what had become of it. This differed from *Jones's Case*, because there there was some evidence that the goods had been sent up the coast.

Mr. Close (in reply): In *Acton's Case* the box was stolen from the ship. There the plaintiff knew there was a printed notice on the ticket, but neglected to read it. As to the presumption that everybody can read, that was only an *obiter dictum* of Mellish, J., and was opposed to *Richardson v. Rowntree*. *Abbot on Merchant Shipping* (p. 206) holds that the company are liable for goods under their control. As to loss of goods, it is for the company to prove that they have parted with the goods in such wise as to free them from liability.

The Acting Chief Justice: The plaintiff in this case was a passenger by the ship *Avondale Castle*, which belongs to the defendants, and which arrived in Table Bay in September last year. He brought with him from Southampton a box of luggage, which box, on arrival here, he has been unable to trace. The defendant

company say, through their second officer, who kept a tally of the luggage on board, that this box was received here, and that it was landed from the vessel, but what has become of it since they do not know. Now, the plaintiff was brought out under a contract which he entered into with the defendants in London, and with reference to this contract several interesting questions arise. The defendants set up the defence that under their contract they are not liable, except in so far as is specified in certain conditions, which are printed on the back of the ticket issued to the plaintiff. One question we have to decide is whether the plaintiff was bound by these conditions. The fundamental principle which underlies a contract is that there must be mutuality between the parties. It would seem to be on this principle that the English Courts sometimes hold that the conditions printed upon the back of the ticket or receipt are not binding upon the parties; for instance, in some cases where the parties are entitled, in the absence of direct notice, to presume that the document given is nothing more than a mere receipt for the articles delivered. But in this case, when we look at the document upon which the whole case depends, we see that it is not a mere receipt at all. On the face of it, it is stated to be a passenger's contract ticket, and reading down it to the bottom we find in clear letters, printed in red ink, the words "See back." On the back are set forth, in large letters and clear print, "the terms, conditions, and regulations under which passengers and their luggage are conveyed under this contract." The plaintiff says he did not read this, as he cannot read, but this contract was not entered into hurriedly. It was entered into three days before the plaintiff sailed from England, during which period he had ample time to ascertain exactly the conditions contained in the document handed to him. It is not like the case of a passenger going to a railway-station in a rush to catch a train, and hurriedly taking out a ticket. Here the plaintiff had plenty of time to find out the nature of the contract he had entered into. Under the circumstances the defendant company may fairly say that they did all that was necessary to give the plaintiff, or any other passenger, notice of the terms upon which they undertook to carry the passengers and luggage from London to the Colony. I think, therefore, that we must hold that the defendants are entitled to rely on these terms, conditions, and regulations, which are prominently indicated on the contract, and that they were referred to in such a way that the plain-

tiff must be taken to have contracted subject to them, and that he is therefore bound by them. These conditions are briefly to the effect that the company undertook to convey the passenger and a certain amount of luggage on the payment of a certain amount of money, and they set forth that the company will not be answerable for any luggage brought on board unless the passenger, in addition to the passage money, pays a small and reasonable amount to the company, and places the luggage under their care, and upon this being done the company will give its receipt for the property. In all long-distance voyages the passengers require to have frequent access to their luggage, and I think it is a very reasonable condition for the company to say, "We will not be responsible for any luggage which you may bring on board with you, unless you pay a small charge and place the luggage under our charge." They also say in this contract that "unless you place this luggage in our charge, and pay us this fee, and unless you specially declare the value of the package, we shall not be answerable for more than £10 in case of loss of any one package so specially placed in our charge." In this case there was one box, the contents of which the plaintiff values at £63 odd. I think it would be very difficult, even if we were satisfied that the liability of the defendant company had been proved, to award the plaintiff in this case more than £10, the amount to which the company limits its liability for any one package. It is not alleged against the defendants in this case that there is any *mala fides*, that there is any wilful detention, or that the box is still in the custody of the defendants. The box has gone from the ship; it went over the ship's side with the other luggage, as far as the ship can trace. It may or may not have gone to the Customs warehouse with the other luggage, but, at any rate, it cannot now be found. There is no suspicion that it is still in the defendants' possession, as was the case in *Jones v. Union Steamship Company*. The company now say that they are not answerable for any luggage unless specially placed in their charge. A further defence set up by the plea is that this luggage was delivered to McKenzie and Co., the Dock agents who received it on behalf of the passenger. This plea has apparently been framed in misapprehension of the Dock regulations, which say that, on the arrival of any vessel in this port, a dock agent shall be appointed by the consignees to receive the cargo on their behalf. There is no such compulsory requirement to have a dock

agent to receive luggage on behalf of the passengers. The plaintiff in this case never appointed Messrs. McKenzie and Co. to receive the luggage on his behalf; nor were McKenzie and Co. his agents by virtue of any Dock regulation. The company, however, protected itself from liability for loss of luggage by the special condition referred to. The plaintiff must be taken to have contracted subject to this condition, and judgment must therefore be given for the defendants. As the plaintiff is suing *in forma pauperis*, there will be no costs in this matter. The case of *Stretton v. The Union Steamship Co.*, which was decided by the Eastern Districts Court, is directly in point in this case. There the conditions were similar and the grounds for decision the same as here.

Mr. Justice Jones concurred, and said that the case of *Stretton v. The Union Steamship Co.*, decided by the Eastern Districts Court, was a very strong authority indeed.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendants' Attorneys, Messrs. Fairbridge and Arderne.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

GASLOLI V. SALT RIVER CEMENT WORKS. (1911. (Sept. 9th.)

This was an action instituted against a company called the Salt River Cement works, and also against certain persons who were members of the syndicate called the Salt River Cement Works Syndicate. The plaintiff, who lived at Salt River, was a shareholder in the company. He had set up certain works, and on May 20, 1898, an agreement was made between the company and Gasloli and one Jonsoni, with whom he had formerly been working. They sold to the company the whole of their undertaking, they being fitters, and it was part of the agreement that plaintiff and Jonsoni should get five thousand shares, two thousand five hundred each. It was also part of the agreement that these shares should not be disposed of by plaintiff for a period of three years without permission of the directors. The company allotted and issued to the plaintiff two thousand five hun-

dred shares, but the complaint in regard to these shares was that they issued them with the words "not negotiable" endorsed upon them, and that they were not sealed with the seal of the company, as required by law, and plaintiff said that he had objected to these shares, and wanted proper shares issued to him. That was the first complaint in the declaration, and with regard to this defendants said in their plea that they denied that plaintiff refused to accept the said shares. They said he did accept, in October, 1899, and only objected in January last, and they said that they were willing to give him scrip without the words "not negotiable," and otherwise to be in due legal form when he was entitled to them. The second point in the declaration was that on May 25, 1898, the chairman, who was also a member of the syndicate, purported to enter into an agreement between himself, on behalf of the company, and himself and the other members of the syndicate. According to this agreement it had been arranged with the Bank of Africa that the company should be allowed to overdraw the banking account to the extent of £8,000, upon the bank being furnished with sufficient guarantee for repayment. The syndicate had consented to become security, and indemnify the bank against all loss it might sustain, to the amount of £8,000, together with interest. It was agreed between the parties that the sum of £8,000 so guaranteed should represent the syndicate's share in the capital of the company, and that the syndicate should be liable for such sum as remained unpaid after the bank's claim had been duly satisfied. It was provided that the consideration of and for the said guarantee should be the allotment and issue by the company to the syndicate or its nominees, of 8,000 fully paid up shares, which should be apportioned in the manner set out in the schedules annexed to the agreement.

Sir H. Juta, K.C. (with him Mr. Benjamin), appeared for the plaintiff, and Mr. Searle, K.C. (with him Mr. Close), for defendant.

After having opened his case, Sir Henry Juta intimated that his attorney had communicated to him that the case had been settled.

The Court made an order in the following terms by consent: In settlement of all claims between the parties, judgment for plaintiff for the sum of £2,500, each party to pay their own costs, plaintiff undertaking to deliver up the scrip held by him.

SUPREME COURT

[Before the Acting Chief Justice (the Hon Sir JOHN BUCHANAN), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

OHLSSON V. SOUTH AFRICAN { 1901.
MILLING COMPANY. { Sept. 10th.

Mr. Searle applied for an open commission to take the evidence at Port Elizabeth of the plaintiff, and such other witnesses for the plaintiff and defendant as might be produced before the commissioner. The applicant was master of the barque Ingrid, and was the plaintiff in a shipping case.

The application was granted by consent, the Resident Magistrate of Port Elizabeth being appointed commissioner.

STUTTERHEIM MUNICIPALITY { 1901.
V. DE BEER. { Sept. 10th.

Water—Act 45 of 1882—Judicial discretion.

The Municipality of Stutterheim had been constituted under Act 45 of 1882. Under powers conferred by section 109, sub-section (6) of that Act a bye-law had been framed by the said municipality, providing (inter alia) "that no person should make any private watercourse within the boundaries of the municipality without the permission, and under the control of the said Council." Respondent had applied to the Council for leave under this bye-law to lay down a pipe to his own property, and the Council granted the leave applied for, but subject to the condition that before laying down the said pipe applicant should first pay certain arrears of water-rates, which he had denied to be due. It had been held by the E.D. Court that the Council were not justified in insisting on this condition, and the said Court had granted an order restraining the Council from obstructing appli-

cant in laying down the pipe aforesaid. Against this order the Council now appealed.

Held, that the Council having exercised a judicial discretion by granting permission as applied for could not prevent respondent from acting on that permission merely because he refused to pay the rates in dispute; and that the appeal must therefore be dismissed, with costs.

This was an appeal from a decision of Mr. Acting Justice McGregor, sitting in the Eastern Districts Court, in an application of Alphonso Allen de Beer against the Stutterheim Municipality for an order restraining the Municipality from obstructing him in laying certain water-pipes from the Municipal furrow to his property, or compelling them to lay or supervise the laying down of the said pipes.

The petitioner's affidavit was as follows:

1. Your petitioner is a ratepayer and citizen, resident within the limits of the Municipality of Stutterheim.

2. Your petitioner is the owner of Lots 3, 4, 10, and 11, Block I., which are situate within the Municipality of Stutterheim.

3. The respondents, under and by virtue of section 8 of their Municipal Regulations, have charged your petitioner with water rates on certain other house and premises, of which your petitioner was joint occupier with other persons, but not a householder in terms of the said Municipal Regulations, which said charge was at the rate of six shillings sterling (6s.) per annum, amounting for 7½ years to £2 5s. sterling, and which your petitioner has paid to them under protest. The respondents, however, now refuse to accept the said payment.

4. On the 17th day of November, 1900, your petitioner applied to respondents for permission to lay a water-pipe from the water furrow to his said property, as per letter hereunto annexed, marked A, to which request he received a reply on the 21st November, 1900, inquiring whether your petitioner was prepared to pay water rates and leading licence from the date the pipe is laid, as per letter hereunto annexed, marked B, which terms your petitioner acceded to on the 28th November, 1900, as per annexure hereunto, marked C.

5. On the 30th January, 1901, the respondents advised your petitioner that he was granted permission to lay a 2-inch pipe from the furrow to his property, provided he first paid his arrear water rates, amounting to £2 5s. sterling, as per letter annexed, marked D.

6. Further correspondence passed between your petitioner and respondents, and on the 21st March last your petitioner paid the respondents the sum of £2 5s. sterling in cash under protest, being the amount alleged by the respondents to be due for water rates. Your petitioner has also called upon the respondents to lay down or appoint someone to supervise the laying down of pipes to his property, as per letter hereunto annexed, marked E.

7. On the 10th April, 1901, the respondents returned the said sum of £2 5s. sterling, and have refused to allow the work of laying down the pipes to commence, as per letter hereunto annexed, marked F.

8. Your petitioner engaged a man to lay down the said pipes, but he has received notice from respondents not to do so until he gets instructions from them.

9. Your petitioner is being seriously inconvenienced, and is sustaining damage by the delay and refusal of the respondents to lay down the said pipes, and the rates are still being assessed upon his said property.

10. Wherefore your petitioner prays that your lordships will be pleased to grant an order restraining the respondents from obstructing your petitioner in laying down the said pipes, or compelling them to lay or supervise the laying down of the pipes to your petitioner's property, or such further or other relief as to your lordships may seem meet, with costs.

The affidavit of the petitioner was as follows:

I, Alphonso Allen de Beer, of Stutterheim, make oath and say:

1. That previous to the erection of my house on Lots 3, 4, 10, and 11, Block I., in Stutterheim, I was not a householder, and the respondents are not justified in charging me with water rates.

2. That I merely occupied three rooms in Mr. Grunewald's premises, two of which I used as offices, and the third as a bedroom.

3. That I believe Mr. Grunewald has paid all water rates assessed upon his premises in respect of his occupation.

4. That I have occupied the said two offices and bedroom for the past seventeen years, during which period I have boarded with Mr. Wylde, at whose premises I have on most occasions had my morning bath.

5. That during the past seventeen years, prior to the matters in dispute herein, no claims whatever have been made upon me for water rates.

6. The first intimation that I received from respondents that I was liable for water rates for 7½ years was on the 21st November, 1900, when application was made for the payment of the amount of £2 5s. for rates alleged to be due.

The affidavit of Henry Shone set forth:

1. That I am the Mayor of the town or village of Stutterheim, and know the said Alphonso de Beer.

2. That this Municipality is constituted under Act 45 of 1882, section 156 of which regulates the powers and duties of the Council, and section 109, clause 6, gives power to pass bye-laws regulating the supply and distribution of water.

3. That in terms of the above Act, By-law No. 6 was passed and duly published in the "Government Gazette" No. 6,679, of December 25, 1885. (Copy attached, marked A.)

4. That no householder or other resident can claim a right to lead water or take a pipe leading from the furrows, which are open ones, and intended primarily for drink purposes of man and beast, and not for irrigation. (Copy of leading licence attached, marked B.)

5. That only three persons, viz., Messrs. David Murray, John Johnson, and Geoffrey Emerson, have been granted the privilege of taking a pipe leading from the furrow, to continue during the pleasure of the Council.

6. That the said Council was quite willing to grant the same privilege to the said Alphonso Allen de Beer, providing he first paid all arrear rates owing by him, the payment of which he had so far evaded. (List of arrear rates and charges still owing to the best of my knowledge and belief by the said Alphonso Allen de Beer hereto attached, marked C.)

7. The said Alphonso Allen de Beer is not a citizen, this being only a small town or village; neither is he a burgess or municipal voter, as hitherto he had not the property qualification, the only property standing in his name being nine erven, Nos. 5 and 6, Block F, 4, 5, and 11, Block V, and Nos. 3, 4, 10, and 11, Block I, valued at £10 each, or ninety pounds in all.

8. That the said Alphonso Allen de Beer or his wife has recently erected a dwelling-house on erfs 3, 4, 10, and 11, Block I, which was only completed last month, and has not

been valued for rating purposes; therefore no rates have been assessed on it. The said Alphonso Allen de Beer has not called upon the Council to have it valued.

9. That the said Alphonso Allen de Beer has resided in Stutterheim for about seventeen years, and has not paid one penny in water rates.

10. That the said Alphonso Allen de Beer, until about the end of 1900, occupied three or four semi-detached rooms (belonging to W. A. Grunewald), one of which he used as an office, and one as a bedroom. He kept a native servant, a trap, and two horses. He made use of the water, as he admits in his letters of November 28 and January 30, hereto attached, and marked D and E. I believe it is correct that he boarded with a Mr. Wylde, but that gentleman was only a private householder, and did not pay water rates for a boarding-house, and the so-called well is only a hole sunk on the banks of the furrow, into which the water filters from the furrow.

11. That all householders, whether they take water from the furrow or not, have to pay 6s. per annum, in terms of the bye-laws.

His lordship (Mr. Acting Justice McGregor) delivered judgment as follows: In this matter the applicant, who styles himself a citizen and ratepayer of Stutterheim, asks for an order against the respondents, the Mayor and Town Councillors of the Municipality of Stutterheim, restraining them from obstructing him in laying down certain water pipes from the watercourse to his property at Stutterheim, or compelling them to lay down or supervise the laying down of such pipes, or for further relief. It appears that the applicant on November 17, 1900, asked for permission to lay down a 3-inch pipe from a certain point to his property. On November 21 the Town Clerk wrote that the Council could not grant a larger pipe than 1½-inch, and inquired whether applicant, in the event of permission being granted, would be prepared to pay water rates and leading licence from the date the pipe was laid. On November 28 the applicant replied that he was prepared to pay in advance for a leading licence. Thereafter, in reply to the letter of November 28, and one of January 21, which is not included among the papers, the Town Clerk again wrote on January 30 saying that permission would be given to lay down a 2-inch pipe from the required place, provided he first paid his arrear water rates, viz., £2 5s.; that he would also have to pay in advance for a water leading and be responsible for all damage caused by his pipe.

In reply to this, the applicant, on March 21, wrote offering to pay the £2 5s. under protest, calling upon the Council to lay down or cause someone to supervise the laying down of the pipes, and offering to pay the leading licence as soon as he was informed of the amount thereof. On April 10 an answer came refusing payment under protest. It appears from the applicant's answering affidavit that the £2 5s., viz., householder's rates for 7½ years, was for the first time demanded from him on 21st November, 1900. The bye-law which is attached to the respondent's affidavit and is here material, after providing that the Council should, when it appeared to them requisite, cause to be made watercourses and ditches, and that occupiers of erven should keep clean public watercourses passing through their property, goes on to say: "Provided always that all private watercourses and leadings from the public water furrow shall be made and kept in proper repair by the party using the same; and, further, that each party making or causing to be made such private watercourse or leading shall make or cause to be made such sluice or flood gates as the Council shall approve. And no person shall make any such private watercourse without the permission and under the control of the Council, and the Council shall have the right to levy such rates as they may deem fair and reasonable for such private watercourse." A considerable portion of the affidavits deal with the question whether or no the £2 5s. was due for arrear rates, and certain letters were put in bearing on this question. The bye-law first cited provided that every householder should pay a certain rate per annum, but as it was not proved that applicant had been a householder during the years for which he is charged (he had apparently occupied three rooms on Grunewald's premises and boarded with Wylde), and, as the respondent Council seemed to admit that there was no ground for liability except as a householder and under the provisions of the bye-law now under consideration, I come to the conclusion that the respondent Council has failed to establish the applicant's liability to pay the £2 5s. According to the contention of applicant's counsel, this finding would dispose of the case. It was, he submitted, the one essential point in issue; whilst it was argued for the respondents that, apart from the question of liability to pay this £2 5s., the respondents had a discretion in the matter, and that the order prayed for could not be granted. Paragraph 6 of the Mayor's affidavit, to which it is useful at once to refer,

states that "This Council was quite willing to grant the same privilege (of a private water leading) to the said De Beer, provided he first paid all arrear rates owing by him, the payment of which he has so far evaded." The question is one of some nicety, and not without importance, and, as no authorities were cited during the argument, I thought it desirable to take time to consider my judgment. I may at once state that I take the water rates at issue to amount to £2 5s. It is true that Annexure C attached to the Mayor's affidavit shows a further sum of 30s. as being due as assessment rates, but the bye-law attached to the affidavit makes no reference to assessment rates. The letter of January 30 makes the consent of the Council conditional on the payment of £2 5s., and, if my memory serves me right, the argument went wholly on the assumption that, apart from the general legal question involved, the point in dispute was the 45s. alleged to be due as householder's water rates. Consequently I ignore that sum of 30s. for the present. Every case of this kind must to some extent depend on its own merits. In this matter the issue is very much narrowed by the admission made in paragraph 6 of the Mayor's affidavit. But for that admission candidly made, and which indeed was a re-statement in part of the position taken up in the letter of January 30, there would have been greater difficulty in sustaining the applicant's prayer in its present form. Mr. Hutton argued broadly that there was discretion in the Council, and that therefore there was no legal right on the part of the applicant, whose application could not therefore be admitted. The argument is certainly not wanting in plausibility, and I cannot regard the matter as being free from doubt. In a certain sense, however, the applicant has a legal right. The respondents are not private individuals, and cannot act arbitrarily, but only on grounds of justice and equity, and, where one finds that a certain permission has been granted to some erf owners in the place, there is at once a presumption that others who will conform to the like conditions are entitled to a like permission. There can be no *delectus personae* in such a case, nor do I wish to suggest that any *delectus personae* has been operative. Reading the regulation as I best may, I am inclined to think that the applicant has a right to a private water leading, subject to the consent of the Council, which consent can only be withheld on just and reasonable grounds, and subject, of course, to any such conditions

governing such a right, as lawfully obtain in that connection in the Municipality. (Bevan I, 372, *On Negligence*). Now, the only objection, according to the letter of January 30 and the sixth paragraph of the Mayor's affidavit (subject as regards the latter to the qualification already noticed), is the non-payment of the sum of £2 5s. Without inquiring now whether that is a wholly expedient way of endeavouring to get payment, instead of directly suing the applicant, it seems sufficient to say that I find no proof of liability to pay that sum of 45s., and that therefore the objection is not well founded. On this reasoning there is the less difficulty about interfering with the discretion of the Council, or, rather, the interference is more apparent than real. They have sufficiently exercised that discretion, and the only objection taken in that exercise of discretion appearing to me to be unfounded, I think the grounds for an interdict are sufficiently shown. Three or four cases in our courts are helpful in this connection: *The New Gordon Diamond-mining Co. v. Du Toit's Pan Mining Board* (9 Juta, 150), *Black v. Town Council of Cape Town* (4 Sh., 42), *Short v. Town Council of Cape Town* (15 S.C.R., 190), and *Claremont Municipality v. Hudson* (9 Sh., 190). I mention these cases, not because I wish to consider them here, but to show that I have not lost sight of them. I make one excerpt from *Short's* case, however, where the Chief Justice remarks that "If the Town Council refuses its consent to the building, unless a decision thus based on a wrong decision is adhered to, the applicants must have a legal remedy of some kind. It may be that they have an action for damages, or for a declaration of rights, or for an interdict restraining the respondents from interfering with the erection of the proposed building." To order an action for a declaration of rights, or even for damages, seemed to be a course which one should only adopt in this case if it were absolutely necessary, and, on the whole, I think that one should here act on the maxim *boni judicis est jurisdictionem ampliare*, and hold that there is authority to grant the order. That seems to be the soundest course in the interests of all parties where the sum in dispute is small, and there is no intricacy of facts for the unravelling of which an action for a declaration of rights would be desired. If, again, an action for damages could lie, it would surely be owing to the infringement of a right, and given the right here, the interdict can also under the circumstances issue. The applicant

must, of course, submit to the conditions lawfully obtaining in respect of private water leadings, as, indeed, I understand from his counsel, he is prepared to do, and the sluice-gate or flood-gate must be such as the Council approves of. We have no right to anticipate that such approval will be withheld on wanton or improper grounds, now that the legal question in dispute has been settled. Seeing that the Council opposed the laying of a private water-leading on grounds which meant a pecuniary benefit to themselves, I think that the costs must follow the result, and be paid by them. I would have been prepared in this case to suspend the operation of the interdict till the 12th July, so as to give the respondent Council an opportunity of moving, on notice to the present applicant, to set aside the interdict (and to recover the costs) on the ground only that the 30s. (set out in Annexure C to the Mayor's affidavit) was a debt owing to them, and that the non-payment thereof was a ground for setting aside the interdict unless or until it was paid, and for recovering these costs. But seeing that the argument, according to my recollection, went wholly on the item of 45s., that no sufficient facts are set out in the affidavit to enable me to adjudicate on the other item of 30s., that the Council's letter of January 30 makes the payment of the 45s. only a condition precedent to leave being obtained, and, above all, seeing that the respondent's attorney, in the absence of his counsel (who is no longer in town), has intimated in court that, apart from the legal question, the only dispute is as to the 45s., it seems unnecessary to keep the matter further in suspense, and I accordingly make the order already indicated. It was ordered that the Council be restrained from obstructing the applicant in laying down a pipe from the watercourse to the property of the applicant referred to in his petition, such pipe to be of such reasonable size, regard being had to the correspondence herein of record, and its sluice or flood-gate being such as may be approved of by the Council, and to be laid from the point referred to in the Council's letter of January 30, and subject to such lawful conditions regarding water-leading and payment of water rates and leading licence as obtain in the Municipality or may be appointed by the Council.

Mr. Searle, K.C. (for respondents, now appellants): The bye-law in dispute reads as follows: "The Council shall, when it shall appear to them requisite, cause to be made, provided, and built such bridges, sluices, and dams, roads, reservoirs, watercourses, pumps,

wells, fountains, and ditches, and shall make such alterations in the same as they may deem necessary, and shall cause the same to be kept at all times in good and sufficient repair; provided, however, that each occupier of an erf shall be bound to the extent of his or her erf to keep clean and in such a state of order and repair as the Council shall desire (but not to mason out the same) such of the public watercourses as pass by their property; provided always that all private watercourses and leadings from the public water furrow shall be made and kept in proper repair by the party using the same, and, further, that each person making or causing to be made such private watercourse or leading shall make or cause to be made such sluice or flood-gate as the Council shall approve. And no person shall make any such private watercourse without the permission and under the control of the Council, and the Council shall have the right to levy such rates as they may deem fair and reasonable for such private watercourses, and every householder shall pay the sum of six shillings per annum; also, where such businesses are carried on as baker, butcher, miller, brewer, hotels, boarding-houses, and smiths, the sum of eighteen shillings per annum shall be paid. No person may make a private watercourse without leave of the Council"—and the whole point is, whether under the bye-law the Council can be *compelled* to give a private leading.

[Maasdorp, J: What purpose is this private leading to serve—is it to supply drinking water, or other water?]

I suppose it is to supply both. The "leading licence" is as follows:

"STUTTERHEIM MUNICIPALITY.

"LICENCE FOR WATER LEADING.

"Granted to _____ to lead water from the _____ furrow hours on every _____ in each week, viz., from _____ a.m. to _____ p.m., one leading only. This licence expires on the 31st _____, 18 _____, and is granted subject to the conditions endorsed on the back.

"This licence is granted subject to the following conditions:

"1. That the person to whom it is granted shall only take the water on the days and during the hours specified.

"2. That in the event of there being no water in the furrow or only sufficient for the wants of the town on the day or time allotted to the licensee, the Council will not hold itself liable in any way to the licensee, nor will he be allowed to take it any other day or time.

"3. That the person to whom this licence is granted shall not take the whole of the water, but shall leave sufficient in the furrow for the wants of the town, culinary purposes, and other persons' leadings.

"4. That the person to whom this licence is granted shall have a proper sluice-box, gate, etc., constructed (as the Council shall deem sufficient), and shall keep the same in good order and repair, and shall not alter or remove it during the continuance of this licence without the Council's permission.

"5. That should the person to whom this licence is granted, his servants, or members of his household contravene any of the conditions on which it is granted, the Council shall have full power to cancel the same forthwith."

Respondent wrote on November 28, 1900, that he was prepared to pay for laying down a leading pipe. On the same day he also wrote excepting to the water rate which had been charged against him. Another letter (not in the record) was sent on January 21, 1901. On January 30 respondent wrote in reply to a communication received from the Town Council, asking what the amount was of a charge for a water leading licence, and what rights were connected with such leading, and also protesting again against the ordinary water rate the Council sought to exact from him as excessive. Nothing further happened till March 21, 1901, when respondent wrote, tendering, under protest, £2 5s., the amount charged for alleged arrear water rates. This, by letter dated April 10, the Council refused to accept, stating that they could not receive payment under protest. That letter closes the correspondence. Mr. Justice McGregor (of the Eastern Districts Court) granted a *mandamus* to compel the Municipality to put down a private watercourse to respondent's property, and against this decision the Council now appeal, as they claim to have discretion to refuse to grant this request.

[Buchanan, A.C.J.: Then the Council are willing to grant the application if the applicant will pay the rates in arrear?]

Yes, they say they have a discretion to refuse or grant the application, and they justify the use of their discretion by saying that applicant has not paid his rates.

[Jones, J.: What do you contend for?]

That the Municipality cannot be compelled to give a private watercourse. All the cases hitherto before this Court are in our favour.

[Buchanan, A.C.J.: Even those cases in which Municipalities were ordered to grant licences?]

Yes, because in such cases no discretion was vested in the Municipality. But see *Municipality of Wynberg v. Wilson* (7 Juta, 398). The Court has always refused to interfere where discretion has been vested in the Council. *Clark v. Town Council of Cape Town* (4 Sheil, 42).

[Buchanan, A.C.J.: In that case there was an attempt to show that the Council was not using its powers *bona fide*.]

See also *Short v. Town Council of Cape Town* (15 S.C.R., 190). In that case the Court (p. 196) implied that it would not decide any matter of specific performance on motion, but that an action must be brought. Then, again, the Court will not override a bye-law of the Town Council.

[Buchanan, A.C.J.: The Town Council are quite willing to grant permission for the watercourse if he will pay his arrear rates.]

They have absolute discretion to grant or refuse. *New Gordon Company v. Du Toit's Pan Mining Company* (9 Juta, 150). The only remedy against a public body having discretion is by action for damages.

[Buchanan, A.C.J.: Have they exercised their discretion? They say that they will grant a 2-inch, instead of a 3-inch pipe, if he pays rates, which he says are not due.]

The Court cannot say what discretion the Council should exercise. *Carter v. Town Council of Cape Town* (December 4, 1900). The whole point is, whether the Court will override the decision of the Council.

[Buchanan, A.C.J.: The difficulty is that in the exercise of their discretion, on the Mayor's own showing, they are quite willing to do what they are asked to do, provided that applicant will pay a claim, which he disputes.]

They are not obliged to give any reason, but can fall back on the exercise of their discretion. The form of licence already quoted shows that the Council have a right to refuse a licence, and *a fortiori* to impose limiting conditions. This is also evident from the Town Clerk's letter of January 30, 1901.

[Buchanan, A.C.J.: Is not clause 2 of that letter (i.e., insisting on payment of disputed arrears as a condition precedent to obtaining permission to lay a 2-inch pipe) *ultra vires*?]

No, in face of the bye-law, this Court cannot override the discretion of the Council. There are no grounds for its doing so. Here there was clearly no contract, for the parties were not agreed. The duties of public bodies having discretion are very clearly laid down in *Julius v. Bishop of Oxford* (5 App. Cas., 214). It is true that some months ago the Town Council were willing that applicant

should have his private leading under certain conditions, which he failed to accept. Now they have withdrawn their permission.

[Buchanan, A.C.J.: They have exercised their discretion, and said: "You can have the leading, if you pay the rates."]

[Jones, J.: The rates you demanded were tendered, as the Town Council admit in their letter of April 10, 1901.]

That was no real tender, but a tender under protest. Petitioner did not accept our condition.

[Buchanan, A.C.J.: He took no exception to your condition, and that was surely agreeing to it?]

No, he agreed to pay a leading licence, but he never agreed to pay water rates; besides, the Council are not bound to give any reason for their refusal.

[Buchanan, A.C.J.: The Mayor's affidavit gives a reason, viz., that respondent refused to pay £2 5s., which he said was never due.]

Again, neither this Court nor any English Court has ever decided a question like this on motion. The affidavits are very meagre, and it is quite foreign to our practice to compel a Town Council to do this work.

[Buchanan, A.C.J.: They do not object to do it if the £2 5s. is paid.]

They did not, but they do now. They would not give a leading now even if he paid the £2 5s. The Town Council now take the ground that they have absolute discretion, and that they are not bound to grant the leading. See *Queen v. Kensington* (12 Q.B., 654).

[Buchanan, A.C.J.: In that case the surveyor had not certified; but suppose he had certified, under condition that the certificate should be inoperative until the applicant had done something else?]

The consent was never really granted, because the applicant would not consent to the terms proposed by the Town Council. Other cases in which a similar refusal has been upheld are *Regina v. The Three Fishers of Whitstable* (7 East, 353). In that case the Court refused to override a bye-law, but *Julius v. Bishop of Oxford* is the leading case, in which many other cases are discussed (vide judgments of Penzance and Blackburn, L.L.J.J.). Even supposing the Town Council said: "We will not give the leading until you pay your rates." That would have been quite legitimate.

[Buchanan, A.C.J.: It would have come very near *mala fides*.]

No; for see *Clark's Case*.

[Buchanan, A.C.J.: In that case the application was refused on the ground that the building would not be for the advantage of the town. There was no question of exacting money.]

[Mr. Searle quoted the report (4 *Sheil*, 42).

[Buchanan, A.C.J.: There the Court agreed that there was a *bona fide* objection to the bow windows.]

It was not on that ground that the objection was made, but on account of the stoep.

[Jones, J.: In *Kimberley Town Council v. L. and S.A. Exploration Company* (1 Ap., 385, and 2 Ap., 10), the Supreme Court set aside the absolute discretion of the Municipality.]

That was not *in pari materia*. This is a matter peculiarly within the duties of a municipality. Neither in *Clark's Case*, nor in *Short's Case* would the Court override bye-laws of the Town Council on motion. In the case of the *Kimberley Town Council* the valuation had been set aside as not being *bona fide*. That case was not at all on all fours with the present case.

Sir H. Juta (for respondent): In the Court below there was no question raised as to whether applicant had agreed to accept the conditions of the Town Council or not. The point then is: "Can we demand that a public body should not refuse to exercise its discretion unless we agree to do certain things which in their capacity as a Council they have no right to exact?"

[Mr. Maasdorp, J.: Suppose the Town Council gave you permission to-day and revoked it to-morrow?]

That would not meet our case. Here the Town Council have exercised their jurisdiction, and they are trying to levy blackmail on us. They say: "We will take care you do not go into court, but we have certain powers, and we will not exercise them in your favour unless you pay something which we cannot prove to be due." That is a monstrous exercise of discretionary powers. The Town Council has consented to this leading, but suspends the effects of this consent until certain blackmail is paid. As to the exercise of discretion, vide *Maxwell's Interpretation of Statutes* (p. 172). The same reasoning given by the Court in this case is to be found in *Short's Case*. *Carter's Case* was on a different footing. He did not ask for something which every other member of the public had, but tried to establish a private right. In this case all the facts are before the Court, and nothing could be gained by an action. The Town Council said: "You

can have your leading, but you must give something which we say is due, and you deny to be due." The Town Council is bound to do what they have said is perfectly right.

[Maasdorp, J.: Suppose they had refused permission, and given no reason for so doing, could you have compelled them?]

No. See *Clark's Case*. We should have had to show *mala fides*. If we could have proved that the real reason of refusal was to extort payment of a disputed debt without protest, surely the Court would not uphold their refusal?

[Jones, J.: McGregor, J., found that the rates were not due, as applicant was not a householder at the time.]

Yes, and neither here, nor in England, can a case be cited in which a public body has used discretionary powers to extort money. Such action would be quite *mala fide* and hence the cases cited by appellants do not apply.

Mr. Searle (in reply): There is no reported case in which the Court has interfered with the discretion of a public body. *Queen v. Vestry of S. Pancras* (24 Q.B.D., 371) has been cited by the other side, but it is not in point.

[Jones, J.: In that case they had not exercised their discretion, here they have.]

In that case the Court said: "We will compel you to exercise your discretion, but once you have done so, we have nothing further to do with you." In this case the Council has given water leadings to three persons only, and only during the pleasure of the Council. A leading subject to these conditions has been offered to applicant, and he has refused to accept it.

[Maasdorp, J.: Does the regulation contemplate that the licence shall be *durante beneplacito*?]

Yes, because the supply of water is very precarious. The privilege of a private pipe is a very special one, and the applicant could have had a furrow under the usual conditions, but refused to accept it.

In giving judgment, the Acting Chief Justice said: The Municipality of Stutterheim is a Municipality constituted under Act 45 of 1882, which Act gives the Council of the Municipality powers, *inter alia*, to pass bye-laws regulating the supply and distribution of water. Under these powers Bye-law No. 6 was passed by the Council, which authorises the Council to make and provide watercourses, among other things, and to keep them in good and suffi-

cient repair, and it also provides that "each occupier of an erf shall be bound to the extent of his or her erf to keep clean and repair as the Council shall desire, such of the public watercourses as pass by their property." And then it goes on to say: "Provided, always, that all private watercourses and leadings from the public waterfurrow shall be made and kept in proper repair by the party using the same, and, further, that each person making or causing to be made such private watercourse or leading shall make or cause to be made such sluice or flood-gate as the Council shall approve. And no person shall make any such private watercourse without the permission and under the control of the Council." Under this bye-law, Mr. De Beer applied to the Council for permission to have a private water-leading. It appears that other persons have been granted this privilege, and he applied for the same privilege as had been granted to these other persons. Construing this bye-law, there is no doubt that a certain amount of discretion is vested in the Council as to granting their permission to make these private watercourses; but I think one may adopt the language of the learned judge in the Court below in saying that, although there is discretion in the Council, the applicant has to some extent a legal right. He says: "The respondents are not private individuals, and cannot act arbitrarily, but only on grounds of justice and equality, and where one finds that a certain permission has been granted to some erf owner in the place, there is at once a presumption that others who will conform to the like conditions are entitled to a like permission." About the time this application was made, a dispute existed between the Council and Mr. De Beer as to his liability for certain rates, which had been assessed over the past seven or eight years. These rates are not leviable under this regulation at all, but under another regulation altogether, and the question in dispute was whether or not he was a householder. The amount of the rates claimed was small, but the principle in dispute is of considerable importance. The claim made, according to the Mayor's affidavit, was for the sum of £3 15s. for arrear rates, but after correspondence, £2 5s. was demanded by the Council from Mr. De Beer. Mr. De Beer denied liability altogether. The Council, after considering his application for a private water leading, and after distinctly granting it, made their permission subject, according to the letter

of the 30th January, to the condition that Mr. De Beer should pay these arrear rates. Their condition was that permission would be granted him to lay a 2-inch pipe from the furrow near Mrs. Schneider's property to his property, provided he first paid his arrear water-rates, namely, £2 5s. It was also granted subject to certain other conditions, which seem to be the usual conditions of the Council, and also subject to the permission only continuing during the pleasure of the Council, which, according to the blank form put in, is also a condition imposed on all other persons to whom such permission is given. These all seem to be reasonable conditions, and are not in dispute in this case. It was said in argument that applicant never agreed to submit to these conditions, but I find in the judgment of the learned judge in the Court below this: "The applicant must, of course, submit to the conditions lawfully obtaining in respect of private water-leading, as, indeed, I understand from his counsel, he is prepared to do." The whole dispute in the Court below was whether De Beer was liable for this £2 5s. arrear rates or not. It is admitted the Council has a right to exercise its discretion as to granting or refusing a water leading, but this discretion must be exercised in a *bona-fide* manner. In this case they have exercised that discretion, and have granted permission for water leading, but, as the learned judge in the Court below said, they have no right whatever to make the exercise of this discretion a lever for obtaining payment of a debt which was in dispute between the parties, and which has no reference to the private water-leading granted by them. They converted this permission into a means of obtaining pecuniary benefit. No doubt the amount was small, but the principle is great. De Beer, when he received this permission from the Council, tendered the £2 5s. which were claimed by the Council, and which he contended were not due by him, but he tendered payment of this amount under protest. The Council, instead of accepting this money as they ought to have done, leaving the question of liability for these rates to be decided in the proper manner, returned the money and said: "Unless you pay without protest we will not give you this water-leading." It is not as though there was any ground, any justification, any reason for the Council refusing to grant permission for this water leading. They had granted it; as the Mayor says: "We

are quite willing to grant permission, providing you first pay your arrear rates." Now this differs very much from other cases in which the Court has refused to interfere with the exercise of discretion by a public body. In this case the public body has exercised that discretion, but what the Court says is that, having exercised this discretion, they were not entitled to use it as a lever for getting something outside. In a serious case, it would amount to clear want of *bona fides* for a Town Council or other public body to use their discretion to force people to comply with demands which they dispute. In the case of *Clark v. The Town Council* it was urged that the Town Council were exercising their rights in refusing to sanction the erection of certain buildings in order to compel an abandonment of certain prescriptive or other rights to a stoep, but the Court there clearly decided that, as a fact, there was no proof that there was any such *mala fides* on the part of the Council. It was held that the Council were exercising a *bona fide* right in saying that the plans were such as would not be beneficial to the public. For that case to be in point the Town Council would have to have passed the plans, and then to have tried to enforce a condition which had no connection with the plans themselves, and to have said that they would not allow the work to be carried out without complying with that condition. If that had been proved, there certainly would, in my opinion, have been *mala fides* on the part of the Council in refusing to pass the plans. But the learned Chief Justice, in giving judgment, distinctly pointed out that *mala fides* was not proved, and said that he had reason to believe from the evidence and affidavits before him that the Council *bona fide* refused to sanction the plans because they did not consider them beneficial to the interests of the town. In this case a further objection has been taken on appeal to the form of procedure adopted being by motion instead of by action. If facts had been in dispute which could not be settled on the papers put before us, the Court might have directed pleadings to be filed, but I may point out that no such objection was taken in the Court below. The whole question before the Eastern Districts Court was whether or not De Beer was liable to pay this £2 5s., and the learned judge went into this and decided on the affidavits that he was not liable, and therefore that the Council had no right to make payment a condition on which to grant this permission to have a

private water leading. I would rather say that the two things ought to be kept entirely separate. It is said that it is in the discretion of the Council to grant permission or to refuse it, but the answer to that is clear, namely, that the Council had granted permission, only with a condition attached to it, which was an improper condition. Mr. Searle urged that one of the conditions upon which the Council granted permission was that it should continue only during the pleasure of the Council. That seems to be the ordinary condition on which permission for these water-leavings is granted, and that does not mean that the Council may at its own will withdraw the permission from one to whom it has been granted, and not from another. It simply means that under circumstances which, in the public interests of the town, might necessitate the exercise of the Council's authority, they may withdraw the permission. The form of the judgment given in the Court below is perhaps a little uncertain, but in effect it is what we think right. However, I think that to make it distinct, certain words may be removed from the judgment, and certain other words substituted to make the meaning clear. Therefore, in place of the words "such pipe to be of such reasonable size, regard being had to the correspondence herein of record," there will be inserted: "Such pipe to be laid subject to the control of the Council, and to be of the size approved by the Council in their letter of the 30th January." We do not wish to interfere with the Council's rights to exercise its authority in any way that the bye-law requires. We only say that, having in their discretion granted permission, they cannot now stop the respondent from carrying out the permission, simply because he refuses to pay arrear rates, which may or may not be due from him, and which the Council may in proper form seek to recover from him. The appeal must be dismissed, with costs.

Mr. Justice Jones said he wished to say a few words in regard to what appeared to be the principle involved in that case. If the Council had discretionary powers, and exercised those powers in a fair manner, then no court of justice would question the exercise of that discretion. But when they obviously did not exercise that discretion, or where they exercised what was not discretion at all, then the Court would interfere. And when they exercised discretion, as they did in this case, there was only one course for the Court to pursue. If they choose,

after having exercised discretion, to withdraw again, simply because some wretched little amount like £2 5s. was owing, and then gave another decision, it was certainly not exercising the function which the law intended to confer upon them. I would go further, and say that the Council had been guided in their conduct by *mala fides* rather than *bona fides*.

Mr. Justice Maasdorp said the Council went beyond their discretion, and acted improperly. He concurred.

[Appellant's Attorneys, Messrs. Innes and Hutton; Respondents' Attorney, G. Trolip.]

REX V. LEVIN.

1901.
} Sept. 10th.

This was an appeal from the conviction by the Acting Resident Magistrate of Cape Town of appellant and another man named Schroeder for the crime of theft. They were charged on July 27 in Cape Town with wrongfully stealing a case of whisky from His Majesty's Customs, also a case containing sewing machines, in the possession of the Harbour Board. They pleaded not guilty, but were found guilty, and sentenced to three months' hard labour each.

Mr. Searle, K.C., appeared for the appellant and Mr. Howel Jones for the Crown.

The Acting Chief Justice: Is the objection a legal one or one of evidence?

Mr. Searle: It is on the evidence, my lord. Levin was driver of a wagon which had to bring up cases to some person in Cape Town, the cases having been loaded up by McKenzie's men. Schroeder was a delivery clerk in the service of Carroll, Browne and Co. He had to see things were put upon the wagon. A consignment note was made out. According to this note they had to bring up 28 cases of sewing machines. It was found that 29 cases of machines were on the wagon, and one case of whisky. The case of whisky was under a tarpaulin behind the driver's seat. Levin, the driver, said he knew nothing of it. He did not know how it came to be there. But nevertheless he was found guilty on the evidence of one man, employed by McKenzie, who overheard Levin say to Schroeder, "Can't we get a case of whisky." There was also evidence that he (the driver) had been seen in the store. Otherwise there was nothing. The driver had nothing to do with the loading of the wagon, but because the whisky was found on the wagon with the sewing ma-

chines he was found guilty. Counsel held that, having in mind the state of confusion existing at the Docks, it was rather hard on the driver to find him guilty on such bare evidence. At first the same man was charged because an extra case of machines was found on his wagon, but this charge proved to be groundless. The charge in regard to the whisky was, counsel submitted, equally groundless.

Counsel produced the evidence taken during the hearing of the case in the Court below. It was to the effect that a case of whisky was standing at the door of the store where the goods were being loaded; that Schroeder was sitting on the case; that Levin was overheard saying to Schroeder, "Try and get a case of whisky"; that suspicion being aroused, the wagon was searched but nothing found; that the case of whisky at the door disappeared, and a second search of the wagon was made, when the case was discovered under a tarpaulin behind the driver's seat; and finally that accused could give no explanation of how it got there. Witness, in cross-examination, had admitted that the case could not have been put there by Levin, and that he had nothing to do with the loading of the wagons, also that they did not see the case removed from the door to the wagon.

Schroeder did not now appeal, only Levin. In his (Mr. Searle's) opinion there was no evidence to convict Levin. Practically all the evidence was that of the man who heard him say to Schroeder, "Let us get a case of whisky." The driver had nothing to do with the loading, and he could not possibly have taken the whisky. The fact that more cases were on the wagon than should have been there was not in itself incriminating. The additional cases had been put on by some mistake. There were actually 30 instead of 28 cases on the wagon. Mistakes such as this were constantly occurring. Anyhow, according to the evidence of the checkers, it was impossible for the man to have taken the case, and it must have been placed on the wagon by either Schroeder or the Coolies.

Mr. Justice Jones: Do you appear for Schroeder also?

Mr. Searle replied in the negative, but expressed the opinion that in Schroeder's case there likewise was not sufficient ground for conviction. He held that it was not right to pounce down on men in the manner disclosed in this case. No intention had been shown on their part to convert the goods to

their own use, much less of any attempt to so convert them. The whole case was one of vague suspicion, which was never verified. In these circumstances he held that the conviction of the Court below should be set aside.

Mr. Howel Jones was not heard.

The Acting Chief Justice. The appellant Levin and a man named Schroeder were charged before the Acting Resident Magistrate of Cape Town with the crime of theft. Levin, who now appealed, was driver of a waggon, and Schroeder, the other accused, was the tallying clerk in charge of the wagon, which was down at the Docks loading sewing machines. Twenty-eight cases of sewing-machines were put on the wagons by the Coolies at the store, who stated they did not put any whisky on the wagon. While the wagon was being loaded a box of whisky was standing at the shed door, upon which case the tally clerk was sitting. While the prisoners were at the shed, one of the witnesses heard the driver say to Schroeder: "Try and get a box of whisky." This aroused the man's suspicion, and he reported the matter. He was told to overhaul the wagon, which he did, but found nothing. On looking for the case of whisky which had been standing near the door, he found that it had been removed, and a second examination of the wagon resulted in its being discovered under a tarpaulin behind the driver's seat. The driver must have known what was being put on the wagon, and also Schroeder, who was in charge of the loading. They both said they had no idea how the whisky came to be on the wagon. The Court had the facts that the whisky was found on the wagon, that machines and not whisky were being loaded, that the Coolies did not place the whisky on the wagon, and that Levin said to Schroeder, "Try and get a box of whisky." Then they had the position of the prisoners, and the want of explanation by them. Whether Schroeder put the whisky on the wagon or Levin was not clear from the evidence. It appeared that the Coolies did not put it there. In these circumstances, and with this evidence before the Magistrate, his lordship considered it impossible to say that there had not been sufficient evidence to support the conviction. The appeal must be dismissed.

SMITH AND CO. V. BRADLEY { 1901.
AND ANOTHER. { Sept. 9th.

Periculum rei venditæ—Estoppel—

Defendants in the Court below (now appellants) had purchased certain pigs from plaintiff and left them in plaintiff's custody. While plaintiff had charge of them two of them died. Defendants kept back a balance of £4 12s. 6d. when paying plaintiff for the pigs and for his having taken care of them. For this sum plaintiff had sued in the Court below. Defendants denied the debt, and argued that the loss of the two pigs should fall on the seller, in whose custody they had been left. The Magistrate held that in law the loss fell on the purchaser, and that defendants were liable for the full price of all the pigs. On appeal it was argued that defendants having sent plaintiff a cheque in full settlement of his account, and plaintiff having accepted it, he could have no further claim.

Held (1) That as the cheque in question had not been accepted in full settlement by plaintiff, he was not estopped from making further claims.

(2) That the Magistrate's decision as to the liability for the loss of the two pigs was good in law, and that the appeal must be dismissed with costs.

This was an appeal from a judgment of the Resident Magistrate of the Cape Division.

Appellants had been sued in the Court below for the balance of the purchase price of certain pigs, together with costs incurred in feeding and tending them. The Magistrate had given judgment for plaintiffs, and against this judgment defendants now appealed.

The defendants had purchased from plaintiffs 40 pigs for the sum of £35. Part of the contract was that the sellers should keep the pigs for a week at 10s. As a fact, the animals were left for a month, and the sellers

claimed £37, being £2 for the keep of the pigs. Defendants paid £20 on account, and afterwards £12 7s. 6d., leaving a balance unpaid of £4 12s. 6d. Three of the pigs were lost during the time they were in seller's possession, and one of the points in dispute was the question of liability for this loss. The Magistrate ruled that the liability rested with the buyers, and that the defendants were therefore liable for the full amount sued for. He accordingly gave judgment for plaintiffs. Defendants now appealed, on the ground that the death of the three pigs was due to the plaintiffs' negligence, and that therefore no payment was due for them. The Magistrate's reasons for his judgment were as follows: Forty pigs were sold by the plaintiffs to the defendants for the sum of £35. They were not delivered at the time, but it was agreed between the parties that the pigs should remain in plaintiffs' possession for one week. Except three that died in the meantime, the pigs remained in plaintiffs' possession for four weeks. It is admitted that at the end of that time the whole number (40) were not delivered, but I uphold that, after the bargain was made, they remained in plaintiffs' possession at defendants' risk, and although the whole forty were not delivered, as alleged in the summons, defendants were still liable for the purchase price of the lot. Defendants practically admitted the £2 for the keep of the pigs, but maintained that that sum was included in the sum paid by them before summons.

Mr. Benjamin (for appellants): The plea taken in the court below was that of general issue, under which accord and satisfaction could be pleaded. The account submitted shows that a number of claims are in dispute, e.g., the item 16 pigs not delivered, also the difference in value between a hog and a boar. We have settled for everything, save for 16 pigs not delivered. My first point is that once the respondents have received our cheque in final settlement they cannot go back on that.

[Buchanan, A.C.J.: They do not accept in full settlement.]

No similar case has been decided in our courts, but a similar one is alluded to in *Atwell and Co. v. Purcell, Yallop and Everett* (7 Sheil, 408), and see *Sutton v. Hawkins* (8 Carrington and Payne, 259). Respondents, having accepted our money in full settlement, they are estopped from further proceedings. Had they gone into the merits, we should have had a good case on two points. In the

first place, it was admitted by defendants that there was a shortage of 16 pigs.

[Buchanan, A.C.J.: Who was to bear the loss?]

The vendor—see *Van der Linden*, p. 139. The vendors were guilty of gross negligence. Some of the pigs were drowned owing to the state of the pens. It is the duty of the vendor to take care of the property. Then, again, the vendor in this case was also a bailee for hire. Moreover, it is quite clear that plaintiff has accepted £2 as full compensation for the keep of the pigs. An essential pre-requisite to sustaining his claim for £2 12s. 6d. would have been to refuse the cheque tendered.

The respondents' counsel was not heard.

The Acting Chief Justice, in giving judgment, said: The plaintiffs sold, and the defendants, through an agent, bought forty pigs for the sum of £35. It was part of the contract that the sellers and vendors, the plaintiffs, should keep these pigs for a week, for which 10s. was to be paid. Instead of being kept for a week, the pigs were not taken away for a month, and the plaintiffs therefore claimed £2 for their keep for the four weeks, making their total claim £37. This amount was accepted by the defendants as correct, as appears in their letter of June 27. They paid £20 on account, and afterwards they paid a further £12 7s. 6d., leaving an amount of £4 12s. 6d. unpaid; and on being sued for this amount, they pleaded a denial of the debt only. In the Court below, as it appeared from the Magistrate's reasons, the question in dispute between the parties was who was liable for the loss of certain of the pigs which had died between the date of the sale and the date delivery was taken by the purchasers. The Magistrate held that in law this risk belonged to the purchaser, that although the whole forty were not delivered, the defendants were still liable for the purchase price of the lot, and accordingly gave judgment for the plaintiffs for the amount sued for, with costs. It is now contended that there was negligence on the part of the vendors, which led to the death of these pigs; but when we come to look at the evidence, we find that there was no evidence at all led by the defendants to prove such negligence, nor is there any such plea on the record. This question, besides being unsupported by evidence, was not even raised in the Court below. However, the appeal has been pressed more upon the legal point, viz., that upon June 25 the defendants sent to plaintiffs a cheque for £12 7s. 6d. in full settle-

ment of the amount in dispute, and it is alleged that this was accepted as such by the plaintiffs. Now, there is no doubt that when a tender is made of a lesser amount than is claimed, and the claimant accepts it in settlement of the whole amount, he is foreclosed, and cannot go further. But in this case the plaintiffs did not accept this cheque sent to them in settlement of the amount due, but wrote back to say that they accepted it as a payment on account only, and would sue at once for the balance. There was therefore no acceptance. This defence also was not pleaded in the Court below, and is only now taken on appeal; but although taken on appeal, in the absence of any acceptance of this cheque in full settlement of all claims, this defence cannot stand. As I have said, the plaintiffs did not accept the part payment in final settlement; but said they would accept it on account only, and that they would sue for the balance. The plaintiffs said no more, but left the matter alone; and when it came before the Magistrate they set up quite another defence. The Magistrate's judgment seems to be perfectly sound, and the appeal must be dismissed, with costs.

Mr. Justice Jones and Mr. Justice Maasdorp concurred.

[Appellants' Attorneys, Minchin and Sonnenberg.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

COHEN V. WOOLF.

{ 190'.
Sept. 11th.

Sale of Land—Verbal Contract.

Plaintiff and defendant had agreed to purchase jointly a certain piece of land. Thereafter defendant bought the land aforesaid in his own name and repudiated the said agreement. No written contract between the parties had been entered into.

Held, that since the evidence showed that there was a verbal

contract between the parties, defendant had defrauded plaintiff by purchasing the property in his own name without plaintiff's sanction, but, that in view of the facts (1) that money had subsequently been expended on the property and (2) that it would not be convenient to order specific performance, damages were given for £50 and costs.

This was an action for a declaration of rights, and for damages for breach of contract.

The declaration set forth that the plaintiff is a trader, and resides at Bree-street, in Cape Town, while the defendant is a speculator, and resides at Broad-road, Wynberg. On or about April 27, 1901, the plaintiff and the defendant, by an oral agreement, entered into partnership for the purchase of certain ground situate in Cape Town, on the terms that each should contribute one-half of the price and of the costs of the transfer, and of all disbursements in connection with the said ground; that the ground should be transferred into their joint names; and that they should share equally in the profits to be derived therefrom. Thereafter, and whilst the said partnership agreement was still subsisting, the defendant purchased the said ground in his own name only. The plaintiff tendered payment of his half-share of the price and of the costs of transfer, and of all other disbursements (if any) that had been properly made by the defendant as such partnership as aforesaid in connection with the said ground. The plaintiff claimed: (a) An order declaring that the plaintiff and defendant are partners in equal shares in respect of the said ground, and that the plaintiff is entitled to one-half interest therein; (b) that the said ground be transferred into the names of himself and the defendant; (c) an account of all disbursements made by the defendant in regard to the said ground; (d) £50 damages for breach of contract; (e) alternative relief; (f) costs of suit.

Defendant's plea was a special denial that he had entered into the agreement set forth in the declaration, or into any agreement of partnership in regard to the land in question, which he admitted he had purchased in his own name. Wherefore he asked that the plaintiff's claim be dismissed, with costs.

Mr. Wilkinson appeared for the plaintiff and Mr. B. Upington for the defendant.

Mr. Wilkinson called,

Bensimon Cohen, the plaintiff, who said he lived at 101, Long-street. At three o'clock on the afternoon of April 27 last the defendant called at his house. Witness was in bed at the time, but he got up and saw defendant in the dining-room. Besides defendant and witness, the latter's wife, daughter, son, and cousin were present in the dining-room. Witness told defendant that he had sold his property in Bree-street, and the defendant asked witness if he would go into speculation with him. Defendant then said he had got the refusal of a piece of ground in Sir Lowry-road, measuring about sixty feet by sixty feet for £1,100. He asked if witness would join in the partnership with him. Witness agreed, and said they would go and have a look at the ground. They went out there by tram, and when witness saw the place he said it was all right. They then went to the office of Mr. Woodcock, the owner of the ground. The clerk there said that Mr. Woodcock was not in, and witness then suggested that they should leave a card on behalf of the two of them, stating that they agreed to purchase the ground at the price. Defendant took out a card from his pocket, and asked the clerk, Mr. Nelson, to lend him a pen and ink. Defendant then wrote something on the back of the card to the effect that he, Abraham Woolff, and Bensimon Cohen agreed to purchase the ground at £1,100. Witness could not remember whether the card gave his address. Defendant then handed the card to Mr. Nelson. Defendant and witness then returned to the latter's house, and when they arrived there, witness said to his family in the dining-room, in the presence of defendant, "Congratulate me on being a proprietor again; I have bought the place together with Mr. Woolff in partnership." Witness then ordered some drinks, and the whole family congratulated witness and defendant on being so successful. Then, after staying a little while, defendant went home. When the family were congratulating witness on having along with defendant, purchased the ground, defendant said that was so, and also congratulated witness and himself. When they were discussing the matter during the afternoon they spoke about the payment, and how they would raise the money, and witness told defendant he could get money from Mr. McIntyre, his attorney. On Monday, April 29, defendant came to witness and said that he had seen Mr. Woodcock, and

that everything was all right. That afternoon witness went to his attorney and saw about an advance on the ground. He did not see defendant again until Wednesday, when, in consequence of what his attorney told him that day, he went to the corner of Napier-street and Somerset-road, where defendant was building some premises, and said to him, "Mr. Woolff, what is the latest about our transaction?" Defendant said that Mr. Woodcock had given him a further refusal of the purchase for ten days. Witness then told defendant that he was telling an untruth, because he had just come from Mr. McIntyre's office, where he had been shown a broker's note for the ground passed in the name of defendant alone, and not his (witness's). Defendant said he did not want a partner in the business any more. Witness then said, "If you don't want a partner, allow me something?" Defendant said he would give nothing. Witness then said, "I will give you £50 for your trouble, and you will allow me to have this piece of ground." Witness meant that he would take the whole property. Defendant said he did not want that. Before taking proceedings witness tried to settle this matter amicably. He never saw defendant personally, but he sent people to him to try and bring about a settlement. Witness thought the property was a bargain at the price. He estimated that they could erect a three-story building on the ground, from which they would derive rents which would yield a profit of £400 per annum.

[The Acting Chief Justice said that in the declaration specific performance of the contract was asked, with damages for breach of contract. There was no alternative claim, so that if the specific performance was given the damages would fall away. There would then be really no damage.]

Mr. Wilkinson said that what they really wanted was specific performance.

Cross-examined by Mr. Upington, witness said he had heard that defendant had got property. Defendant on the Saturday afternoon said he wanted witness in as a partner, because he had two other transactions in hand, and the third would be too heavy for him, so he wanted a good partner in. Witness believed defendant was now building on the ground.

By the Court: At the time the partnership was entered into witness told defendant he could put £2,000 into the transaction. That was to go into buildings.

Cross-examination continued: Witness knew on the Wednesday that defendant defi-

nately repudiated the partnership, but he did not at once go to a lawyer, because he tried first to settle the matter without going to law. He never heard between April and July that someone wanted to purchase the property from Woolff. Witness never went personally to defendant to try and settle the matter.

Robert C. Nelson said he was in the employ of the City Flour Milling Company, of which Mr. Woodcock was the manager. Witness knew Mr. Woodcock had a piece of land in Sir Lowry-road for sale. On Saturday afternoon, April 27, the plaintiff and defendant came into the retail department, where witness was employed, and asked if Mr. Woodcock was in. Witness replied in the negative, and then, at Mr. Woolff's request, gave him pen and ink. Mr. Woolff thereupon wrote on the back of a visiting card something to the effect that they closed the bargain in respect to the piece of land. Defendant wrote both names (his own and Mr. Cohen's) on the back of the card. Defendant's name was also printed on the front of the card. Defendant asked witness to give that card to Mr. Woodcock on the Monday morning. Witness did not see Mr. Woodcock on the Monday morning, and as he thought they had settled the matter witness threw the card away. He did not give the card to Mr. Woodcock that week, because he had forgotten all about it. He saw Mr. Woodcock and Mr. Woolff together during the week, so that it did not strike witness that he ought to give Mr. Woodcock the card. Afterwards another card was left by Mr. Woolff, but it was written in pencil. That card was given to Mr. Woodcock himself.

Cross-examined: Mr. Woolff came one morning and asked for the card back, and witness then told him he had thrown the card away. That was after Mr. Woolff had had the summons.

Re-examined: Mr. Cohen was not a personal friend of witness's, but he had known him before as his brother's friend.

Leopold Cohen, son of the plaintiff, and living in the same house, generally corroborated his father's evidence as to the agreement with Woolff being entered into on April 27. When his father and defendant returned after inspecting the ground, and had been congratulated by witness and the others present on closing the bargain, witness asked defendant what they intended to do with the ground, and defendant said they were going to put up a three-story building.

Herman Cohen, a cousin of the plaintiff, and also residing at 101, Long-street, said he was present at the interview between plaintiff and defendant on April 27. Witness gave corroborative evidence as to what then took place.

Mr. Wilkinson closed his case.

For the defence, Mr. Upington called

Abraham Woolff, the defendant, who said that formerly he was an artist, but latterly he had gone in for speculating in land and building. He was acquainted with plaintiff, but the first time he was in plaintiff's house was on April 27. Plaintiff was a distant connection of witness's wife. Witness went to the house because his niece had several times written to him asking him to see plaintiff. When witness went to the house he saw plaintiff, and they spoke at first about family affairs. Afterwards plaintiff said he had sold his property in Bree-street, and was sorry he had done so. Witness mentioned that he had an option of purchasing this ground in Sir Lowry-road, and asked plaintiff if he would give his opinion upon it. They went to the place together, and witness expressed a favourable opinion as to the bargain. He said he would like to become a partner in the transaction, and witness said he would see about it. Witness then went to the office of Mr. Woodcock. He asked plaintiff to wait outside, but plaintiff came inside with him. Mr. Woodcock was not in, and witness then left a card, which simply said that he wanted to see Mr. Woodcock on Monday about the ground. Witness then went to the station, and took the train to his house. He never went back to the plaintiff's house that evening. On the Monday witness saw Mr. Woodcock, and got a renewal for one week of the option to purchase the ground. The same day witness saw plaintiff at his house. He went there, because he wanted to get clear of plaintiff, and he told him that he did not want to buy with him. Plaintiff said he did not care, but he got a little angry. Witness saw the plaintiff on the Thursday or Friday. He asked witness if he had bought the place, and witness said he had. He asked witness if he would take him as a partner. He offered witness £50 to take him into partnership, and witness said he did not want any partnership. Witness spoke about the expenses of transfer, and plaintiff suggested that they should buy the property together, and have one transfer. Witness said that would be humbugging the Government. Since then wit-

ness had not spoken to plaintiff. He had however seen persons sent by plaintiff.

Cross-examined by Mr. Wilkinson: Witness wanted to buy for himself. He did not like partnerships. Witness wanted a man named Sugarman to go into partnership in connection with this property. There was no arrangement between Sugarman and witness. Witness brought up Sugarman before the Zionist Society. The Society fined witness £5 for breaking faith with Sugarman about this property. Cohen went with witness to see Woodcock. They saw Nelson, to whom witness handed a card on which he (witness) had written something. Witness was not sure whether it was Nelson. Witness did not put Cohen's name on the card. Witness did not know why Cohen accompanied him to Woodcock's. Witness asked him to remain outside, but he came in, as it was windy. Cohen had nothing to do with the business upon which witness went to see Mr. Woodcock. After witness told Cohen he would not take him as a partner he became angry. Witness did not tell Cohen that Woodcock had given the option of selling to another. Witness did not go to Nelson and ask him to return the card, nor did Nelson say he had destroyed it. Witness did not remember leaving a second card for Woodcock, or giving a card to Woodcock.

Mr. Wilkinson: I put this to you: that finding that this property was a valuable property, you then tried to get rid of the partnership which you had entered into with regard to it?

Witness: I beg your pardon. There was no partnership between us.

Tom Woodcock, employed by the City Flour Mills, said he had certain property for sale in Sir Lowry-road. He gave the option of purchase to defendant. The option expired on Friday, the 26th April. Witness had never known or heard of Cohen in the matter. On the 29th witness renewed the refusal to Woolff until May 4. The sale was concluded on May 1 for £1,100. The only card witness ever received was before he ever saw Woolff. Woolff called at the office to ask particulars about this ground. The manager received a card (now produced) and left it for witness. On this card was written "Want to know the price and particulars." That was the only card witness ever had.

By the Court: It made no difference to witness, who bought the property, so long as he got his price. If Cohen and Woolff had acted together witness would have sold to them. He sold to Woolff personally.

Mr. Upington closed his case, and counsel addressed the Court.

In giving judgment, the Acting Chief Justice said that the declaration alleged that on April 27 last plaintiff and defendant agreed to purchase jointly a certain piece of land, and that thereafter the defendant, notwithstanding this agreement, which is still subsistent, went and bought the land in his own name and for his own purpose. The plea admitted that the defendant purchased the property in his own name, and for himself, but defendant denied the agreement, and that was the issue between the parties. There was a great deal of force in Mr. Upington's contention that in matters relating to property, it was very desirable indeed that contracts should be evidenced by writing. In this case there was no such contract in writing between the parties. At the same time, if there was sufficient evidence to satisfy the Court of the existence of a contract, where the contract was a verbal one, the Court would accept that evidence. Plaintiff and defendant in this case were not on very intimate terms. They were distantly connected by marriage, but they had had no transactions together before. Plaintiff's allegation was that defendant told him he had the option of a certain piece of ground, and asked him if he was prepared to go into partnership. Defendant said "Yes," and they went off and saw the land. They got back to the house, and there, in the presence of the family, they announced that they had agreed to buy the land, and they congratulated each other on having made the purchase. It was common cause that a partnership was spoken of by the partners, but defendant said that he refused to agree to a partnership, and that he only got plaintiff to look at the ground for the purpose of advising him (defendant). After seeing the ground, they went to the office of the seller, Mr. Woodcock. He was not there, but they saw one Nelson. They asked for Woodcock, and were told he was not there, and then defendant took out a visiting card, upon which he wrote. Defendant said that what he wrote was that he wished to see Mr. Woodcock on Monday morning. Plaintiff, who was corroborated by Nelson, both of whom saw the card, said distinctly that what was on the card was that Mr. Woolff and Mr. Cohen would purchase the property, and avail themselves of the option. Here they had outside testimony showing that what was on the card could not have been written if defendant's story was the correct one. De-

fendant would never have written on this card, "We, Abraham Woolff and Bensimon Cohen agree to buy the property," if, as a matter of fact, Woolff had intended to buy for himself and refused the partnership. He (the Acting Chief Justice) saw no reason why the Court should not accept the evidence of Nelson, who was an independent witness, although Nelson was very careless in the matter of the card. It was said defendant did not require any assistance in buying the property, but this again was questioned by the fact that he had negotiated with one Sugarman with reference to a partnership, and that evidently he was contemplating a partnership. On the whole of the evidence the Court found that it had been proved that there was an agreement, and having made this agreement, it was fraud on the part of the defendant to buy the property in his own name without having obtained plaintiff's permission. Since then, money had been expended on the property, so that it would be particularly awkward to order specific performance. Moreover, if the Court ordered specific performance, the partnership could be terminated immediately afterwards. The Court would give an amount of damages which would be sufficient compensation. The Court thought that £50 at the outside was what Cohen had lost through not being jointly in the partnership. Judgment would be given for £50 damages and costs.

Their lordships concurred.

[Plaintiff's Attorney, J. J. Michau; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

COTTRELL V. TOWN COUNCIL } 1901.
OF CAPE TOWN. } Sept. 11th.

Wrongful Dismissal—Damages.

Plaintiff, who had been engaged by the Town Council, had been dismissed from his employment on notice given by a committee of the aforesaid Council. He now contended that the said dismissal was illegal. Held, that as sections 64, 65, 67, and 68 of Act 26 of 1893 enable the Council to resolve itself into a Committee of the whole Council, and that as section 32 of the Council's Rules of Order provide that the resolutions of a committee so constituted shall have the same effect as if adopted by the

Council out of committee the defendant Council was entitled to judgment with costs.

This was an action for £200 damages for wrongful dismissal.

The plaintiff's declaration was as follows:

1. The plaintiff resides in Cape Town. The defendant is the Town Council of the City of Cape Town, constituted under Act 26 of 1893.

2. On or about 8th February, 1900, the defendant Council, at a meeting duly held, appointed plaintiff as General Outside Foreman, at a salary at the rate of £208 per annum, the appointment being in all respects subject to the rules and standing orders of the Council.

3. Plaintiff accepted the said appointment, and entered upon his duties forthwith, and discharged them thereafter to the satisfaction of the Council.

4. Thereafter, on the 4th May, 1900, plaintiff received a note from the Town Clerk, to the effect that the defendant Council would not require to avail themselves of plaintiff's services after the 5th June, 1900, and that plaintiff was from that date discharged from the service of the said Council.

5. The said notice was illegal and void by reason of no resolution of the Council having been passed removing the plaintiff from his office, as provided by paragraph 82 of Act 26, 1893, and the said notice was given without any due authority, according to the laws and regulations governing the defendant Council, and plaintiff therefore refused to recognise the said notice, and continued thereafter in the employ of the Council, and performed his duties up to June 11, 1900, and was thereafter willing, and tendered, to perform his duties.

6. The defendant Council has refused to recognise the plaintiff as being still in its employ, and by reason of the wrongful dismissal plaintiff has sustained damages in the sum of £200, which sum he has demanded from the defendant Council, but the said Council has refused to pay the same, or any portion thereof.

Wherefore the plaintiff claims:

(a) £200 as damages for wrongful dismissal.

(b) Alternative relief.

(c) Costs of suit.

The defendant Council pleaded as follows:

1. Defendant admits the allegations in paragraphs 1, 2, and 3 of the declaration,

save that it does not admit that plaintiff discharged his duties to the satisfaction of the Council.

2. On May 4, 1900, the Council sitting in committee of the whole Council, considered the services rendered by plaintiff under his engagement, and adopted a resolution that notice should be given him removing him from his engagement after one month, in accordance with section 82 of Act 26 of 1893.

3. By the 32nd Standing Rule of Order of the Council, lawfully made in accordance with section 68 of the said Act, it is provided that after the members shall have discussed a question in committee, and have adopted a resolution thereon, and the subject under discussion shall have thus been disposed of such resolution shall be considered as if adopted by the Council, not in committee, and the Council proceed with the other business, as if it had not been sitting in committee, without requiring any motion for that purpose.

4. Defendant admits that no motion was made in the Council dealing with the removal of plaintiff, save and except the resolution adopted in committee of the whole Council, referred to in paragraph 2 hereof, and says that no such motion was necessary, having regard to the above standing rule of order, subject to which plaintiff was engaged, as aforesaid.

5. Plaintiff received notice on May 4, 1900, of his removal from his engagement, which notice took effect on June 5, 1900, on which date his engagement duly and lawfully terminated accordingly.

6. Defendant admits (a) that plaintiff was willing, and tendered to continue to perform his duties; (b) that it has refused to recognise plaintiff as being in its employ; and (c) that it has refused to pay him £200, demanded by him, or any part thereof.

7. Save as aforesaid, defendant denies all the allegations of fact and conclusions of law in paragraphs 4, 5, and 6 of the declaration.

Plaintiff's replication was as follows:

Plaintiff says that the contract of service entered into between him and the defendant was as set forth in the 2nd and 3rd paragraphs of the declaration, save in so far as the said rules and standing orders of the Council, or any of them, are *ultra vires*, or inconsistent with the terms and provisions of the Cape Town Municipal Act of 1893. *Quoad ultra*, General.

The facts appear from the argument and judgment.

Mr. Wilkinson (for plaintiff): Section 64 of Act 26 of 1893 provides that the Town Council may appoint committees of the whole Council. Section 65 provides that a committee must have its acts confirmed by the Council. The Council cannot say, "Now we are a committee," and when they find they have made a mistake, turn round and say, "Oh, no, we were the Council." Again, this committee of the whole Council was irregularly constituted. No resolution to go into committee had been passed, and therefore, from a legal point of view, the committee was non-existent. It is true that section 68 of the Act empowers the Council to make rules of order, but then they must not be inconsistent with the terms of the Act.

[Maasdorp, J.: Does not section 67 cover the acts of this committee? What proof have you that this meeting of committee was not legally constituted?]

We say that the Council (as such) never resolved to go into committee, and the Council never confirmed the acts of its General Committee. The Council have clearly treated this as a meeting of committee, for there is no entry of it in the minutes of the Council. It has, however, never been confirmed, and section 65 expressly requires confirmation by the whole Council. If a committee of the whole Council is the same thing as the Council, the Council can override the Act. Standing Order 32 is clearly in contravention of the Act. Rule 53, again, is inconsistent with Rule 32, but 53 is in accordance with the Act.

[Jones, J.: What is the advantage of referring back to the whole Council a matter which has already been decided by them as a committee?]

To prevent a committee from usurping the functions of the Council. A committee of the whole Council is only a committee, and here (1) the committee was irregularly constituted; (2) its acts were not confirmed. The only question which can arise is: "Are the words of sections 64 and 65 of the Act imperative or directory?" If a right is involved, the words are imperative. See *Bryce on Ultra Vires* (p. 608). There are a number of cases in which forfeiture of shares was involved, and in which this aspect of the question was discussed, e.g., *Friend v. Bennet* (4 C.B., N.S., 506). So here the Town Council had no power to discharge plaintiff, unless they did so in the way indicated by the Council's own rules. See *Carr v. Corporation of Preston* (6 Ch., D., 463).

Mr. Benjamin: The Town Council can deal with minor matters without going through all the formalities required by Parliamentary rules.

[Maasdorp, J.: But here you have to deal with a committee not constituted by the Council.]

A notice was issued by the Mayor stating that the Council would meet in committee.

[Buchanan, A.C.J.: Was that done under the Act, or under one of the Rules of Order?]

Rule of Order No. 2 authorises the Mayor to convene the Council.

[Buchanan, A.C.J.: Do you argue that, if the Mayor can convene the Council, he can convene a committee?]

Yes.

[Maasdorp, J.: Then the Mayor can constitute a committee?]

Possibly, but the only objection now taken is that of informality. But a number of acts, such as the dismissal of officials and similar minor matters, may be done by the directorate of a company or by a committee of a Council. *Bryce on Ultra Vires* (p. 615). Again, section 64 of the Act gives the Council power to appoint either general or special committees "for any purposes which, in the opinion of the Council, would be better regulated by means of such committees."

Mr. Wilkinson (in reply): Sections 64 and 65 of the Act must be read together. The Council may appoint committees, but no act of such committees is binding on the Council until it has been approved by them. Section 82, again, is quite in our favour, for a committee of the Council is not the Council.

In giving judgment, the Acting Chief Justice said: The plaintiff alleges that he was appointed in February last as outside foreman of the defendants, the Town Council of Cape Town, at the rate of £208 per annum, and he says that under the 82nd section of the Cape Town Municipal Ordinance, he was entitled to continue this office. When we look at the 82nd section, that simply gives the Town Council power at any time to remove any officer of theirs upon a notice of not less than one month, or, in case of misconduct, without notice. If plaintiff had been improperly removed at once without notice, he would have been entitled to one month's salary, but a month's notice was given to him. He now comes into court and says that this notice given to him was not a legal notice, in that it was not given

by the Council itself. Now this was the only ground upon which he could found his claim, which is for £200 damages. Clearly, if he had been dismissed without notice, and there had been no misconduct, he could have claimed a month's salary in lieu of notice, which was £17; but he says that he was wrongfully dismissed, and that notice was wrongfully given. By the 64th section of the Act, the Council may from time to time appoint out of their own body an executive committee, and such other committees as they chose, and of such numbers as they chose. By the 65th section, the Council may, by resolution, delegate to such committee such of their powers as they may think fit. The 67th section says that all meetings of either Council or committee shall be deemed to have been duly convened and held, unless the contrary be proved. Then the 68th section says the Council may from time to time make rules of order, not inconsistent with the terms of the Act, for the regulation of the proceedings and business of the Council. These rules of order have been made for the regulation of the proceedings of the Council, and under these rules it is provided that the Council may, for certain purposes, resolve itself into a committee of the whole Council, and discuss any question before it. The rules and regulations state the reasons why the Council resolves itself into a committee—to have greater freedom of debate and for other things. The 32nd section of these rules provides that, when the Council has resolved itself into a committee, a resolution passed by them shall have effect, as if adopted by the Council when not in committee. Now this does not seem to be an unreasonable thing. True there was the analogy of Parliamentary practise, where a committee of the whole House has to report to the House, which has *pro forma* to adopt the report. But when the Council itself, for convenience of discussion, resolves itself into a committee, when the whole Council is there, there is no reason why such a resolution as this should not be passed without again coming before the Council. I do not see why they should go over the same ground twice, when they had come to a resolution which they say shall be considered binding. In this case the Council had met in committee of the whole Council, and had passed a resolution authorising the Town Clerk to dismiss this man. The only ground upon which exception could be taken was that it was passed by committee of the whole Council, and not subsequently

confirmed by the Council. Now the 32nd rule of order seems to me to be a reasonable one, and it does not seem necessary that a resolution passed by a committee of the whole Council should require to be confirmed by the Council. There was no reason why this rule, which seems to be a common-sense rule, should not be adopted by the Council. This is the only ground upon which plaintiff can come into Court, and it seems to me a ground which could not damnify plaintiff in any way. Under these circumstances, I think we must hold that plaintiff has no cause of action against the Council on the declaration as filed in his case.

Their lordships concurred.

[Plaintiff's Attorney, J. J. Michau; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice).]

ADMISSIONS. { 1901.
 } Sept. 12th.

Orders were granted admitting James Tait Plowden-Wardlaw and Henry Hamilton Hunter, as advocates of the Supreme Court.

Orders were granted admitting Robert Radcliffe Lindsay Sands and James McLachlan Armstrong as attorneys and notaries of the Court.

An order was granted admitting Albertus Nicholas Rowan as an attorney of the Court.

PROVISIONAL CASES.

HAVENGA AND DICKSON V. { 1901.
PAGE. } Sept. 12th.

Accommodation note — Counter-claim.

Defendant was sued for provisional sentence on a certain promissory note given by him in favour of plaintiffs. By this said note defendant had hypothecated to plaintiffs his (defendant's) household furniture and shop goods. Defendant maintained (1) that the said note was an accommodation note; (2) that he (defendant)

had a counter claim against plaintiffs in excess of the amount of the note. These allegations were denied by plaintiff.

Held (1) that as security had been given for payment, the probabilities were in favour of the note not being considered as an accommodation note, and (2) that as the accounts annexed to defendant's affidavit were unsatisfactory, provisional sentence must be given as prayed.

Mr. Upington moved for provisional sentence for £37 19s. 6d. due upon a promissory note.

Mr. C. de Villiers appeared for the defendant, and read his affidavit, which stated that the promissory note was given for the accommodation of plaintiffs, who were in difficulties and wanted cash. He had received no legal consideration, and could not be held responsible for the payment of the note. The matter had come up in the Magistrate's Court when defendant had excepted on the ground that he had a *bona fide* counter claim, the plaintiffs being lawfully indebted to him in a sum of £52, which was therefore beyond the jurisdiction of the Court, and the exception was upheld.

There was an answering affidavit by the plaintiff Dickson, in which he denied that the promissory note was given for the accommodation of his firm. On January 8 the defendant's account was made up, and showed a debit balance against him of £38 19s. 5d., and he gave them the promissory note for £37 19s. 6d., leaving 19s. 11d. still due, which was afterwards increased by a few shillings. Proceeding, plaintiff alleged that the accounts annexed to defendant's documents in the Magistrate's Court did not show the true state of the accounts between the parties. As to the exception, it was upheld on the question of jurisdiction, and the merits of the case were not gone into.

Mr. De Villiers said he had an answering affidavit to this one, but Mr. Upington objected to it being put in, and under these circumstances the Court held that it could not be put in.

Provisional sentence was granted as prayed.

In giving judgment, the Acting Chief Justice said: This promissory note was signed by the defendant on January 8, and became

due on May 8. The defence now set up is, in the first place, that this is a note given for the accommodation of the plaintiffs. This allegation is denied by the plaintiffs, who say that in reference to their daybook entries will be seen showing a settlement of accounts on that day, and that the note was given for value received. Moreover, in the note itself, the defendant gives as security his house and shop goods, and if this was simply an accommodation note, it is hardly likely defendant would have given security to the plaintiffs for its due payment. Therefore I do not think that defence is sufficiently supported to justify the Court in refusing provisional sentence. Another defence set up is that the defendant has a counter-claim against the plaintiffs for more than the amount of the promissory note. This counter-claim is founded upon accounts for work and labour done, against which there were certain cash payments acknowledged to have been received from week to week. In the accounts put in by defendant, there are no credits entered between July and October 6. The plaintiffs say there were payments made during this period, and that if the accounts be looked into, it will be found that, instead of there being a balance due to defendant, there is a balance due by him. The facts before us sufficiently justify the Court in giving provisional sentence. This does not debar the defendant from going into the principal case, but I do not think a sufficient defence has been disclosed to justify the Court in refusing provisional sentence, which will, therefore, be given as prayed.

PITMAN V. KOHNE.

Mr. Russell moved for provisional sentence for £550, with interest from January 1, 1901, due on a mortgage bond, and also for 13s. 9d., insurance paid by the plaintiff. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

SPIILHAUS V. C. H. H. CADMAN.

Mr. B. Upington moved for the final sequestration of defendant's estate.

Final sequestration adjudicated.

DAVIES AND CO. V. M. O. WOOLF.

Mr. Benjamin moved for the final sequestration of defendant's estate.

Final sequestration adjudicated.

SILBERBAUER V. ROBERT WHITEHEAD.

Mr. Alexander moved for provisional sentence for £78 7s. 8d., due on a promissory note.

Provisional sentence as prayed.

SCHLESSINGER V. J. C. KIPPEN.

Mr. Ferris moved for provisional sentence for £32 3s. 5d., due on a promissory note.

Provisional sentence as prayed.

**ROSS AND CO. V. CHETTY. { 1901.
Sept. 12th.**

Attachment of property—Sheriff's return.

A return of nulla bona had been made to a writ of attachment sued out in the Magistrate's Court. Application was thereupon made to the Supreme Court to have certain immovable property of defendant declared executable. The Supreme Court, however, refused to grant the order as prayed, as the return aforesaid had not been made to a writ issuing out of the said Supreme Court. But the Court granted provisional sentence against defendant and intimated that should it not be satisfied the property in question would be declared executable.

Mr. Close moved for provisional sentence on a Magistrate's Court judgment for £52 10s. 11d., also on two promissory notes for £40 each. There had been a return of *nulla bona* to the Magistrate's Court writ, and counsel now asked that certain property set forth in the summons be specially attached and made executable.

The Acting Chief Justice pointed out that there had not been a return of *nulla bona* to the writ of the Supreme Court.

Provisional sentence was granted as prayed, and if it was not satisfied, then the property in question would be declared executable.

VAN HEERDEN V. STRYDOM.

Mr. Langenhoven moved for provisional sentence for £100, due on a mortgage bond, and also that the property specially hypothecated be declared executable.

Provisional sentence as prayed, and property declared executable.

SPENGLER V. W. TWINE, JUNIOR.

Mr. Currey applied for provisional sentence on certain sums due on a mortgage bond, with interest and for judgment under Rule 329 d for a sum due in respect to an insurance premium.

Provisional sentence and judgment granted as prayed, the property specially hypothecated being declared executable.

**DAVIS V. JAMES A. NELSON. { 1901.
Sept. 12th.**

Mr. Alexander moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £195 16s., with £9 11s., taxed costs. There had been a return of *nulla bona*.

The defendant appeared in court, and said that the debt was due on some bicycles, he having last year carried on business in Sir Lowry-road as a cycle dealer. He had offered to pay the debt by instalments of £1 per month, as he could not afford more, being out of a situation at present. By trade he was a cycle mechanic, and if he had work would earn from £10 to £12 per month. He had other creditors whom he was paying off by instalments. He had no property, and was living with his mother-in-law, who was helping him.

Defendant then went into the witness-box, and in reply to Mr. Alexander, said that the bicycles for which the judgment was obtained were all sold and the money obtained for them was put into the business and paid away on the debts of the business. He had originally owed Mr. Davis about £400, and had paid off all except what judgment was obtained for. He had been trying to sell some property belonging to his father, and had expected to make some money out of that. He had not been able to sell the property, and now his father had himself sold it. He had about £5 to come from the military authorities, he having been a lieutenant in a corps.

Questioned by the Court, defendant said he was married and was 22 years of age. He put £300 cash, which his father had given him, into the business when he started. He started business at a bad time, during the war. He had other creditors, to one of whom he owed £62.

A decree of civil imprisonment was granted, but execution stayed upon payment of instalments of £1 per month, the first instalment to be paid on September 15, and thereafter on the 15th of every month.

The Acting Chief Justice, in giving judgment, said that the defendant seemed to be a

young man hardly of age, who entered into business with a capital of £300 given him by his father, and the plaintiff supplied him with the articles for which judgment was obtained. It was hardly surprising that a young man without experience should fail in such a business. The debtor had paid off a substantial amount of the price of the goods supplied by the plaintiff, but was now utterly without means. He was a married man, at present out of employment and living with his mother-in-law. However, when in employment he was capable of earning £10 to £12 per month, and as he had other creditors to settle with as well as the plaintiff, a decree would be granted, but execution stayed, pending payment of instalments of £1 per month, the first instalment to be paid on September 15, and thereafter on the 15th of every month.

VAN DEN BERG V. VAN DEN BERG.

Mr. Close moved for provisional sentence for £237 due on a promissory note, and also for judgment under Rule 329d for £47 10s., money lent and advanced.

Provisional sentence and judgment granted as prayed.

ILLIQUID ROLL.

CLARK V. HOLZ.

Mr. Benjamin moved for judgment for £100, being £75 principal and £25 interest.

Judgment granted as prayed.

MENDELSSOHN V. SHAPIRA.

Mr. Alexander moved, under Rule 329d, for judgment for a sum of £47 12s. 11d., being balance of amount due for goods sold and delivered.

Judgment granted as prayed.

LEWIS V. WHEELER.

Mr. Close moved, under Rule 328d, for judgment for £92 6s. 6d., being balance of amount due for goods sold and delivered.

Judgment granted as prayed.

STEYTLER V. STAGMAN.

Mr. Howel Jones moved, under Rule 329d, for judgment for £200 12s. for goods sold and delivered.

Judgment granted as prayed.

REHABILITATIONS.

Mr. P. S. Jones moved, under the 117th section of the Insolvency Ordinance, for the rehabilitation of the insolvent estate of Benjamin Urdang. The certificate of the Master was put in.

Order granted as prayed.

Mr. Gardiner moved for the rehabilitation of the insolvent estate of Frederick Jacobus Cilliers, which was surrendered on May 4, 1894.

Order granted as prayed.

Mr. Close moved for the rehabilitation of the insolvent estate of Leonardus Dirk van Schalkwyk, which was surrendered on February 12, 1897.

Order granted as prayed.

LIPSCHITZ AND ANOTHER V. { 1901.
HARDEN AND ANOTHER. { Sept. 12th.
Interdict.

A rule nisi to operate as an interdict had been granted, calling upon respondents to show cause why they should not be interdicted from passing transfer to a third person of certain land which applicant alleged he had purchased. It appeared that respondent was a part proprietor of the land said to have been sold, and that the alleged sale took place in his absence and without his privity.

Held, that as the applicant had not established a clear right to the property in dispute and as he had other legal remedies, the interdict must be discharged.

This was a motion to have a rule nisi, restraining respondents from passing transfer of certain land, made absolute.

Mr. Gardiner appeared for the applicants, and Mr. Searle, K.C., for the respondents.

The applicant Lipschitz, in his affidavit, alleged that the respondents had agreed to sell to him a certain share of an erf situated in the village of Dusseldorff, in the Oudtshoorn district. Afterwards he heard that the land had been sold to another party, and that transfer was about to be taken, and he thereupon obtained the rule nisi, which he now sought to have made absolute.

There were lengthy supporting affidavits.

For the respondents, there were also several affidavits to show that no such sale to Lipschitz had ever taken place.

Mr. Searle, K.C. (for respondents): The applicant comes forward to object to the sale, on the ground that he bought a piece of land worth £50 for £2 10s. Respondent had the declarations of purchaser and seller signed in due order. Clearly the whole of the property cannot be sold, and as to the other portion, we have only certain entries in a pocketbook to depend upon, and the evidence is very contradictory as to the correctness of the entries as to what took place on June 27. Maria Hardman was then in a very critical state of health, and has since died. She was not capable of transacting business. The transfer should not be set aside; it was quite regular, and no interdict should be granted.

Mr. Gardiner (for applicants): In view of the difficulty of unravelling the truth from all the irrelevant matter which has been imported into the affidavits, I would suggest that an interdict should be granted (until the case can be tried at the next Oudtshoorn Circuit), restraining the transfer of the share of Brill Hardman. Probably the £2 10s. mentioned was intended as an instalment of the purchase price. The purchaser knew that he was buying a lawsuit, and he cannot complain if he gets it. It is better to restrain transfer if a *prima facie* case is made out than to subsequently upset the transfer.

In giving judgment, the Acting Chief Justice said that this was an application to make absolute a rule interdicting the respondents from passing transfer of certain plots of ground situate in the village of Dusseldorff. The land in question belonged to certain coloured people, and there seemed to be a great deal of competition among white people in that neighbourhood to get hold of the coloured people's land. The owner of a part of this land was absent at the time of the alleged sale, and the applicant said he bought the absent native's land, and also that of April Harden, for the sum of £50, and that the applicant had lodged the share of the purchase price due to the absent native with an attorney. With whom the contract was entered into was not clear, but a small deposit had been paid to the mother of the two owners. The mother was now dead, but in one of the affidavits it is stated that the mother before her death had said she had received a loan of this

money from applicant. The whole of the transaction was irregular, and the contract set up by applicant himself could not be sustained, as he was unable to show that he had bought the absent person's land from any person authorised to sell same. It was not admitted by the other side that there was any sale to the applicant, even of that portion of the land belonging to April. Altogether the circumstances connected with this case would not justify the Court in making the rule absolute. Before an interdict could be granted, the first essential was that the applicant must establish a clear right, which he had not done in this case. Another requisite was that the applicant would be without any other remedy. In this case applicant was not without any other remedy. On these two grounds, he (the Acting Chief Justice) thought the rule should be discharged. The rule would be discharged, with costs, but no costs would be allowed for the affidavits filed by respondents in reply to applicants' answering affidavits.

MOLWENDORF V. OLIVIER.

Mr. Uppington moved for removal of the case for trial to the next circuit court at Oudtshoorn. Counsel said that the removal was consented to.

The application was granted.

IN THE MATTER OF THE PETITION OF MOGAMAT NOOR SALAMAN.

Mr. C. de Villiers moved for leave to mortgage certain property.

The application was granted.

IN THE MATTER OF THE PETITION OF NOGO NANGU AND FLORENCE ZENZILE NANGU.

On the motion of Mr. Benjamin, an order was granted authorising the Registrar of Deeds to register a certain post-nuptial contract.

BROWN V. CAPE TOWN AND GREEN POINT TRAMWAY COMPANY. } 1901.
Sept. 12th.

Contract — Mutuality — Act 23 of 1895, section 22.

Under Act 23 of 1895, section 22, the Tramway Company aforesaid were bound to work the concession granted to them thereby properly and efficiently. The Court found

as a fact that the company had done so. They had, however, issued certain books of tickets at reduced fares. These tickets the company now refused to continue to issue save on condition that they would not be liable to any purchasers thereof who might fail to find accommodation on any particular car.

Held, that as the public were not bound to purchase these tickets, there was no mutuality, and hence no contract between the said company and the public. That the company were therefore not bound to issue these tickets, and that if they did so issue them, they were at liberty to attach a reasonable condition to such issue.

This was an application by Mr. J. M. L. Brown, individually, and as the representative and agent of certain residents of Sea Point, against the Cape Town and Green Point Tramway Company, to show cause why they should not be ordered to issue to the applicant and those whom he represented, against payment of £1, the usual book of 120 tickets, available during the month of September, free of all conditions other than those contained in certain correspondence of September, 1896. Counsel read the affidavit of the applicant, John Louis Mitchell Brown, which was as follows:

1. I am and have been for many years a resident at Sea Point.

2. I was formerly one of the directors of the horse tramway company which owned the cars plying between Cape Town and Sea Point.

3. When authority was granted by Parliament to convert the old concern into an electric tramway, I was a member of the Municipality of Sea Point, and jointly with others took an interest in the schemes which were then in progress.

4. In order to protect the residents, negotiations were opened in or about the month of September, 1896, through me (as I happened to be a Commissioner of the Municipality of Sea Point at the time) with the Tramway Company, and an arrangement was arrived at which is set forth in certain correspondence (copies of which are hereunto annexed).

5. On or about the 20th September, 1896, a meeting of the residents was convened in the Sea Point Hall, and a resolution was adopted by the public there assembled approving of the terms set forth in the correspondence, and I annex hereto a copy of the minutes of the proceedings at that public meeting, of which I was chairman.

6. In accordance with the agreement arrived at, and in fulfilment of the contract contained in the said letters, the Tramway Company issued books of monthly tickets to me and to other Sea Point and Green Point residents, who applied for them from month to month, until August, 1901.

7. In September, 1896, Sea Point was served by a railway as well as a tramway, and in 1898, when the train service stopped, the Tramway Company confirmed the agreement of 1896, and guaranteed in a letter dated 30th July, 1896 (copy annexed), the issue of the monthly book of tickets.

8. On the 2nd September, 1901, I applied in the usual manner for the monthly book containing 120 tickets to be issued to me for my own personal use during the month of September, 1901, and tendered the stipulated price, viz., £1 sterling, but I was informed by the official at the Tramway Company's office that the usual book of tickets would not be issued to me unless I signed an undertaking, of which a copy is annexed.

9. I declined to agree to these conditions, as I required that the book of tickets should be issued to me as heretofore, in accordance with the contract arrived at in the year 1896, free of any conditions.

10. For the information of the Court, I might state that during the last two years, in consequence of the great influx of population resulting principally from the arrival of refugees from the Rand, the traffic on the tramcars has greatly increased.

11. The Tramway Company neglected to obtain the necessary rolling-stock to cope with the increased traffic, and the cars in consequence became so overcrowded that the Municipal bodies have at last been compelled to pass regulations prohibiting such overcrowding.

12. The Tramway Company assign the promulgation of these regulations as their reason for departing from the contract entered into with me in September, 1896, and wish to impose the conditions to which I have taken exception.

13. I am apprehensive that if I accede to the variations now sought to be introduced into the original agreement, that the Tramway Company may claim to be freed from

all obligation to provide reasonable and adequate accommodation for the Sea Point residents travelling to and from Cape Town, and may attempt to screen themselves behind such conditions for their failure to render the tramway service as efficient as is contemplated in the Act of Parliament conferring upon them their running powers.

14. I therefore apply on behalf of myself and my fellow-residents at Sea Point for an order in the nature of a mandamus, requiring the Tramway Company to issue to us the usual book of monthly tickets, free of all conditions other than those contained in the agreement arrived at during the month of September, 1896.

Counsel read the letters attached to the declaration. The letter of September 10, 1896, written by Mr. Waterman, the general manager of the Tramway Company, to Mr. Brown was as follows: "Dear Mr. Brown,— Referring to our interview of this morning with your committee, I have, in accordance with your request, to state formally that the following are the terms of the arrangement entered into between us for a settlement of the question of fares: The tramway will issue books of tickets available for one month only by the persons to whom they are issued as follows: Adderley-street to Sea Point and *vice versa*—80 rides, 16s.; 120 rides, 20s.; 150 rides, 25s. Adderley-street to Three Anchor Bay and *vice versa*—£0 rides, 11s.; 120 rides, 15s.; 150 rides, 19s. The school children's rate we are prepared to make as follows: Sixty rides, with a five o'clock limit, for 7s. 6d. to Three Anchor Bay, and the same to Sea Point for 10s. The intermediate rate between Varney's Corner and Sea Point will be 7s. 6d. These tickets are to be good only for the month in which they are issued. We will further issue books of 48 tickets for casual fares at 10s., which tickets may be used for any threepenny distance on the Sea Point, Metropolitan, or City lines. Should, of course, the holder wish to proceed to the sixpenny distance, two tickets will be required. These tickets will be available at any time, and, as you will notice, are a reduction of 16 and 2-3rds per cent. from the advertised casual rates. In submitting this proposal to you, we beg to point out that it is the very lowest on which we can possibly work with any prospect of a reasonable return to the shareholders of the company, and we make these concessions with a view to securing the goodwill of the Sea Point and Green Point residents. Consequently,

we need hardly say that one of our conditions must be that they are accepted by your committee, and also by the Municipal Council, in the spirit in which they are offered by us, and that all matters otherwise must revert to the conditions they were in before the question arose. The Sea Point Railway directors, we understand, are prepared to issue unlimited tickets at the rate of 15s. to Three Anchor Bay, and 20s. to Sea Point, with the same rates as ours for school children. They will also issue the forty-eight book of tickets at 10s. for "casual passengers." The extract from the minutes of the public meeting held on September 20, 1896, was as under: "Read. Letter of terms proposed by the Tramway Company, dated September 10, and railway. Proposed by chairman, seconded by Dr. Anderson: "That this meeting accepts the terms of the Railway and Tramway Companies, and that it be an instruction to the Municipal Council to obtain more advantageous terms for school children's tickets if possible." The letter of July 30, 1898, from Mr. Lloyd, the present manager of the company, to Mr. Brown read: "Dear Sir,—It having come to the notice of my directors that fears were being expressed by correspondents in the newspapers that, owing to the stoppage of the Sea Point railway, the Tramway Company might take advantage of the consequent absence of competition and withdraw the privileges granted by the way of monthly books of tickets, etc., to its customers residing in your Municipality, they thought it well to communicate with the London Board upon the subject, and to ask whether a guarantee might be given to the public that no such advantage would be taken in the absence of competition, and as a result of this communication I am instructed to inform you that my directors have pleasure in being able to offer the necessary guarantee. Owing to the stoppage of the railway, there has been an increase of traffic during certain hours of the day, and this we have coped with by largely increasing our service during the busy hours. I may also state that in deference to wishes expressed by many of the inhabitants of your Municipality, we are making arrangements to run a luggage car at certain periods of the day." The undertaking which applicant said he was required to sign before tickets were issued to him was in the following form: "Cape Town Tramways. The book of monthly tickets (— distance). No. — is issued to me on the

understanding that the Tramway Companies shall not be liable for failure to provide accommodation for me in any car or cars."

Sir Henry Juta then read the affidavit of John Edward Lloyd, general manager of the Metropolitan Tramways Company, Limited, the City Tramway Company, Limited, and Southern Suburbs of Cape Town Tramway Company, Limited, collectively known as the Cape Town Tramways. The affidavit of Mr. Lloyd was as follows:

1. I have perused the applicant's affidavit made in this matter. The said applicant has in no way signified to me or the companies I represent the names of the Sea Point residents for whom he professes to act.

2. The said Cape Town and Green Point Tramway Company (Limited) is no longer in existence. It was formally wound up, and the undertaking was transferred to the Metropolitan Tramways Company (Limited) a couple of years ago.

3. I admit the allegations made in paragraphs 1, 2, and 3 of the said affidavit.

4. With regard to paragraphs 3, 4, 5, and 6, I admit that the letter dated 10th September, 1896, was written to the said applicant, but I deny that it constituted an agreement legally binding on the Tramway Company. The privileges were granted to meet the wishes of the inhabitants of Green and Sea Point, and to secure their goodwill, it being obviously to the advantage of the company that the relations between its customers and itself should be as friendly as possible. I admit also that monthly books of tickets were issued, as stated by the applicant.

5. I admit that, on the 30th July, 1898, the letter annexed to the applicant's affidavit was written to the applicant. It was intended as an assurance that the company had no intention of taking an undue advantage in regard to fares; and I say that the company is still prepared and anxious to act in accordance with such assurance, but deny that the company intended to bind itself for all time, and under any circumstances, to issue tickets on the terms stated.

6. At the time the old horse tramway to Sea Point was converted into an electric tramway, the company made reasonably sufficient arrangements to provide ample motive power, and enough cars for the conveyance of Sea Point and Green Point people. It was considered by persons well qualified to judge that, even after allowing for a substantial increase in population, the provision that had been made was

ample for all requirements. In January, 1898, there were nineteen cars in use on the entire system, but this number has been gradually augmented, and it is now 45, the maximum which the cables at the disposal of the company can deal with.

7. The large increase in traffic is accounted for, as stated in the applicant's affidavit, by the large influx of persons from the Transvaal consequent on the war. The company did their utmost to cope with the enormous strain produced by the condition of affairs, but it was expected that the war would terminate before many months, and that the normal conditions would be reverted to. However, the company proceeded to provide for increased motive power, and cables, as well as accommodation for passengers. They arranged for the laying of additional cables, costing approximately £17,000. These cables have been laid, and we are now engaged in connecting them up as fast as possible. Sixteen cars have been ordered from England, to be used on the Sea Point section. Of these, four have, during the last few days, arrived at the works, and two are at the Docks. These were for fifty-three days lying in the Bay. We are at present engaged in making foundations for an 800 horse-power engine and generator; the latter has arrived, but we have no advice as to whether the engine has yet left England. Two additional boilers have been for some weeks in a ship in the bay. Plans have been drawn and approved for a new car-shed and workshops, costing £20,000, and contracts for the ironwork are being entered into in England. Plans for a new boiler-room and stack, at a cost of £8,000, approximately have been passed and approved, and the foundation of the stack will be commenced this week.

8. The Tramway Company's cars were designed in such a way as to provide large platforms for the accommodation of persons who were not able to obtain seats inside the car, and for some time past these platforms have been used by a great many of the travelling public, who have also crowded on the other parts of the car. An overcrowded car is not a thing to be desired by the Tramway Company, because, not only do ten per cent. of the passengers avoid payment of fares, but the strain on the cars is tremendous, and tends greatly to abnormal depreciation of the plant. The company was anxious to avoid this overcrowding as much as possible, but the Cape Town authorities, as well as the directors,

recognised that under existing circumstances overcrowding could not be avoided. I was aware that regulations had been framed by the Council, but was led to believe that the regulation in regard to overcrowding was to be excluded, as it was not approved by the Government. On August 10, to my surprise, I learned that the regulations had appeared in the "Government Gazette," and on the 24th August I received an informal intimation that the regulations regarding overcrowding were to be shortly enforced. Knowing the result would be that about two-thirds of the passengers would not be able to travel on the cars in the manner previously adopted, and that they would look to the company for redress, I considered that the more straightforward of the two courses that I was advised were open to protect the company, would be to sell tickets only to those who could obtain accommodation. This necessarily entailed the withdrawal of the books of tickets. As on August 28, the public would apply for books of tickets, it was necessary that a notice should forthwith appear in the newspapers informing them that such tickets would not be issued, and I accordingly caused such a notice to be inserted. The public, however, gave proof of their resentment of such a proceeding, and in many ways indicated that they would prefer to have the books of tickets, and take their chance of finding room on the cars. Consequently my directors decided to withdraw the notice that had been published, and to authorise the issue of books of tickets for the month of September, subject to the understanding that the Company was not to be held responsible for failure to accommodate passengers, and pending instructions from the London Board, to whom the position of affairs had been cabled. The instructions received from London in reply to the local Board's communication were to the effect that books of tickets should be issued as heretofore, subject to the conditions above mentioned.

9. Negotiations are pending with the Government and the Town Council in regard to the suspension of the regulations for a period of six months, to enable the company to provide for the accommodation of passengers in accordance with Town Council requirements, and it is hoped therefore that the company will be able to issue the tickets henceforth without the condition complained of by the applicant.

Mr. Searle, K.C. (for applicant): Act 23 of 1895 is the latest Tramway Act, and it merely amends the Act 33 of 1861 and 19 of

1879. The only provision as to fares is contained in the schedule at the end of the Act. We must, however, consult section 22. Section 19 of Act 33 of 1861 (which is still in force) provides how the trams were to be run. Section 31 provides as to the tariff. But nowhere do we find any provision as to the number of trams which must be run. Applicant says that under section 26 of Act 23 of 1895, the Tramway Company entered into an undertaking with the public.

[Buchanan, A.C.J.: Are the company bound to issue as many tickets as you apply for?]

Yes.

[Buchanan, A.C.J.: Then can the company compel a man to buy tickets? If not, where is the mutuality?]

In this, that I pay £1, and get in return a book of tickets.

[Buchanan, A.C.J.: Suppose there is no tram running, or no room, is the company bound to sell further tickets?]

That is not the point here. The company do not say that they have issued so many tickets that they cannot issue more.

Sir H. Juta (for the respondents) was not called upon.

In giving judgment, the Acting Chief Justice said that this was an application of a very novel nature, and no precedent of any kind has been cited which bears upon this case at all. It was an application by a resident of Sea Point calling for an order requiring respondents, the Cape Town and Green Point Tramway Company, to issue to him, and those he represented, a book of tickets entitling them to travel for one month over the company's lines, free of all conditions other than those contained in an agreement arrived at in September, 1896. Mr. Searle based this application upon two grounds. One was section 26 of the Tramway Company's Act, and the other was the letters written by the directors of the company to the applicant. Section 22 of the Tramway Company's Act required the Tramway Company to work the tramway concession given to them, and provided that "if, during a period of two days consecutively they ceased to run their cars over the line, unless from strike of operatives or some other cause beyond their control, or if any section of the tramways be not properly or efficiently worked, the road authorities might give one month's notice, and at the expiration of this period the powers conferred upon the company in regard to such improperly-worked portion should cease and determine." In

1898, when the correspondence took place between the directors of the company and the applicant, who was the chairman of a public meeting of residents at Sea Point, it is said that there were nineteen cars running daily along the line, and even that was a great increase upon the previous accommodation provided for the public. These cars had been constantly running. There had been no improper working of the tramway line. But it was said that the line was not efficiently worked, because it could not cope with the suddenly-increased demands now made. The company had increased the number of cars between 1898 and the present time from nineteen to forty-five. Looking at the state of affairs when the correspondence took place, it could not be said that this was not an efficient working of the line. The applicant wished to compel the company to go on increasing *ad infinitum* to meet the public requirements. That would be a very strong construction to put on any such words as were contained in this Act of Parliament. No one could come upon the Tramway Company and say: "You must supply as many cars as we want, whether you have the plant or not." He (the Acting Chief Justice) did not think there was evidence of any violation of the 22nd section, but even if there had been, there was no application of the remedy provided for in the Act. It was said that by the correspondence relied upon as the second ground of this application the company had agreed to issue books of tickets at considerably reduced fares. The company were still willing to issue these books. They did not say that they would not provide cars, but they wished to protect themselves against actions when there was no accommodation on any particular car. They said "if you fail to find accommodation in any one car, our contract with you does not entitle you to make us liable for failure to provide additional accommodation." That seemed a reasonable thing. But coming to the legal position of the parties, and to the question of the so-called contract, where was the contract? How long was it to last? Every contract implied mutuality; where was the mutuality here? The company, with a view to securing the goodwill of the public, offered certain privileges. The public were not bound to take them. If there were a contract, it must be binding upon both parties. To be mutual, the contract would entitle the company to sue Mr. Brown every month to pay for a book of tickets. The company did not wish to stop the issue of tickets. They only said they would not be liable for a failure to

provide accommodation in any particular car. There was nothing on the affidavits, nothing in the law, nothing in the letters, which entitled the Court to say to the company: "You shall issue books of tickets free of all conditions which you find necessary to put in for your protection, and we shall take these books or leave them alone, just as we choose, but if we choose to take them, you must provide accommodation at any time we may happen to want it." He (the Acting Chief Justice) could not find any ground upon which he could grant the application, and therefore the application must be refused with costs.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinné; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

THE MASTER OF THE BARQUE
"ANDES" V. THE UNION-
CASTLE CO. AND THE EAST } 1901.
LONDON HARBOUR BOARD. } Sept. 12th.

This was an application to release the cargo of the barque, which had been attached, and to authorise the immediate sale of the vessel, the proceeds of the sale to be paid into Court pending the result of the action.

Sir Henry Juta, K.C., appeared for the applicant; Mr. Searle, K.C., for the Union-Castle Co.; and Mr. Benjamin for the East London Harbour Board.

The affidavit of applicant's attorney stated that it would be in the interests of everybody to release the cargo and sell the barque.

Replying affidavits by the attorneys for the respondents were read. In one of these it was stated that the barque could only be sold as a hulk, and would not realise more than about £800.

After hearing Sir Henry Juta in argument, the Court refused the application.

The Acting Chief Justice, in giving judgment, said that this ship and cargo had been attached for the purpose of founding jurisdiction in an action which the plaintiffs were bringing against the vessel for salvage services. There was certain freight due on the cargo, but this freight could not be recovered until this cargo was landed and delivered. The applicant now wished to have the cargo released, the ship sold, and the proceeds paid into court in lieu of security. However, as the case was shortly coming on, it was desirable that judgment should first be given, and execution taken in due form, before the cargo should be landed. As the case stood at present, the

application could not be granted. The application was therefore refused, and the question of costs ordered to stand over until the trial.

IN THE MATTER OF THE PETITION OF
THE EXECUTORS OF THE ESTATE OF
THE LATE CHRISTIAN CORNELIS
THERON.

This was a motion for an order directing amongst whom the capital in the said estate should be distributed, and for the interest to be paid to the children, all of whom were majors.

Mr. Searle appeared for the applicants.

The Court granted an order directing that the capital in the estate should be distributed among the children of the deceased after the death of Johanna Maria Brink, and that until that event the interest, after the payment of £5 per month to J. M. Brink, be paid to the children. Costs were ordered to be paid out of the estate.

LEPPAN V. LEPPAN.

Mr. Russell moved for a rule nisi authorising applicant to pass a bond without the assistance of her husband (respondent) to be made absolute.

The Court granted an order authorising the Registrar to pass a bond on the sole signature of the applicant.

IN THE MATTER OF THE PETITION OF HARRIET MARIA ROGERS.

Mr. Searle, K.C., moved for an order authorising the Master to pay out certain moneys. Counsel said that applicant was married in 1869 to Richard Deeble Rogers, and there were three children, all majors. In 1874 R. D. Rogers left applicant and went to the Diamond-fields. There he remained until 1876, sending money regularly to his wife. In 1876 he came back to Cape Town suffering from fever, and in the same year he returned to the Diamond-fields. The parties were on affectionate terms. The applicant last heard of her husband in 1878, and had since used every effort to find whether he was still living. The petitioner had reason to believe he was dead. She asked that she should be paid the amount of certain legacies bequeathed to her husband.

The application was granted.

IN THE MATTER OF THE PETITION OF
MARIA CHRISTINA VOS STAMMETT,
EXECUTRIX IN THE ESTATE OF THE
LATE MICHAEL CHRISTIAN VOS STAMMETT.

On the motion of Mr. Gardiner, authority was granted to take over certain landed property.

IN THE MATTER OF THE PETITION OF
OCKERT ALMERO OOSTHUIZEN.

Mr. Searle moved for an order authorising the Registrar of Deeds to register a certain deed of transfer in favour of the petitioner.

The Court ordered the case to stand over for further information, notice to be given to the children of a deceased son of the testator.

VAN DYK V. VAN DYK.

This was a motion for confirmation of the receiver's report.

Mr. Searle, K.C., who appeared to move, said that the Court had granted a decree of separation, and a receiver was appointed, but the parties had since come together again. He applied for the release of the receiver, and for authority to hand back the assets of the estate to defendant as administrator.

Granted.

WILSON V. WILSON.

Mr. Benjamin moved for confirmation of the receiver's report. The estate had become insolvent, but had been realised. Counsel asked for an order confirming the action of the receiver, and confirming the liquidation account.

Granted.

IN THE MATTER OF THE PETITION OF
ETHEL KATE PERKINS.

Mr. Solomon moved for leave to transfer certain property.

An order was granted, subject to the Master's report.

IN THE MATTER OF THE PETITION OF THE
EXECUTOR OF THE ESTATE OF THE LATE
JAN ISAACS LENNECKS.

Mr. Benjamin applied for the cancellation of a certain mortgage bond.

The matter was ordered to stand over, in order that efforts might be made to find the executors of the mortgagee, the late J. G. Steytler.

Granted.

Granted.

Mr. Wilkinson moved for leave to applicant, a Kafir living at the location, to sue

Held, that as a contract to discharge within a specified time, entered into by a party in Cape Town, who must be presumed to have known the customs of the port and to have been acquainted with the present difficulties which hinder the speedy discharge of vessels at this port, with a party in New York, who could not be presumed to have such knowledge, must be regarded as absolute and unconditional, and that defendants could not plead inability to perform it on account of the difficulty of obtaining lighters; as lightering had been shown to be one of the customary modes of discharge at this

port, and also as it had been shown that defendants had other lighters at their disposal, judgment must be given for plaintiff with costs.

This was an action between Wm. Thomas McAloney, master of the ship Wm. B. Palmer, and Arnold Wilhelm Spilhaus, trading as William Spilhaus and Co., to recover £556 for demurrage.

The declaration was as follows:

1. The plaintiff is the master of the ship Wm. B. Palmer, now lying in Table Bay, and as such represents the owners of the said ship. The defendant is a merchant carrying on business in Cape Town, and is the proper party to be sued in this action.

2. On or about December 14, 1900, a charter party was entered into at New York between the owners of the ship Wm. B. Palmer through their agents H. W. Peabody and Co., for a voyage from Philadelphia, U.S., to Cape Town. Copy of the said charter party is hereunto annexed.

3. The said ship arrived in Table Bay on March 29, 1901.

4. By the fifth clause of the charter party it is provided that the said ship is to deliver cargo as customary, commencing forty-eight hours after the captain thereof has given written notice to the consignees that the vessel is ready, such cargo to be discharged in twenty weather working lay days.

5. The consignees of the said cargo were and are the defendant, and on April 1, the plaintiff gave written notice to the defendant that he was ready to discharge cargo.

6. By the charter party it is provided that in case the vessel is longer detained than the lay days herein provided for, the charterers agree to pay to the said party of the first part demurrage at the rate of 108 dollars 25 cents per day, day by day, for every day the vessel is so detained, provided such detention shall happen by default of the charterers or their agents. The said obligation to pay demurrage became and is the obligation of the defendant.

7. The charter party further provides that the ship shall have a lien on cargo for all freight, dead freight and demurrage, that the freight shall be payable at the rate of 26s. per ton of twenty cwt. on the quantity of cargo delivered to the consignees as per dock weighbridge weight, the ship paying weighing charges, or upon the quantity as per bill of lading less two per cent. at consignees' option.

8. On April 1, the defendant gave notice that the freight would be payable as per dock weighbridge weight.

9. After the notice in the fifth paragraph mentioned, the defendant began to receive the cargo, but owing to the default of the defendant, the said vessel was detained beyond the said lay days and is still so detained.

10. The plaintiff has discharged 1,600 tons of coal, which were received by the defendant, and it was and is the duty of the defendant to weigh the coal by the dock weighbridge, which is situated in the Cape Town Docks. But the defendant has neglected and failed so to weigh the same, and still neglects and fails so to do.

11. The said vessel has been detained as aforesaid beyond the said lay days from April 30, and is still at the date of summons, being detained, but the defendant contends that he is not liable to pay any demurrage.

12. There is due to the plaintiff the sum of £2,080, being the freight due on the said 1,600 tons of coal landed from the said vessel, less £200 paid on account, and there is due to the plaintiff the sum of £556 2s. 11d., being for demurrage due from April 30, 1901, to May 24, 1901, inclusive.

The plaintiff claims: (a) The sum of £1,880 for freight, with interest *a tempore moræ*; (b) the sum of £556 2s. 11d. for demurrage, with interest *a tempore moræ*; (c) an order declaring that the defendant shall have all coal discharged from the said vessel weighed over the dock weighbridge, or that freight be paid on the quantity as per bill of lading, less two per cent; (d) alternative relief; (e) costs of suit.

The claim was from the 30th April up to the 24th May, which was the day before summons was issued, but, as a matter of fact, the evidence showed that the vessel was not discharged until about the 12th June. The freight had been paid, so the sum of £1,880 was not now in dispute. Plaintiff claimed £556 2s. 11d. for demurrage.

The plea was as follows:

1. Defendant admits the allegations in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the declaration.

2. He says that under the said charter party he is liable for demurrage only where detention of the vessel was due to the default of the charterers or their agents, and that in any case his liability is further protected by the exemption clause, providing, *inter alia*: "Strikes of Pitmen and Others," "Disputes with Workmen," "And all unavoidable

able Accidents or Hindrances in Discharging the Cargo," "Mutually Accepted."

3. He says that it was likewise specially provided *inter alia*, that the vessel should work overtime at the port of discharging if required by the charterers or their consignees, but although she was so required she wrongfully and unlawfully refused to do so, and that otherwise plaintiff was not duly diligent in discharging the cargo.

4. He says that the detention at the port of discharge and consequent demurrage were due to the congested state of the shipping therein, the fact that the Harbour authorities did not or could not, as is customary soon after her arrival, assign a berth in the Docks for the discharge of the cargo from the said vessel, to the deficient quay space, and the block at the Docks resulting therefrom, to the deficiency of labour, partly arising from the plague and partly arising from the refusal of the Kafir labourers to work on their removal to the native location, to the fact that lighters could not be obtained in such numbers as to assure greater despatch, or to the aforesaid refusal of the said vessel to work overtime, and want of diligence on the part of the plaintiff, or that such detention and demurrage were due to two or more or all of these causes, and that he is therefore not liable for such detention and demurrage in that they were not due to the default of the charterers or their agents, but were due to one or more or all of the causes specified in the exemption clause set out in paragraph 2 hereof, and hereinbefore more particularly indicated.

The following is a copy of the charter party:

African Coal Charter.—This charter party, made and concluded upon in the city of New York, the 14th day of December, 1900, between Nathaniel F. Palmer, agent for, and on behalf of the owners of the ship or vessel called Wm. B. Palmer, of Bath, 1,625 tons or thereabouts, register measurement classed , and now at New York, of the first part, and Henry W. Peabody and Co., merchants, of New York, of the second part, hereinafter designated as charterers; Witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said charterers, doth covenant and agree, on the freighting and chartering of the said vessel unto the said charters, for a voyage to and from Philadelphia to Cape Town, Cape of Good Hope, on the terms following, that is to say (dangers of the sea mutu-

ally excepted): (1) That said party of the first part doth engage that the said vessel is in a sound and seaworthy condition, and in and during the said voyage shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage. (2) The said party of the first part doth further agree that the whole of said vessel under deck from stem to stern, including the poop and compartments, shall be at the sole use and disposal of the charterers during the voyage aforesaid, with the exception of the necessary and usual accommodations for the master, officers, and crew, and also room for the storage of sails, cables, provisions, water, etc., for the ship's company for this voyage. (3) In case, prior to loading, the vessel should meet with accident, or be in such condition that underwriters decline to insure the cargo at customary rates for the intended voyage, charterers shall have the option of cancelling or maintaining this charter. (4) Vessel to haul to loading berth, or berths designated by charterers at her own expense; but if required to move more than once, charterers are to pay the towage, and further that, when loaded, cleared at Customs, and charterer's papers have been delivered to master, the vessel is to proceed to sea within forty-eight hours, wind and weather permitting, or pay charterers full demurrage, at rate as hereinafter stated. (5) The vessel to deliver cargo as customary, commencing forty-eight hours after captain has given written notice to consignees that vessel is ready, the cargo is to be discharged in twenty weather working lay days. Vessel to work overtime if required by charterers or their consignees at ports of loading and or discharging. The said charterers for, and in consideration of the covenants and agreements to be kept and performed by said party of the first part, do covenant and agree with the said party of the first part to charter and hire the said vessel as aforesaid, on the terms following, that is to say: (1) The charterers engage to provide and furnish to the said vessel a full and complete cargo of coal under deck, about 2,700 tons. (2) The said charterers further engage to pay to the said party of the first part, his or their agent, for the charter of freight of the said vessel during the voyage aforesaid, in manner following, that is to say, at the rate of 26s. Br. sterling (twenty-six shillings) per ton of 20 cwt. coal delivered, payable in British sterling, upon right and proper delivery of cargo at stipulated port of discharge, on the quantity delivered to con-

signees, as per dock weigh-bridge weight (ship paying weighing charges), or upon the quantity as per bill of lading, less 2 per cent. at consignees' option. The act of God, restraints of princes and rulers, holidays, quarantine, bad weather, fire, riots, stoppage of trains, strikes of pitmen and others, lock-outs, disputes with workmen, frosts, floods, or fogs, and all unavoidable accidents or hindrances in procuring, loading, and (or) discharging the cargo, as well as all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, which may prevent the loading and delivery during the said voyage, mutually excepted. (3) Charterers' responsibility to cease when the cargo is all on board and bills of lading signed, ship having a lien on cargo for all freight, dead freight, and demurrage. The master to sign bills of lading at charterers' office when required, at any rate of freight, without prejudice to this charter party, but the amount to be sufficient in the aggregate to cover this charter. Ship to be consigned at port of discharge as designated by charterers, inward only, who are to attend to ship's inward business, charging therefore $2\frac{1}{2}$ per cent. commission on the amount of this charter and customary fee for entering at Customs. It is further agreed between the parties to this instrument that the charterers shall be allowed fifteen running lay days for loading (Sundays and holidays excepted), commencing at Philadelphia twenty-four hours after ship hauls to loading berth, and ready to receive cargo, but not before December 20. One additional working lay day to be allowed charterers to clear the vessel at the Custom-house (and if necessary to put in cargo), which is not to be counted as a lay day. In case the vessel is longer detained than the lay days herein provided for, the charterers agree to pay to the said party of the first part demurrage at the rate of 108 dollars 25 cent. per day, day by day, for every day so detained, provided such detention shall happen by default of the charterers or their agents. It is also further understood and agreed that the cargo or cargoes shall be received and delivered within reach of the ship's tackles at the ports of loading and discharging. Should lirage be necessary at port of discharge, only sufficient cargo to be lightered to enable vessel to proceed to place or wharf designated by charterers' consignees, and there complete her discharge, such lirage to be at risk and expense of the cargo. It is also mutually agreed that this charter is

subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc." This charter is subject to the rules of the New York Produce Exchange, including strikes. Average, if any, according to York-Antwerp rules of 1890. Should the vessel not arrive at Philadelphia in good order on or before sunset December 26, 1900, charterers have the option of cancelling or maintaining this charter. To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns (especially the said party of the first part), the said vessel, her freight, tackle, and appurtenances, and the charterers the merchandise and freight to be laden on board), each to the other, in the penal sum of estimated amount of this charter.

Sir H. Juta (with him Mr. Searle, K.C.) appeared for the plaintiff, and Mr. Benjamin (with him Mr. Gardiner) for defendant.

Mr. Benjamin said there was an apparent omission in the second paragraph of the declaration between the words "Wm. B. Palmer" and "through their agents."

Sir Henry Juta asked that the word "and" should be put in after the words "their agents" in the third line of the second paragraph. The defendants had admitted the second paragraph in their plea.

Mr. Benjamin said that in drawing up the plea, counsel did so under the impression that there was an omission in the second paragraph, and that it should read, after W. B. Palmer, "and defendants through their agents." He could not understand the declaration. Were defendants sued as charterers, as agents for the charterers, or did the plaintiff intend to make them liable for the bill of lading?

[The Acting Chief Justice: They sue on the charter party, and you admit you are liable under the charter party.]

The plea was drawn up under the impression that there was a clerical omission of the nature I have mentioned. I apply to amend the plea so as to state that the declaration showed no cause of action. How could defendants be sued in respect of the charter party entered into by some other party?

[Mr. Justice Jones: Why did you admit it?]

It was because of the fact that counsel assumed that there was an omission of the kind stated.

Sir Henry Juta : In the declaration plaintiff said that there was an obligation under the charter on the charterers that they were liable, and that this obligation became and was the obligation of the defendants. Defendant admitted that part of the declaration.

[The Acting Chief Justice said that clause one of the declaration stated that defendants were the proper party to be sued. The plea admitted that, and the Court could not allow Mr. Benjamin to take exception now that there was no cause of action after the admission in the plea.]

Mr. Searle read the evidence taken, on commission, of the plaintiff and the chief mate. He also read the correspondence.

Sir Henry Juta put in a document which, he said, showed all cargo landed by lighters during the months of April and May, the names of the ships, the date of arrival, where the ships came from, and the names of the agents. It also showed the amount of tonnage discharged by each ship.

The Acting Chief Justice asked when the lay days expired.

Sir Henry Juta said that they expired on April 29. Counsel pointed out that the document put in stated that from April 13 to April 19, 941 tons were discharged from a ship named the Varzin, of which Messrs. Spilhaus were the agents, while during that time only 81 tons were discharged from the Wm. B. Palmer. From May 22 to May 31, the Duisberg, another ship of Messrs. Spilhaus', discharged 810 tons, and during the same period not a single ton was discharged from the Wm. B. Palmer. The dates of arrival of these two ships were shown in the document. One, the Duisberg, arrived on May 21, whereas the Wm. B. Palmer arrived in March.

Jno. Beedle, chief clerk in the firm of Thompson, Watson, and Co., said that lighters had been used for the discharge of cargo from ships in the Bay for a number of years. These lighters were used indiscriminately for any kind of cargo. The same lighter could be used for coal, or other description of cargo.

Cross-examined by Mr. Benjamin: The smaller lighters were about ten tons. These were used for coal or wheat. Lighters had not before been used to the extent they had during the last two years. Boats under ten tons would not be practical for lightering coal.

Wm. Twine, boat-owner at the Docks, said he had been 15 years in the Bay. Lighters were used in the Bay for any cargo. One lighter was kept for the mail; all the others were used indiscriminately.

This closed the plaintiff's case.

Mr. Benjamin called

Wilhelm Spilhaus, the defendant, who said that his firm imported a great deal of coal. At about the end of last year witness attempted to make arrangements with regard to a cargo of coal he expected. It was to come, not by the William B. Palmer, but by another vessel, with which he had been negotiating. These negotiations were not carried through, but the William B. Palmer was chartered. Witness's son went to see Mr. McKenzie to make arrangements for the William B. Palmer. Witness was not successful in making a definite arrangement with Mr. McKenzie, who would not guarantee anything. After the William B. Palmer arrived witness frequently saw McKenzie, and sent down to him in order to try to get him to do something in regard to the William B. Palmer. The German-Australian Line was a line which had been running to Cape Town for several years. Witness was local agent for this line.

Mr. Benjamin said this was the line to which vessels referred to by Sir Henry Juta belonged.

Proceeding, witness said an arrangement was made with McKenzie that the vessels of this line should be discharged as quickly as possible. They had dynamite on board, and could not come into dock. McKenzie undertook to do the discharging in a reasonable time. There were no other vessels discharging at the time by lighter with the exception of some which had a small cargo for Cape Town; not large enough for them to come into dock. Excepting these, the usual place for discharging was at the Docks. The freight by the W. B. Palmer was one of the highest he had ever known. He had never known freight to be higher. The freight before 1897 was as low as 18s. 6d. The whole of the cargo was drawn against. The coal itself had been paid for.

Cross-examined by Sir H. Juta: They had no coal stores before April. They had no coal stores at all. The coal went direct from the ship to the customer. The first portion of the coal was sold from the W. B. Palmer before November, and more than half by the time the vessel arrived.

By the Court: The coal was sold to arrive. The first sale was made by the first

ship that offered to them. He forgot the name. The charter fell through, and the purchaser afterwards agreed to take coad to arrive by the W. B. Palmer.

Cross-examination continued: It was the practice that as the vessel went on discharging the coal was sold. If they did not sell all the cargo they made other arrangements. They lent it to the shipping company, to the railway people, and on one occasion they stored it with friends. He could do this again. He could not say what was the consideration for this last storage. The Vasin arrived on April 11, and in eight days they discharged 941 tons. That was very good work. There were plenty of lighters, but there was a great want of men. The Duisberg arrived on the 23rd May. In nine days they discharged 810 tons. During that time it might be that no lighters went to the Palmer, but that was because the captain refused to discharge further until demurrage was paid. They could not use the lighters from the Vasin for the Palmer, because the lighters belonged to the steamship company, and it would have been dishonourable for him as an agent for the steamship company to use these lighters for his private purposes. He had no written agreement with McKenzie. Had McKenzie told him that there would be a difficulty in discharging a hundred tons a day he would not have cabled accepting the Palmer.

By the Court: He saw the agreement before he cabled the order for the first ship. When McKenzie said he could land 100 tons a day he took the first ship. After the first charter fell through his son went to see McKenzie, who stated that he could discharge 130 tons a day. Therefore witness chartered the Palmer.

Re-examined by Mr. Benjamin: His nephew had charge of the coal branch of the business. During the time of the plague and the trouble with the natives the crew of the German ship assisted to discharge in the lighters as well as in the vessel. Witness asked McKenzie to guarantee the discharge of a hundred tons a day. McKenzie refused to give a guarantee, but said he would do his best to discharge a hundred tons a day. If McKenzie had not said this they would not have ordered the Palmer. McKenzie did not anticipate difficulty.

By the Court: The German ships saw they could not come to this port unless they got facilities for discharging. The firm would not have chartered the Palmer but for

McKenzie's promise. When they asked McKenzie for lighters he did not refuse, but said he would do his best.

Andrew Richard McKenzie, called, deposed that the usual and customary place for discharging vessels before the war was in all cases in the Docks. Only vessels with dynamite on board discharged in the roadstead. That was according to the Dock regulations. Australian boats sometimes passing might discharge passengers and a little cargo in the Bay. In 1899 a slight block began in the Bay. It was in March, 1900, that the difficulty really began. Then vessels began discharging in lighters. Witness was the only dock agent who had lighters. Then the Harbour Board got a few of their own. These were handed over to witness in March or April, about the time of the arrival of the Palmer. They were handed over to work the railway coal ships. He could only have used them for other ships when there were no railway coal ships to work. In March last they had difficulty at the Docks with labour owing to the plague. At first there was an entire clearance out. They had no native labour at all, only Colonial boys. They felt the effect of this for two months. They were without natives for a week, and for some time after that the natives were so demoralised by the plague that they would not work regularly. They were also afraid of being compounded. He felt the want of labour up to May, but even at present the effect was felt. His manager made an agreement in regard to stevedoring the vessel. The W. B. Palmer was discharged quite as quickly as she could be discharged under the circumstances—the plague and the congestion in the Bay. There was also great congestion on the quays. Lighters of coal were left undischarged in the basin when the men cleared out. Coal lighters discharged in the basin or slip-way. This was true of all lighters. They worked several nights on the Palmer's lighters, discharging them. During the period May 24 to June 4, when the captain stopped the lightering, witness could have supplied lighters at the same rate as he had the ten days previously. Witness had an agreement with the German-Australian Line in regard to lightering. When that line's boats first touched here Mr. Spilhaus called on witness and informed him that these ships wanted to coal here, but that they had dynamite on board, and would require their cargo to be lightered. Witness then undertook to lighter the German boats coming here with cargo, and had carried out that arrangement up to the present time. The

Invincible was a timber vessel. Timber vessels usually discharged in the dock. They often discharged over the bows, and thereby economised quay space. A coal vessel could not discharge over the bows. She had to have a quay berth. Witness considered that he was honourably bound to discharge the German-Australian boats as soon as they came. Nothing Mr. Spilhaus could have done would have induced him to leave the German-Australian boats for the Palmer. Witness made a fair distribution of the lighters amongst the shipping, and the Palmer, he thought, got about the best advantage of the lot.

Cross-examined by Sir H. Juta: It was true that from March 1 to March 8 (the worst time of the plague difficulty), he discharged 1,067 tons from the Emperor Menelik, but it was for the railway people, who were bound to have their coal. The Norwegia discharged 532 tons between March 11 and March 19, and during the same time the Vasir discharged 941 tons. They had grain. Witness had very little difficulty at that time with grain ships, and the reason for the Menelik being discharged as she was, although a coal ship, was that the railway department had to have the coal for the engines, and men were kept working at her all night. The difficulty was in regard to labour. They could have probably got labour by paying a much higher rate. The Palmer was not discharged, partly because of the want of labour, and also because of there not being sufficient lighters in the Bay. Lighters could not have been obtained from English builders under a year. There had been complaints about the discharging of vessels at the Docks since 1900. Since then lightering had become a customary way of discharging.

Re-examined by Mr. Benjamin: They could not have got the Kafirs to work during the scare, no matter how high the wages were made. It was not at that time a question of money.

By the Court: It was not possible, considering the circumstances of the port, to discharge the vessel more rapidly than they did. Mr. Spilhaus left no stone unturned in order to facilitate discharge of the vessel. There had always been a certain number of lighters in the Bay. The present lighters were different from those used in the old days when everything was brought ashore by lighter. There were only six of these lighters left now. Although Mr. Spilhaus was agent for the German line, witness

would not have sent the lighters from the German boats to the Palmer at Mr. Spilhaus's request.

William Sinclair, called, deposed that he was chief railway storekeeper. The vessels named in the pleadings were railway coal ships. There was a great shortage of coal during March and April of this year on the main and Wynberg line. At one time the deficiency was such as almost to stop the working of the Wynberg line. The department represented to the Harbour Board that they absolutely must have coal.

By the Court: Consequently they got the coal.

William Stephen, port captain, deposed that the customary place to discharge was the Docks. Previous to the war there was very little lightering of cargo. German steamers used to lighter their cargo, and any vessel with a small quantity of cargo. There had been rather more work at the Docks than they could do, and lightering had become more common. There were as many lighters as they could do with. They had not enough lighters to discharge all the ships, but they had as many as they could work in the Docks. The plague disorganised the work at the Docks for a month or two, probably until some time in May. He remembered the Palmer coming in. He thought that, considering the circumstances, the discharge was equal to that of other vessels. They came into dock in turn, according to the rule of the port. If there was a place where they could put a small vessel, they would put her there. Vessels that could discharge over the bows would get in in their turn also.

Cross-examined by Mr. Searle: A good deal of lightering had been done in the Bay since the war; as much as could be done. There was a good deal of coal lightered. He had not gone into the figures, and could not say precisely. Shortly after the plague, regulations were promulgated, there was considerable unrest amongst the natives. Work was going on at all times, but it was practically nil for a short time. All the lighters in the Bay had been employed in some way or other. Some times they were left undischarged, and thereby delay was caused. He had not compared the number of days the W. B. Palmer was in the Bay with the period of the other vessels, but he thought the Palmer would compare very favourably with the other vessels, so far as despatch was concerned.

By the Court: The rapidity of the loading and unloading of a vessel depended on the appliances. He considered that the lighters were rather a drawback than otherwise in this port, because they interfered with the work in the dock itself. The delay was caused by the removing of the cargo from the lighters. If the delivery could be expedited, the vessel could discharge 50 per cent. more cargo than they did at present. The Customs required that everything should go through the Docks.

Frank Robb, secretary to the Harbour Board, stated that since last March and April representations were made by the Railway Department to the Board in regard to the supply of coal, which was badly needed for the main and suburban lines. The Board handed over certain lighters to McKenzie, on the condition that he should supply an average of 400 tons a day. The plague disorganised work at the Docks to a large extent. This disorganisation lasted for some time.

Cross-examined by Sir H. Juta: The disorganisation began in March, or, at all events, immediately after the outbreak of the plague. The disorganisation existed amongst the natives, who were not under the Board's control. They were employed by the agents. He thought the date of his last interview with the natives in connection with the plague trouble was in April.

Re-examined by Mr. Benjamin: He did not think the interview had any effect.

By the Court: Fresh lighters were got out by the Harbour Board to relieve the congestion.

Carl Antonie Spilhaus, called, deposed that he had charge of the coal department of W. Spilhaus and Co.'s business. He saw to the discharging of the W. B. Palmer. He did all he could to urge on McKenzie to expedite the discharge.

By the Court: Warner and Co. bought a thousand tons of coal before the ship came in. The City Flour Milling Co. got a hundred tons.

Cross-examined by Sir H. Juta: Mr. Buchanan's order was given after the vessel arrived. They always got rid of the coal. They sold the coal at a reduction if they could not get their price for it, in order to get the ship discharged.

Re-examined by Mr. Benjamin: The agreement with Warner was that he should take a thousand tons at a price, and another

thousand at a reduction, if the firm could not get a better price for it.

By the Court: The coal was not kept on the ship in order to get customers. The customers they had were, on the contrary, kept waiting for coal. The City Flour Milling Company was almost out of coal. When the cargo was discharged all the coal was sold.

Polyphemus Lyon said he was the local representative of Peabody and Co. He was in the firm's business formerly in New York. He had just returned from New York. It was difficult to get a boat from New York for this port, because of the pressure here. The freight in 1899 was 18s. 6d. That was the highest they had ever paid for a coal ship at that time.

William Hendrik Carrol said he was manager for A. R. McKenzie and Co. He saw Mr. Fritz Spilhaus in regard to the discharge of the Palmer's cargo. He wanted witness to guarantee a discharge of 100 tons a day. Witness could not do that.

Cross-examined by Sir Henry Juta: That was in December. The daily discharge of cargo between May and June of this year would average from 4,600 to 4,900 tons.

By the Court: He could not say from memory what would be the average of cargo from the lighters, because sometimes they worked night and day, and at other times through stress of weather lighters could not go out for days at a time.

Mr. Benjamin closed his case.

Sir H. Juta, K.C. (for plaintiff): We may at once dismiss what has been said about the freight. It was high, and that was all the more reason why the discharge should be expedited. In November and December, 1900, there were as many lighters as in April. With full knowledge of the state of the Docks, defendant agrees after twenty days to pay for demurrage.

[Buchanan, A.C.J.: In the event of his being in default?]

Yes, but default must imply an omission of something which he ought to have done. Spilhaus knew that the ship could not come into the Docks, and yet he and McKenzie contracted to discharge her in twenty days. The vessel arrived in April. There was no evidence that the consignee made any provision to get the ship discharged, although he knew months before that she was coming.

[Jones, J.: The only undertaking in the charter party was that sufficient cargo should be taken out of the ship to enable her to come alongside the wharf.]

Spilhaus said on oath that he would not have entered into the contract had he known

the ship would not be discharged by lighter. At the time the contract was entered into lighterage was the customary mode of discharge. It rests with defendant to show that he did all that could be done to carry out his contract. He had four months in which to make his preparations. The defendant is in default, as he did not come and take delivery of cargo. He pleads want of labour, arising from the plague, scarcity of lighters, etc., but he must show why he did not take delivery of cargo, and under what exception in the charter party he falls. If a man contracts to do a thing and fails, he must show that his case falls under some exception provided for in the contract.

[Jones, J.: I should have thought that default meant fault of one's own?]

If that were so, it would be possible to get out of any contract. It was physically possible to discharge this vessel. Other vessels were discharged by lighters. What then was the unavoidable hindrance in this case? Simply that other ships got the preference. An instructive case on the obligations of a charterer under a charter party is *Wright v. The New Zealand Shipping Company* (4 Ex. D., 165). In that case a "reasonable time" for discharge was defined as "a time within which a man working reasonably could do the work." See the judgments of Bramwell and Cotton, B.B. Thesiger, B., takes the same view. In the case now before the Court a time was fixed within which the vessel had to be discharged, so that this is a stronger case than that. It is the duty of the consignee to have his appliances ready to unload. See *Ashcroft v. Crow-Orchard Colliery Company* (L. Rep., 9, Q.B., 540).

[Jones, J.: In that case there was clearly a default.]

So there was in this case, viz., the non-discharge of the ship within the time specified. Spilhaus was discharging other ships all the time, because he had a previous engagement with them; but that was so also in *Ashcroft's Case*. Then there were previous engagements; but an owner knows nothing about the prior engagements of a charterer, and the charterer cannot justify a breach of contract on any such grounds.

[Jones, J.: He is only bound to deliver in accordance with ordinary custom.]

It has been proved that discharging by lighters is one of the customs of this port.

[Maasdorp, J.: In a case where the shipper was held liable, it was on the ground that by use of diligence he could have provided more lighters.]

In that case, Selborne, L.C., tried to reconcile his judgment with that of Bramwell,

B., Cotton and Thesiger, J.J. They ruled that if a man undertakes to discharge cargo he cannot say "There are no more lighters." It is otherwise if the contract is to discharge according to custom. ("Times" L. Rep., vol. 16, p. 66.) There the question was as to the meaning of discharging with all due despatch *as is customary*. These words, *as is customary*, make all the difference. They refer to the rules, customs, and the appliances at the port. In the present case there is no question of the custom of the port; there was an undertaking to discharge within a specified number of days. Here the defence is that there were not enough lighters. With regard to default, see *Caffarini v. Walker* (9, Irish Rep., L.J., 431); see particularly p. 437. Default means every failure to perform a contract unless prevented by *vis major*, such as stress of weather, etc.

[Jones, J.: Surely default means default on my part?]

The charter party enumerated all the various kinds of *vis major* recognised by the contract. The defendants excuse themselves on the ground of strikes of workmen. On default, see *Carver on Carriage by Sea* (section 611, p. 609). To carry the case a step further, Spilhaus had made no contract with McKenzie to get lighters, and suppose that McKenzie would not give lighters because he and Spilhaus had quarrelled, was the ship bound to wait till McKenzie would give lighters? In this case the shortage of lighters was not unforeseen, because Spilhaus tried to provide for the difficulty beforehand. He could have made satisfactory provision. He could, for instance, have got a hulk. A converse case to this is *Britten v. G.N. Railway Company* (1 Q.B.D., 244). In that case the charterer was held not responsible, because the delay was owing to the default of the shipowner.

Mr. Benjamin (for defendant): The majority of the cases quoted on plaintiff's side are not in point. This is so both in *Wright's Case* and *Ashcroft's Case*. We say that we are protected by one of the clauses of the charter party. The restrictions therein must have some meaning. See *Scrutton on Charter Parties*, note to Art. 131 (p. 235).

[Jones, J.: Can you bring this case within your exceptions?]

In *Postlewaithe's Case* (5 Ap., 599 and 618), Blackburn, J., states the doctrine of exceptions under a charter party. *Wright's Case* and *Ashcroft's* are two most unfortunate cases for plaintiff, because whenever cited, they are either dissented from or distinguished. See *Scrutton on Charter Parties*,

note to Art. 133 (p. 239). *Ashcroft v. Crow Orchard Company* is referred to in the "Derwent Case" (64 L.T.N.S., 509). We did all we could to discharge within the time specified. We are protected first by the custom of the port; secondly, by the special clause of the charter party; and, thirdly, by the general exception clause.

[Jones, J.: Everybody knows the state of the port now.]

Yes, and that was the very reason why these exempting clauses were put in. As to the case of *Wright v. The New Zealand Shipping Company*, we used the appliance obtainable at the port. Even if we had had more lighters, there was no place at which they could have been discharged.

[Maasdorp, J.: In *Wright's Case* they undertook to discharge according to the custom of the port. In this case, knowing the state of the port, they undertook to discharge in twenty days.]

Yes, subject to restrictions. People thought the war would have been ended long ago, and that the port would have resumed its normal condition. Spilhaus wished, however, to protect himself; hence the special clauses in the charter party.

[Buchanan, A.C.J.: The whole question comes to this: "Have you been guilty of any default?"]

Yes, but *Cafferini's Case* was cited for plaintiff, and it is not in point. Another case in which a defence of default was made is *re Young and Hurston's Contract* (31 Ch. D., 174). See judgment of Bowen, L.J. There was nothing we could have done according to the custom of the port which we did not do. There was no delay or default on our part; the delay was owing to circumstances over which we had no control. Not only was there a shortage of lighters, but also of labourers, owing to the plague, which caused something approaching to a strike. The correspondence of April 1, April 29, and May 10 shows that we did all we could do to hasten the discharge of cargo. The schedules put in show the impossibility of making more despatch, having regard to the tonnage of the vessel.

[Buchanan, A.C.J.: Your contract was to discharge in twenty days.]

The Halbah (a comparatively small vessel) took fifty-two days to discharge. Then twenty days fall to be deducted from the days of discharge of the W. E. Palmer during which she refused to discharge cargo. The W. E. Palmer got really more than her fair share of attention, and the delay was

therefore due to unavoidable hindrances. This is shown by the schedules put in on both sides. As to certain coal vessels, McKenzie had bound himself to the Harbour Board when they handed over their lighters to him to give such coal vessels the preference. The Railway Department was evidently in want of coal. As to the German and Australian Lines, they had made a previous arrangement with McKenzie to discharge. We depended on McKenzie, and he considers himself bound to these companies. We had no control over McKenzie, and therefore any delay is not due to our default, and this brings me to my next point, viz.: How are we to understand the charter party as to the place of discharge? The customary place is in the Docks. The words "in docks" have been struck out of the charter party, so that they cannot be taken into account in construing the document. The term "discharge as customary" meant that the ship was to come into the Docks.

[Buchanan, A.C.J.: Spilhaus said he never expected the ship to come into dock.]

We cannot judge as to the customary way of discharge by what is going on under the present abnormal state of things. Previous to the war the customary place of discharge was in the Docks. The charter party applied only to Cape Town, and it is common knowledge that a vessel of considerable draught could only enter the older part of the Docks without lightering.

[Buchanan, A.C.J.: Why then did Spilhaus get his coal by lighter?]

He had sold the coal to arrive, and was anxious to get it as soon as he could. Again, in this case 26s. per ton freight was paid, instead of 18s. 6d., as before the war. The difference (7s. 6d. per ton) works out at £1,000 for 2,500 tons. Curiously enough, this is just about what is asked for demurrage. The master evidently expected delay, or he would not have charged such a high freight. Spilhaus had done all he could, and therefore was not in default.

In giving judgment, the Acting Chief Justice said: The plaintiff in this case is the master of the ship W. B. Palmer, and the defendants are Messrs. Spilhaus and Co., who represent the charterers of the vessel. The ship was chartered at New York on the 14th December last under the charter party annexed to the declaration. The ship arrived in Table Bay on the 29th March, and on the 1st April the captain gave due notice to the agent to commence discharging the cargo. All questions relating to maritime and shipping contracts have to be determined ac-

according to the law of England, which, on these subjects is now declared to be the law of this country, and consequently we have to be guided by English decisions and English principles. Looking at the English cases, there is no doubt a great conflict of opinion as to the principles upon which claims for demurrage rest; but the authority cited by counsel, I think, lays down the rule which governs these cases, namely, that if, in terms of the charter, the charterer has agreed to load or unload within a fixed period of time, there is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing his contract, unless such impediments are covered by exemptions under the charter, or arise from the fault of the shipowner. The charter party in this case has fixed the time within which the cargo has to be delivered, and it also has certain conditions or exemptions. The charter party says: "The vessel to deliver cargo as customary, commencing forty-eight hours after the captain has given written notice to consignees that vessel is ready; the cargo is to be discharged in twenty weather working lay days." The parties agreed that certain hindrances, such as the act of God, restraints of princes and rulers, holidays, quarantine, bad weather, fire, riots, stoppage of trains, strikes of pitmen and others, lock-outs, disputes with workmen, frosts, floods, or fogs, and all unavoidable accidents or hindrances in procuring, loading, or discharging the cargo, as well as all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind, which may prevent the loading and delivery during the voyage, were mutually excepted. The parties also agreed that in case the vessel is longer detained than the lay days provided for, the charterers should pay demurrage at the rate of 108 dollars 25 cents per day, day by day, for every day so detained, provided such detention should happen by default of the charterers or their agents. Therefore, according to the English cases, this is a contract to pay demurrage if the cargo is not taken from the ship within the lay days mentioned, except it can be shown that the detention has happened by no default of the charterers. Now, it having been proved that the vessel gave proper notice, and that the lay days have elapsed, and that the vessel has not been discharged within that time, the onus is upon defendants to show that the delay is not due

to any default on their part. The question has been raised in argument as to the mode by which delivery of this cargo was to be made, and it was contended that by the words "as is customary" it was intended that the delivery was to be taken only after the vessel came into dock and alongside the quay. If that was the contract between the parties, there are English cases, although there are also conflicting decisions, showing that the lay days do not commence until the vessel comes alongside the quay in the dock. But in this case I am forced to the conclusion that it was not intended originally that this vessel should go into dock at all. The customary mode of discharge at the time the contract was entered into and at the time the vessel arrived here, the evidence shows was twofold, viz., by discharging in dock and by lightering in the Bay. Before the Docks were built, all cargo was lightered from vessels. When the Docks were constructed, vessels came into dock and discharged there, but still some lightering has continued to be done. There has always been lightering going on in the Bay. Owing to the congestion and the influx of ships caused by the war, for the last two years lightering came more to the fore, and during these last two years, McKenzie tells us, at least half the coal ships have been discharged by lighters. Therefore the customary discharge of coal ships is as much by lighters in the Bay as by discharging in dock. This view of the contract was taken by defendants themselves. When the vessel arrived, it was not ordered to go into dock. It could not do so at the time, and Spilhaus immediately attempted to have the vessel lightered in the Bay, and the cargo discharged in this manner. He tells us he endeavoured before entering into the contract at all, to make arrangements with McKenzie to lighter this very cargo in the Bay, and finding McKenzie, though unwilling to give any guarantee, considered there was no doubt he could so discharge the cargo, he gave the order for this coal. If any weight is to be given to the words "customary delivery of cargo," it was as customary for cargo to be delivered by lighterage as by going into dock. It, therefore, being open under the charter party for delivery to be by lighterage, and defendants having accepted the position, and having provided for and ordered the ship to be discharged by means of lighters in the Bay, the question is whether any cause beyond the control of the defendants or whether any unavoidable hindrance has caused the

delay. It appears that before the contract was entered into, there was difficulty in getting sufficient lighterage for vessels which came into the Bay. The defendant Spilhaus stated that he consequently consulted McKenzie, and ascertained from him that he could lighter this cargo at the rate of 130 tons per day. Thereupon, and only in consequence of this representation by McKenzie, he chartered this vessel in New York, on the presumption that it could be lightered by McKenzie in twenty days. Knowing all the facts, he contracted with a person in New York that the vessel should be discharged within twenty weather working days. Here was a distinct contract entered into by defendants, with a knowledge by them of the difficulties which existed at the time at this port, and circumstances of which the people in New York could not be presumed to know. McKenzie, it was true, would not guarantee anything, but having ascertained that McKenzie could discharge the ship within the time stipulated, Spilhaus entered into this distinct contract, that the ship should be discharged in twenty weather working days, and that, if not, he should pay demurrage, unless there was any default on the ship's part. When the vessel arrived here there was delay in discharging, owing to the great demand at the time for lighters, but when we come to analyse the evidence, we find that after the ship gave notice that she was ready to discharge, and during twenty weather working days, Spilhaus had McKenzie's lighters, using them for other vessels of which he is the agent. I can quite understand Spilhaus saying it would be dishonourable of him to take lighters from the vessels of the German Company, of which he was the agent, and to devote them to his own service, but as he had entered into this contract, if he prefers his honour to his pocket, then his pocket must suffer, and not the pocket of the owners of the vessel. Having made the contract, he must stand by it. I think Mr. Spilhaus took a very proper view of what his honour called upon him to do, but he must take the consequences, and he cannot satisfy his honour at the expense of some other person. Mr. Spilhaus said that if McKenzie had not told him he could discharge the vessel he would never have chartered the W.B. Palmer. He said this distinctly. It is true McKenzie said, "If the German vessels were here I would not have sent the lighters to

the W. B. Palmer," but he gave his reason for it in his evidence, viz., that he would not have gone to the W. B. Palmer while the German ships were here, because he had been asked by defendants to lighter the German vessels. That is the reason; not that the lighters were insufficient, but that the lighters were employed on other vessels in the agency of which defendants were interested. We have, therefore, a contract fixing absolutely the number of working days, we have the working days exceeded, we have the fact that the cargo could have been delivered had defendants diverted the lighters from these German vessels to the W. B. Palmer, and that they did not do. So that, under the circumstances, the case is one in which the defendants have not discharged the onus which lay upon them, of showing that the delay was due to unavoidable hindrances or to any cause over which they had no control. I do not go into the question of whether Spilhaus and Co. were bound under this contract to see there were sufficient lighters at the port of discharge to do this work. Further, it is not necessary to say whether this charter was one which made it obligatory on the charterer to discharge in the Bay. When the action was first instituted there were in dispute three matters: There was the claim for freight, and also a claim to have the Court decide the way in which the cargo should be taken, either weighed over the dock weigh-bridge, or in another way; and there was this claim of demurrage. Since then the the questions of freight and of weighing have been settled out of court, and consequently the only claim which now comes before us is the question of demurrage. The point has been raised that the ship is answerable for some of the delay, because there was a refusal to deliver cargo on the 4th June, but this was after the action was instituted, and whether the refusal was justified or not does not come into this case. The number of working days which had been exceeded before action brought, and the amount claimed, has not been seriously disputed. The question which we are asked to decide is whether or not demurrage was payable, and having decided that it is, judgment must be given for the plaintiff for the amount claimed, with costs.

Mr. Justice Jones and Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Reid and Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

[Plaintiff's Attorneys, Messrs. Reid and Nephew; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SAFS V. WHEELER. { 1901.
Sept. 16th

Sir Henry Juta said there was a motion, *Sass v. Nelson*, on the paper. He appeared for the applicant, and Mr. Searle appeared for the respondent. He (Sir H. Juta) wished to state that they wanted to reply to an affidavit made by the respondent, and as their reply would depend upon the reply received to a cable which had been sent to England, they wished the case to stand over for the present.

In reply to Mr. Justice Jones, Sir Henry Juta said the motion was for an injunction restraining the respondent from producing the play "Magda" at the Good Hope Theatre.

The matter was postponed.

IN THE MATTER OF THE PETITION OF THE EXECUTOR OF THE ESTATE OF THE LATE JAN ISAAC LENNECKS.

Mr. Benjamin mentioned this matter, which was an application for the cancellation of a mortgage bond, and which, when before the Court on Thursday last, was ordered to stand over so that inquiries might be made regarding the mortgagee. The Board of Executors had been applied to, and said they knew nothing about the matter, while as to the Mr. J. G. Steytler previously referred to, he was in Europe at present. The bond was a small one, for £75, and passed as far back as 1859.

The Court granted a rule *nisi*, returnable on October 12, to be published once in the "Government Gazette" and once in the "Cape Times," and copies to be served on the Board of Executors and Mr. J. G. Steytler.

COLONIAL GOVERNMENT V. SMITH AND CO. { 1901.
Sept. 17th.
" 19th.
Nov. 1st.

Explosives—Storage—Act 4 of 1887
Negotiorum Gestor.

The defendants had erected magazines for the storage of explosives on Municipal land upon permission granted by the Town Council of Port Elizabeth during pleasure. After some years, owing to the ex-

tension of the town, the locality was found to be dangerous to the inhabitants, and notice was given to defendants to provide other accommodation and to remove the explosives. Negotiations ensued but no preparations were made by defendants to comply with the notice. Nearly a year afterwards, when war had broken out, peremptory notice to remove was given by the Council and by the Government, to whom the Council had applied for assistance. The magazines on municipal land had never been licensed by Government, as required by Act 4, 1887. The defendants being unwilling, or unable to remove their explosives elsewhere, the goods were removed by Government to a place of safety on a floating magazine in Algoa Bay, the defendants formally protesting against liability, but assisting in the removal.

Held, that on principles analogous to those by which a negotiorum gestor, or a mala-fide possessor was entitled to recover useful expenses, the Government was entitled to be repaid the cost incurred in removing and storing the explosives.

The plaintiff's declaration was as follows:

1. The plaintiff is Thomas L. Graham, the Colonial Secretary, and as such representing the Colonial Government. The defendants are Henry B. Christian and Owen S. Christian, carrying on business as merchants in Port Elizabeth under the style or title of J. O. Smith and Co.

2. In the month of October, 1899, defendants had in their possession, either belonging to them or as agents for the owners, certain quantities of dynamite and other explosives, which were stored by them or on their behalf in certain magazines, situate in or in the vicinity of the town of Port Elizabeth.

3. In or about the said month it was decided by the Government that, in consequence of the danger to the public safety by reason of the proximity of the said maga-

zines to the town, it was necessary that the explosives contained therein should be removed to some place of safety.

4. In pursuance of such decision notice was given to the defendants calling upon them to remove the said explosives in the said magazine to a place of safety, and informing them that if not so removed by them, the explosives would be removed and stored by the Government at defendants' expense.

5. The said notice was duly received by the defendants, but the said explosives were not removed by them, as requested, and the Government thereupon, as they were entitled to do, removed the same, and stored them on defendants' behalf on board the "Brambletye," a vessel engaged for the purpose of storing explosives, belonging to the defendants and other merchants at Port Elizabeth.

6. Thereafter certain shipments of explosives consigned to defendants arrived at Port Elizabeth, and were at their request transhipped by the Government to the "Brambletye," and there stored by the Government for and on behalf of the defendants.

7. In the removal of the explosives taken from the magazines and placed in the "Brambletye," and in the transhipment of explosives arriving, as in paragraph 6 set forth, the Government has incurred on behalf of defendants an expenditure of £350 12s. 7d.

8. In the storage of explosives removed and transhipped as aforesaid the Government has incurred on behalf of defendants an expenditure of £2,164 9s.

9. Although all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to recover the said sums of £350 12s. 7d. and £2,164 9s. from defendants, defendants refuse to pay the said sums or any portion thereof.

The plaintiff claims:

(a) £350 12s. 7d., with interest *a tempore moræ*.

(b) £2,164 9s., with interest *a tempore moræ*.

(b) £2,164 9s. 0d., with interest *a tempore moræ*.

(c) Alternative relief.

(d) Costs of suit.

To this declaration defendants pleaded as follows:

1. Defendants admit paragraphs 1 and 2 of the declaration, but they deny the remainder thereof, except in so far as hereinafter specially admitted.

2. With respect to paragraph 3 of plaintiff's declaration, defendants say that what

was decided upon by Government is a matter beyond their knowledge, but deny that there was any danger to the public safety by reason of the proximity of the said magazines to the town, or that it was necessary that the explosives contained therein should be removed.

3. With respect to paragraphs 4 and 5 of the plaintiff's declaration, defendants deny that notice was given them by plaintiff to remove the said explosives, but say that they were wrongfully removed by plaintiff, without defendants' consent and in spite of their protest against such removal.

4. The transhipments referred to in paragraph 6 were made by plaintiff's orders, and in consequence of plaintiff's wrongful action in removing the said explosives, and were not made with defendants' consent, and were subject to the same protest on defendants' part.

5. With respect to paragraphs 7, 8 and 9 of plaintiff's declaration, defendants deny that the said payments or expenses or any of them were incurred on their behalf, or were rendered necessary by them, and defendants admit their refusal to pay the sums referred to, and deny their liability for the same or any part thereof.

6. Defendants further say that at the time the said explosives were seized and removed by plaintiff, they were properly and legally stored in magazines erected for that purpose on a site duly approved of by H.E. the Governor, and duly licensed, and that defendants were entitled to store explosives therein.

7. Defendants further say that the method of storing the said explosives adopted by Government was unreasonable and expensive, and the cost incurred quite unnecessary for the proper storage thereof.

In his replication plaintiff admits that defendants did lodge a protest against the removal of a portion of the said explosives, viz., those stored in the magazines. Save for this admission, the replication is general.

This was an action taken by the Colonial Secretary, as representing the Colonial Government, against Henry Bale Christian and Owen Smith Christian, trading under the name of J. O. Smith and Co., at Port Elizabeth, to recover certain two sums of money, amounting respectively to £350 and £2,164 9s., in respect of the removal of certain explosives and the storage of the same.

Mr. Searle, K.C. (with him Mr. Joubert) for the plaintiffs; Mr. Gardiner (with him Mr. B. Upington) for defendants.

Mr. Searle said that these magazines had existed a good many years in the neighbourhood of Port Elizabeth. There were fourteen of them, and there were fourteen merchants concerned, this being a test case. The magazines were originally established under permits by the Town Council to exist during the pleasure of the Council. This was apparently done under section 77 of Act 14 of 1868. Permits were given at different times by the Town Council. Some of them were expressly during the pleasure of the Town Council, and some were not. In November, 1898, the Town Council gave notice to all these parties that all permits and licences were cancelled, and that some of the owners must remove the contents of the magazines in six months, and in other cases in less time, on account of the danger existing owing to the proximity of the magazines to the town. This action was taken by the Council after consulting the Government, and after having the opinion of the Government expert. The magazines were about a mile and a third from the town. There were a large number of magazines and a great quantity of explosives. The magazines were within the Municipality. The notices expired in March, but the explosives were not removed. Then in October, 1899, the Town Council made strong representations to the Government that the Government should take action on account, no doubt, of the war starting. These magazines were never licensed by the Colonial Secretary. There was a licence given in one case in 1898, but it was not renewed in 1899. Section 16 of the Explosives Act (Act 4 of 1887) provided that explosives should not be kept in any place except where manufactured, and except in a magazine or store for the keeping of which the Colonial Secretary had issued a licence, which he might renew at his discretion year by year, provided that the section did not apply to any explosive in regard to which provision was made by the law. Where explosives were kept in an unauthorised place a penalty was provided.

[Buchanan, A.C.J.: Is there any section authorising the Government to remove compulsorily?]

Mr. Searle said he did not think so.

[Buchanan, A.C.J.: Why didn't they force the owners to remove the explosives?]

Mr. Searle said the matter was so urgent that Government thought they ought to deal with it.

[Buchanan, A.C.J.: The Government could have obtained a madamus. That would have been the simplest and proper method.]

Proceeding, Mr. Searle said that on October 18 a proclamation was issued prohibiting the importation of any explosives to this country, and on November 25 another proclamation was made allowing importation on permission being given by the Colonial Secretary. In the beginning of November certain explosives were in the bay at Port Elizabeth, having been imported by defendants. The Government called upon defendants to dispose of these, and said that if they did not they would transship them. Whereupon the defendants requested the Government to take the explosives and transship them. The transshipping seemed to have been done by defendants, but the charge stated in the declaration was correct, being the amount of the claim for storage. Later on, in May, more dynamite came, and that was dealt with in the same way. From time to time defendants were allowed to take out from the ship what they required. The same system was still going on. One or two of the firms had paid the Government's claim, but the other firms would not pay, and so the action was brought.

William Pillman Pinn, Town Clerk of Port Elizabeth, said the first magazines were placed in about 1863, for the purpose of storing gunpowder. They were allowed to be there under a licence from the Town Council. Witness had searched the record, and found that twelve or thirteen years ago applications were received from merchants for permission to erect magazines for storing dynamite. Permission was granted to construct a number of magazines for storing dynamite during the pleasure of the Council. In November, 1898, the owners received notices (copy produced) from the Municipality. The notices, which were dated the 10th November, 1898, contained a report of a committee in reference to the statements made by an expert with regard to the danger of the magazines. The committee resolved, and it was confirmed by the Council, that notice should be given to the owners to remove the magazines. In the letter, the committee's report and resolutions were set forth, and a conference of merchants affected was invited. In February, one merchant pointed out a site, but nothing was done until October, 1899, when there was correspondence between the Mayor and the Government. The Mayor, in his letters, expressed the alarm of the inhabitants at the danger to the town in consequence of the

storage of dynamite near the town. On October 18, notice was given to the owners to remove the explosives in the magazines in twenty-four hours, failing which the Council would remove them. Defendants and others replied on October 19 that it was impossible to comply with the demand. Later there was a conference. This was referred to in the Mayor's minute. This was a conference of the military, naval, and municipal authorities, who agreed that it was necessary for the safety of the town to put the dynamite afloat. The Mayor further stated in his minute, the steps which had been taken by him in regard to the matter.

The Acting Chief Justice asked why the Municipality did not take action.

The witness said that the Government took action.

The Acting Chief Justice remarked that it looked as if the Municipality was shirking its responsibility.

Witness said the explosives were removed by Government in November, 1899. He did not know what passed between the owners of the magazines and the Government. In December, 1899, the Council wrote to the owners informing them that no storage of dynamite would be permitted, and that the dynamite afloat would not be allowed to be returned. In October, 1900, the magazines were ordered to be removed. The magazines were on municipal land, but no rent was paid to the Council.

Cross-examined by Mr. Gardiner: Defendants had three magazines. For the first of these—No. 6—permission was given in 1877 by the Town Council by resolution. He had not the resolution in court. He did not know whether the permission was for dynamite. He could not say when they commenced storing dynamite. No. 3 magazine—also owned by defendants—was sanctioned in 1887, and No. 4, the defendants' third magazine, in 1890, both being subject to the Council's pleasure. The magazines remained there until 1898 without interference by the Council. When notice was given to certain owners to remove, it was not enforced, as the owners said they did not know where to remove the magazines. After a conference of owners and the Municipal and Harbour authorities, a site at New Brighton was selected—by the Harbour Board, witness believed—and approved. This site was not within the Municipality. But for the war witness thought the Council would have allowed the old magazines to be used until the new ones were completed. At the creek where the old magazines were an aerial

tramway was put up by the Harbour Board for conveying explosives.

Jarvis Ayre Foulkes, Chief Inspector of Explosives for the Colony, said he inspected the magazines at Port Elizabeth in July, 1898, and reported on them. In his opinion the magazines were built too closely together, and were dangerous. They were not properly spaced, some of them being within 40 yards of one another. Witness recommended that some should be removed, and failing that, that all should be removed. All magazines in the Colony should be licensed by the Colonial Secretary. These were not. In October, 1899, witness attended a meeting at Port Elizabeth in regard to the question of removal. The meeting was called in accordance with instructions from the Colonial Secretary, and was held at the Magistrate's office. It was attended by witness, the Mayor, Major Fairholme, Captain Jones, Mr. Innes (Collector of Customs), and the Magistrate. The meeting agreed that it was imperative that the dynamite should be forthwith removed and placed afloat. Witness considered the matter urgent. At a subsequent meeting of the Government Committee it was agreed to get a vessel on which to put the dynamite. This, in witness's opinion, was the only possible arrangement. No other ship but the Bramletye was available. They got a reduction from the ship of from £800 to £600 per month.

Cross-examined by Mr. Gardiner: Most of the contents of the magazines belonging to defendant consisted of collodion, which was not explosive when moist. Some of this was now stored on land, two miles outside the Municipality. There was no danger in leaving the collodion in the magazine. It was classed under explosives. There was no objection on account of their proximity to the town. It was their distance from one another and their construction, which constituted the objection. They were 2,000 yards from the town, which was a safe distance for the explosion of a magazine with 50 tons of dynamite.

[Buchanan, A.C.J.: But if there were several magazines of 50 tons each, they might be dangerous to the town?]

Witness: Yes; but the magazines are of a sufficient distance apart to prevent their all going off together.

Cross-examination continued: Mr. Smith's magazines were very well built. They were some distance apart. No magazines in the creek had licences. He did not know until after the removal that there had been no licences.

The special landing jetty was erected by the Harbour Board.

Re-examined by Mr. Searle: The issue of licences was not in his department. They went direct from the Colonial Office. Collodion was a sort of gun-cotton. It would come under the proclamation dealing with explosives. All the dynamite in the Bay was stored in the Orissa. There was no more room on the Orissa, so the collodion was removed from her and placed in a magazine about two miles from the town. The collodion was used in making blasting gelatine and smokeless powder. He considered it highly necessary in the public safety to have the collodion removed.

Andrew James Fuller deposed that he was a clerk in the office of the Colonial Secretary. He was so in 1899. The Explosives Department was in his hands. He was familiar with the correspondence that had passed in regard to this matter. Only one licence was issued to one of these magazines. It was issued to Hansen and Schrader to the end of 1898. There were numbers of licensed magazines in different parts of the country. There were no military representations in regard to this matter. It was, so far as he knew, an entirely Municipal concern. He made up the different accounts in regard to the defendants' liability in the matter. The extract handed in showed the amount of the claim. It extended from November, 1899, to June 30, 1900. The dynamite remained on the Brambletyde during the months of November and June, and after that it was transferred to the Orissa. Altogether, 10,381 cases belonging to the defendants were removed from the land. The cost of removing all the defendants' stocks worked out at 8d. odd per case. Messrs. J. O. Smith and Co.'s share therefore worked out at £350 12s. 7d. Then the rental on the ships' stocks was calculated. There were two classes of stocks, one removed from the land, and one removed from the ship. The cost in this connection was calculated on the *pro rata* principle, as in the matter of removal expenses. This worked out at 5½d. odd per case per month for rental. The land stocks worked out at £1,719 3s. 6d., and the ships' stocks at £445 5s. 6d. The removal expenses only related to what was removed from the land, the costs of transhipment from the two vessels in the bay being borne by the defendants themselves. The whole amount charged to J. O. Smith and Co. was £2,164

9s. He considered that the accounts were made up on the fairest basis possible.

Cross-examined by Mr. Gardiner: The licences were issued by the Magistrates. He did not know if the action of the Magistrates in this matter was regulated by the Colonial Secretary.

Robert Henry Hammersley-Heenan, Engineer-in-Chief to the Table Bay Harbour Board, said that in October, 1899, he was Engineer-in-Chief and General Manager to the Port Elizabeth Harbour Board. He remembered that the authorities thought it necessary to remove certain explosives from the magazines. There was a consultation in which he took part in regard to the renting of the Brambletye for a period of six months. The charges at the time could not have been less. There was no other vessel or place available for the storage of the explosives; £600 a month was a high charge, but that could not be helped. The removal charges were most reasonable.

Cross-examined by Mr. Gardiner: He did not attempt to buy the Brambletye. He could not say what would have been a fair price for her; £600 was a high rental; £400 would have been a big price in normal times. They were in a hurry to remove the explosives. Had they had time they could undoubtedly have got a vessel cheaper. They could not have got magazines on land. There were about 30,000 cases to store. They were kept in twelve or thirteen stores. There was only one other magazine that he knew of. It was on the other side of the creek. It would not have taken the whole stock of 30,000 cases. He thought the stuff was taken out of Hansen and Schrader's place also. It certainly should have been. The Commandant's orders were that all explosives had to be removed. The vessel containing the explosives was moored out so far from the shore on the advice of the explosives expert. Witness understood that it was put out so far so that the town and the shipping should not be endangered.

By the Court: Endeavour was made some time before the war to have these explosives removed. This was quite independent of any war considerations.

Cross-examination continued: They had a great deal of trouble with the collodion. Eventually it was landed as ordinary stuff, being pronounced safe by the explosives' expert.

Re-examined by Mr. Joubert: There was a great deal of discussion in the Board as regards the landing of the collodion.

John Frederick Webb said that he was Acting Resident Magistrate of Wynberg. In 1899 and 1900 he was C.C. and R.M. for Port Elizabeth. No licences for these magazines were given from his offices. He had absolutely nothing whatever to do with the magazines. There was considerable correspondence in regard to this matter. There was a good deal of excitement in Port Elizabeth in October, and the Town Council took up the matter very strongly. Witness convened a meeting on October 19. Another meeting was held on October 24. Quite independently of the war there had been an agitation for a long time about these magazines. There was great excitement in Port Elizabeth over the matter, and things came to such a pass that there seemed prospects of a great mob meeting. The Bramletye was got on the best terms possible in the circumstances. The original amount asked was £800 a month. Eventually this was cut down to £600 a month. The cost of transhipment was borne by the owners themselves.

Cross-examined by Mr. Gardiner: He was at Port Elizabeth for two and a half years. He had nothing whatever to do with the magazines. When he spoke of the Bramletye as being an old tank, the agent said something about her being worth £10,000. There was no suggestion that she should be bought. It was not the intention to return the explosives to the magazines at the end of three months, because the Town Council absolutely vetoed such a step. He understood the great reason for the removal was the excitement engendered by the war.

Re-examined by Mr. Searle: Witness acted throughout on the instructions of the Office. There was a mass of correspondence in regard to the matter.

Mr. Searle closed his case.

Mr. Gardiner called

Henry Bale Christian, senior partner in the firm of J. O. Smith and Co. He went to Port Elizabeth in 1860. He went into the explosives business 25 years ago, as agent for Nobel's dynamite. In 1877 he got permission to open a magazine. He believed the permission was verbal. In 1880 and in 1887 he got permission in writing for a second and a third magazine. Besides this permission, he every year took out a bonded warehouse licence, which he obtained from the Customs Department, after the places had been properly examined and approved. He informed them that he wanted the magazines for storing dynamite. Their trade in dynamite was chiefly in Kimberley, to

which place they could send it in bond. The collodion was not stored with dynamite. It was stored in a magazine belonging to Julius Weil and Co. by his firm. The Harbour Board and Railway Department had put up a landing place, and the railway ran down to this landing place. The train ran direct from the magazines to the main line. Therefore, it was convenient to store collodion there. His magazines were the first built. Subsequently others were built by other people, under permission from the Town Council. The defendants protested against this, because the magazines were improperly constructed or placed. He considered that when the explosives were removed, they could have been stored by the authorities more cheaply. The vessel could have been purchased, in his opinion, for about £2,000. He could not store explosives himself; but he was not consulted in this matter of the removal or storage at all. Defendants selected a site on the Harbour Board ground which was objected to by the New Brighton people. Eventually they rented sites on the New Brighton estate. Then they built the magazines. But for the war they would have been left in their old magazines until the new were ready. Witness came down to Cape Town and saw Mr. Schreiner (then Colonial Secretary), and after the explosives had been removed to the Orissa, and complained to him of the insecurity of that vessel, she being moored by only a single chain, and that a poor one. Mr. Schreiner said he knew nothing about the matter, and called the Under Secretary, Mr. Janisch, who said that the Colonial Office was acting on behalf of the military authorities in the matter. The explosives were removed from the magazines notwithstanding defendants' protest.

Cross-examined by Mr. Searle: Collodion was not explosive when it was dry. Defendants verbally protested at the Magistrate's Office against the removal of the collodion. They could have put the collodion elsewhere. They never dreamt that by explosives the authorities meant to include collodion. When they saw that the collodion was being removed they protested verbally. There was nothing in writing, but many things took place that were not specified in writing. Witness commenced to build the new magazines after the removal of the explosives to the Bramletye. They had looked about for a site before then. In a couple of months they could have built temporary stores and ef-

fecting the removal. However, they did not want to build temporary stores, preferring to build the permanent stores now completed. The Brambletye was a 1,400 ton ship. He thought £400 would have been a sufficient rental for her. The storage on the Orissa had been reduced to 3d. a case a month. He had intended to buy the Orissa for storage purposes, but seeing that the Government wanted her he stood aside.

Mr. Gardiner closed his case.

Mr. Searle, in answer to the Court, said that £628 of the claim was in respect of dynamite, and £1,021 was charged in regard to the collodion. This was as to the explosives removed from the land.

Mr. Searle, K. C.: This is an action to recover two sums of £350 and £2,164 9s. respectively. Our declaration states that it was necessary to remove these explosives in October last in the interests of the public safety. The Government Inspector of Explosives had condemned the magazines, and the Town Council ordered the explosives to be removed by the 31st March, 1899. The Town Council had a right to insist on this removal.

[Jones, J.: The Government could have confiscated the whole of the explosives.]

Yes. See Act 4 of 1887, section 16. As against the Town Council defendants had no right to put explosives there. The position as between the Government and defendants was that of *quasi* contractors. The Government were *negotiorum gestores*. Voet says (3, 5, 11) that though by Roman Law a *negotiorum gestor* could not recover if the principal disavowed his agency, yet under Roman-Dutch Law he can do so if his principal has been enriched by his agency. In this case the defendants had notice to remove their explosives, and they refused to do anything.

[Maasdorp, J.: Did the Government tell defendants that they were liable to confiscation?]

I cannot find that in the correspondence, but by section 23 of Act 4 of 1887 the Government had a remedy.

[Buchanan, A.C.J.: That is a special provision in case of particularly dangerous goods.]

We learn that only from the side notes, and their authority is doubtful. Under section 16 of Act 4, 1887, the Government might have confiscated the dynamite. Instead of doing so we gave them from October 18 to November 3 to remove the goods. Defendants had no place to which they could remove them, and then Gov-

ernment removed them, and are entitled to charge for so doing. The contract of defendants with the Government was not an implied contract, but a contract *quasi ex contractu*, and the difference between these is that in an implied contract consent is implied by law, but in a contract *quasi ex contractu* the consent is created by law. *Hunter's Roman Law* (1st edit., p. 481), and as to *negotiorum gestor*, p. 485, where Dig. 17, 1, 40, is quoted. The Digest states that a *negotiorum gestor* can have no action if his principal forbids him to act in such capacity. *Van Leeuwen*, Dekker's note (4, 1, 8, note g), *Vinnius on the Institutes*, *Austin's Jurisprudence Note* (Vol. 1, Lecture 6, p. 331, 4th edition) distinguish a quasi contract from an implied contract. Voet (3, 5, 11) takes up the matter, and in section 8 treats of the *actio de negotiis gestis contraria*. See also sections 11 and 12. See also *Groenewegen* ((Cod. 2, 19, last section, 22nd), *Christinaeus Decis Belg.* (Vol. 2, Tit. 19, Decis 112, sec. 4).

[Jones, J.: The whole of that part of the subject was dealt with in *Bellingham v. Blommeje* (Buch., 1874, 36).]

That was a case of a *mala fide* possessor rather than of a *negotiorum gestor*.

[Jones, J., quoted the judgment of De Villiers, C.J., in *Bellingham v. Blommeje* as to a *mala fide* possessor of land.]

If the Court is satisfied that the expenses were reasonable they must give judgment in our favour. There is evidence that the charge for the Brambletye of £600 was not unreasonable. They cut down the charge from £800 to £600.

[Buchanan, A.C.J.: The removal of these explosives was not so much for Christian's benefit as for the benefit of the town.]

No, for the goods were liable to confiscation.

[Maasdorp, J.: He could not move it on land?]

That only shows what difficulty he was in.

[Maasdorp, J.: In whose interest was it forbidden to move this stuff on land?]

Nobody may keep dynamite in an unlicensed place, and the Government is not bound to renew a licence, and if the material is not removed out of the country the Government may confiscate it. In spite of their protest defendants have practically consented to the Government arrangement.

[Maasdorp, J.: Was this property in danger?]

Yes, the Government could have confiscated it.

[Maasdorp, J.: Nobody was going to put that law in force.]

Yes, the Government, as *dominus* put the law in force.

[Jones, J.: Was the dynamite a danger to the public or the public a danger to the dynamite?]

I would hardly put it that way. Everybody—naval and military authorities—the Mayor and the R.M., all said it must be removed. The dynamite was wrongfully there, and it was for defendants' benefit that it should be removed.

[Buchanan, A.C.J.: Where was the necessity for removing the collodion cotton if it was taken back to the same place?]

It was not taken to the same place, but to a place two miles away therefrom.

[Maasdorp, J.: Suppose there was an authorised place and the dynamite was stored in a place unauthorised, could a private person remove it to the authorised place?]

Yes, and the Government, as *dominus eminens*, can do even more than a private person. Again, the Government acted at the instance of the Town Council, and can be in no worse position than the Town Council. The Government acted reasonably and made the best bargain they could. We are entitled to recover the cost of removal (viz., £350) and of storage on the Brambletye (£2,164).

Mr. Gardiner (for defendants): I contend that the Town Council has concurrent jurisdiction with the Colonial Secretary as to the licensing of magazines under section 16 of Act 4 of 1887, and section 44 shows that the powers of the Municipality as to licence were not derogated from by that Act. Act 14 of 1868, section 22, gives the local authority very full powers. It can even grant a licence for a factory—*De Beers Consolidated Company v. Stellenbosch Municipality*. It is only if the local authority refuse that the Government can come in.

[Jones, J.: Section 4 of the Explosives Act puts factories and magazines on the same footing.]

That refers only to a factory magazine, and not to a storage magazine.

[Buchanan, A.C.J.: A factory magazine is only a magazine for storing what is made in a factory.]

A factory magazine would be in the vicinity of the factory where the dangerous trade of manufacturing explosives is carried on.

Act 27 of 1897, section 210, and section 211 (sub-section 19) shows that the Town Council still had power to license.

[Maasdorp, J.: Act 19 of 1856 gives Government power to close a magazine.]

The Town Council may still grant a licence.

[Maasdorp, J.: Government has very extensive powers as far as gunpowder is concerned.]

Yes, but I contend that these powers do not extend to dynamite.

[Jones, J.: But see the end of section 25 of the Explosives Act.]

That relates to the manufacture, and not to the stowage of explosives.

[Buchanan, A.C.J.: In 1898 and 1899 the Town Council withdrew their licence.]

Yes, but the Town Council withdrew their notice, and allowed us to continue to use the old magazine.

[Buchanan, A.C.J.: That was on condition that you should build a new magazine, which you never did.]

The Town Council never pressed us to do so; and they accepted the caretaker's wages for the whole year, 1899. If the magazine was properly licensed the Government had no power to remove us. If this licence was unauthorised, still it was granted by the local authority, and they revoked it (if it was revoked). Hence the Town Council would have been the proper people to remove it (if anybody). The Government have never taken up the position that we were unlicensed.

[Jones, J.: If the Government could confiscate your property, you are surely bound to pay the Government for taking care of it?]

No; because if a Statute provides a remedy, Government is limited to that remedy. They have not thought fit to avail themselves of that remedy. The declaration states that these explosives were a danger to the town. The danger evidently was not pressing, and the evidence shows that the danger arose, not from proximity to the town, but from the proximity of the warehouses to each other. The real danger, however, arose (as the naval and military evidence showed) from the war.

[Maasdorp, J.: If they have power to make you move from an unauthorised place, do they lose that power by giving a bad reason for their action?]

In any case we did not contract to pay rent. Even granting that plaintiffs had a right to remove these explosives, that does not entitle them to rent for stowage. As to the rights of a *negotiorum gestor*, the spirit

of all the passages cited is that the work done by the *negotiorum gestor* must have been done for the benefit of the principal.

[Jones, J.: No, they go further than that. See *Bellingham v. Bloomeje*.]

That is not a case of *negotiorum gestor*.

[Jones, J.: No, but the principle is the same.]

If a man does work for his own benefit he cannot claim for any incidental benefit which accrues to a third party. *Groenewegen* and other authorities all require that the expenses should be necessary. All danger to the town would have been averted if the explosives had been removed further away. It is true that the danger from a military point of view would have been greater, but that does not appear on the pleadings. However, we are not responsible for the military situation. So even, according to the Roman-Dutch authorities, we are not liable, and the Roman Law authorities are in our favour. The case of *Bellingham and Blommeje* deals more especially with the question of improvements. If a remedy is provided by statute, a prosecutor is confined to that remedy. The Government might have seized the goods and prosecuted, and if a conviction had been obtained, might have confiscated the goods. Here the Government has taken the law into its own hands. See *Sterens v. Peacocke* (11 Q.B., Rep., 731); *Crouch v. Steel* (3 Ellis and Blackburn, 402). But this case is commented on in *Atkinson v. Newcastle Waterworks Co.* (2 Exch., D., 441) and *Re International Pulp and Paper Co.* (37 L.T., 351).

[Buchanan, A.C.J.: The plaintiffs do not base their claim on the statute, but on the fact they have spent money for your benefit.]

Had it not been for the statute, plaintiffs would have had no right to remove the explosives, and therefore they must base their claim on the statute. The Government contend that there was danger to the explosives. This danger could have arisen only from (1) danger of the explosives going off by spontaneous combustion, or (2) capture by the enemy. As to point 1, there is no evidence. All the evidence goes to show that the danger was increased rather than diminished by the action of the Government. The dynamite has been collected from some fourteen stores, and packed closely together on the Brambletye. That measure might have been for the safety of the town, but it was not calculated to provide for the safety

of the dynamite. Then as to the danger to the town. Our magazines were built before those near to them, and they were well built. They were no source of danger, and but for military reasons, the Government would not have stepped in. As to the second point, there is no evidence that there was any danger of the dynamite being captured by the enemy. The fact that the people of Port Elizabeth were alarmed was no proof of real danger, and there is nothing about danger in the declaration. Then as to the collodion. If it was a danger to the town, why was it brought back to the same place after it had been removed? There is no proof that collodion is an explosive; certainly it is not one when in a moist state. It is in evidence that it would not have been removed save for military exigencies. If we are to be charged with the expense of removal and storage, some proof should have been given that the collodion was a source of danger. The Harbour Board take no special precautions in landing collodion. As there is no proof of danger, either of explosion or of capture by the enemy, we are not liable. The only danger was that of forfeiture, and the plaintiffs cannot set up a danger caused by themselves.

[Buchanan, A.C.J.: There was constructive danger; you were bound to remove the explosives in twenty-four hours. What could you have done with them?]

We could not have done anything, but the danger would have been caused by plaintiffs' own act.

[Buchanan, A.C.J.: No, by the act of the Municipality.]

Plaintiffs argue that they acted as agents for the Municipality. They would have caused the loss or damage. As to the transshipment, we protested against any charge being made.

[Buchanan, A.C.J.: As to that, you made a distinct contract. You were not bound to send the explosives on board the Brambletyde.]

It was plaintiffs' fault that we could not put it on shore.

[Maasdorp, J.: You do not say that their act was illegal?]

Yes, the proclamation was illegal. As to the reasonableness of the charges, Government might have got a much cheaper vessel.

Mr. Searle (in reply): The argument for defendants only goes to show that we ought to have confiscated the whole of the stuff. I admit that where a statute prescribes a penalty you cannot, as a rule, sue for damages; but we are not suing for damages, but

for reimbursement of expenses necessarily incurred.

[Buchanan, A.C.J.: Was it necessary that the Government should take charge of the dynamite ?]

Yes; there was a common danger to the whole community. On that the Mayor, the Magistrate, and naval and military officers were all agreed. It was a public nuisance. The Town Council could have thrown the stuff away, but instead of doing so, they asked the Government to take care of it.

[Buchanan, A.C.J.: What was the risk to the dynamite ?]

The enemy might have captured it, or destroyed it. The Town Council could have removed it, and they employed the Government to do so.

[Buchanan, A.C.J.: Why did the Town Council wait twelve months after giving notice ?]

I suppose the local interest was too strong. The licence of the Town Council had been withdrawn, and neither in November, 1898, nor in October, 1899, had defendants taken up the position that it was not competent to the Town Council to do this. In the pleadings, they took up the position that they had the Governor's licence, but there was no proof of this. Now they say that the Town Council, and not the Government, should have taken action. Somebody had to move in the matter, for defendants positively refused to do anything.

Cur. adr. rult.

Postea (November 1).

The Acting Chief Justice, in giving judgment, said: For a number of years before 1898, the defendants, who are a firm of merchants at Port Elizabeth, imported and dealt in gunpowder and other explosives. The Town Council of Port Elizabeth had granted to defendants, as well as to certain other merchants, permission to erect magazines wherein to store their explosives upon Municipal land to the northwards of the town. This permission was granted during pleasure, and no rent was charged by the Municipality. Latterly, the merchants interested contributed *pro rata* to the expense of maintaining a caretaker for the magazines. These contributions were collected by the Council, and in January, 1899, the defendants paid their amount for the year in advance. In 1898 the Government Inspector reported that the magazines were too many in number, too close to each other, and too near to the town, to be safe to the inhabitants of Port Elizabeth. The town had extended towards the locality since

the first of the magazines had been erected, and the inspector considered them now to be a source of serious danger. In consequence, on November 10, 1898, the merchants were informed by the Council that they had decided that strenuous and speedy efforts must be made to relieve the town from danger, and they requested that all explosives and buildings should be removed from the present site by March 31, then next ensuing. From some of the magazines the owners were requested to move during the next month. Negotiations resulted between the owners of the magazines and the Council, but no steps were taken to comply with the request for removal. In October, 1899, presumably owing to the outbreak of the war, the inhabitants of the town became seriously alarmed; whereupon the Council, instead of themselves taking action, appealed to the Government. Urgent telegrams were sent to the Premier, and on October 17 the Mayor of Port Elizabeth reported that the military and naval authorities considered it necessary for the safety of the town that the explosives should at once be put afloat. The next day the Council called upon the owners to remove their stocks to a place of safety within twenty-four hours, and informed them that if not so removed, the Council would assume control thereof and make such arrangements for their safe storing as the Council should deem fit, and would hold the same pending reimbursement for all expenses incurred. The defendants and the other merchants not having made any preparations, were helpless, and altogether unable to comply with the Council's requests. Further pressure having been put on the Government, the Magistrate called a meeting of officials and the Mayor, and on their advice he informed the merchants that public safety demanded the removal of the contents of the magazines to some secure place, and gave notice that the owners would be held responsible for the cost of such removal, which must take place with the least possible delay consistent with the making of necessary arrangements. Still the defendants and other merchants took no action. The Government afterwards hired the ship *Brambletye*, and converted her into a floating magazine; and on the 28th October the merchants were asked if they were willing to undertake the work of removing their explosives to the vessel, and if not, giving notice that the Government would do the removal and retain a lien on the merchandise for the expense thus incurred. The defendants replied that they were not prepared

to undertake the work, excepting in so far as moving from inside the magazines to outside was concerned, and that they would leave the right of Government to retain a lien for expenses incurred open for future decision. In answer to further communications, the defendants supplied the Government with a list of the explosives to be removed. A further notice was given by the Government on the 3rd November, after which date the defendants' goods were removed to the Brambletye, the defendants at the time formally protesting against the removal and liability for any expenses. The defendants imported fresh stocks, but owing to a Government proclamation, issued under the authority of the Act, which prohibited the landing of such goods at Port Elizabeth, these additional supplies could not be put on shore. The defendants, being unable to make other arrangements, applied to have these new goods stored on the vessel, and were informed that they could so store them at their own risk and cost, and subject to a lien for expenses. They protested, but accepted the accommodation offered, and thereafter the Brambletye were used by them as a magazine during the period covered by this action. Among the goods removed from the magazines were a number of cases of collodion cotton, a material which, the defendants say, as long as it is kept damp, is not an explosive, and consequently there was no necessity to remove these cases from the magazines. Mr. Foulkes, the Government Chief Inspector, who was the only expert called in this case, gave evidence to the effect that as long as it was kept in a moist state collodion cotton was not dangerous, but that it was a material which was classed among explosives. He described it as a sort of mild guncotton, and guncotton is specially enumerated in the Act. But it is not necessary to follow this particular question further, as no special defence is set up on the pleadings in respect of this collodion cotton, the goods in the magazines being treated as a whole. The Government seek to recover in this action, first, the cost of removing the stocks of explosives from the shore to the Brambletye, and, secondly, the expenditure incurred in storing these stocks safely, as well as the cost of storing the goods transhipped by the defendants. As to the first claim, the declaration alleges that it was necessary, in consequence of the danger to the public safety by reason of the proximity of the magazines to the town, to remove the explosives to a place of safety; that due notice was given to the

defendants, and that the expenses incurred amounted to £350 12s. 7d. In answer, the defendants specifically deny that there was any public danger or that they had notice to remove, and that the removal was without their consent and in spite of their protest. The issues of fact here raised must be found against the defendants. The evidence shows the existence of a public danger, and that due notice was given to defendants to remove their stocks. The question for decision then is, whether under the circumstances already stated the defendants are liable for the expenses incurred on their default to remove their explosives to a place of safety. The defendants have further pleaded that at the time of the removal their goods were properly and legally stored in magazines erected for that purpose on a site duly approved by the Government, and duly licensed, and that defendants were entitled to store explosives therein. But as a fact the Government was never asked to approve of the sites, and the magazines were never licensed under Act No. 4, 1887. It was shown that the Government had granted bonding store licences for some of the magazines, and that they had been inspected and passed by the Customs as bonding stores, so that their existence must be taken to be known to the Government. Moreover, the Harbour Board had constructed a jetty, and made special provision for landing explosives, and for conveying them to and from the magazines. But the 16th section of the Act enacts that such goods shall not be kept in any place except in factories or magazines duly licensed by Government, and when kept in any other place such place shall be considered an unauthorised place. When kept in an unauthorised place the explosives are, by the Act, liable to forfeiture, and the owner liable to a fine. It is true the magazines were erected with the permission of the Town Council, but that did not dispense with the necessity for a Government licence; and it may be noticed that the 44th section provides that all powers given by the Act shall be deemed to be in addition to and not in derogation of any other power conferred on any local authority. No Government licence having been obtained, it has been argued that it was a benevolence to the merchants that the explosives were removed to an authorised place, instead of being forfeited. Even if originally legally stored in the magazines, the defendants had no longer the right to keep their explosives there. The gratuitous permission obtained in the first instance from the Council had

been withdrawn, and ample notice to remove had been given, but the defendants made no other provision. It was their own default which created the difficulty in which they found themselves when the emergency arose. The Government had been requested to assist by the Council, and as regards the defendants, they had at least the same authority as the Council had, independently of the special rights given them under the Act. Both the Council and the Government had the right to insist that at any rate these explosives should be stored in some safe and approved place, even though they might not have felt themselves justified in taking the harsher step of having the goods forfeited. It was to the interest of the owners that the property should be removed to some authorised place, and as the owners would not, and indeed could not, move the goods themselves, the plaintiffs provided suitable storage and moved the goods for them. Under these circumstances it has been argued that the Government is entitled to recover the expenses incurred on a principle analogous to that by which a *negotiorum gestor* would be entitled to be repaid outlay incurred for the benefit and protection of property of a third person. Now the usual conception of a *negotiorum gestor* is one who, without express mandate, carries on the business, or who protects the property of another who is absent or who is incapable of acting for himself. As a rule, if the owner is present, or is unwilling or forbids the business being done, the unauthorised agent cannot force his services upon such owner. In this case the defendants, though protesting against being disturbed at their own magazines, seem to have recognised the desirability, if not the actual necessity, for a removal of their goods to a place of safety, and actually assisted the Government and took the benefit of their work. Voet, in his title *De Negotiis Gestis*, admits the general rule founded on the civil law to be that a person is not liable for expenses incurred against his consent, but he points out the injustice of allowing one person to be enriched to the injury of another, and adds that nowadays it was admitted rather that moneys so expended could be recovered (3, 5, 11), and he adds that this view of the law was also held by Groenewegen and other Roman-Dutch jurists. Voet places such expenditure on a footing similar to that incurred by a *mala fide* possessor, whose case he discussed in b. 6, c. 1, s. 36. In the case of *Bellingham*

v. *Bloommetje* (Buch., S.C. Rep., 1874, p. 39), the learned Chief Justice referred to the conflicting authorities on the point, and remarked that it is not too much to say that the weight of authority was in favour of the right of even a *mala fide* possessor to compensation for useful expenses. It is true in that case landed property was involved, but our law recognises no difference in principle founded on any distinction between landed estate and movables. Here the Government could not justly be called *mala fide* possessors, but at all events they ought not to be considered in a worse position than such a possessor would be in. The Government preserved the property of the defendants at a time when they were unable to deal with it, and under the circumstances I do not think the Government is barred from recovering the amount necessarily and usefully expended on defendants' behalf by the protest which was made by them as a matter of form. The work had to be done, and it was done by plaintiffs at the least possible cost, and without any profit to the Government. The defendants are the richer for the expenditure, in that they have been saved incurring the expenses themselves, and their property has been preserved to them thereby. The claim is certainly an equitable one, and in my opinion our law, possibly differing from English common law, allows the outlay to be recovered. Judgment for the first amount sued for will therefore be entered for the plaintiffs. Having come to this conclusion as to the charge for the removal of the explosives, the claim for their storage causes less difficulty. The amount is divisible into two parts, first, for stowing the cargo transhipped by the defendants themselves, viz., £445 5s. 6d., and, secondly, for the storage of the stocks removed from the magazines, viz., £1,719 3s. 6d.—in all, £2,164 9s. As to the goods transhipped in the bay, these were placed by defendants on board the *Brambletye*, with full notice that they would only be received subject to payment of charges. The defendants plead that the transhipment was made by plaintiffs' orders, and in consequence of their wrongful action in removing the explosives, and was not made with defendants' consent, and was subject to the same protest as was made in regard to the other goods. But, as a fact, the Government never ordered the transhipment. Defendants were at liberty to dispose of the goods as they pleased. It is true they could not land them at Port Elizabeth, in consequence of the prohibitory

proclamation, but they were free to send them elsewhere. Wishing to keep the goods at Port Elizabeth, and having no authorised magazines wherein to store them, they were obliged to put them on board the Brambletye, but they were not forced by Government to do so. Having acted voluntarily, they can have no legal defence to the claim for storing these goods. As to the remainder of the claim, the defendants were at liberty at any time to have removed their stocks, but it suited them best to leave them on board the Brambletye, although they knew they would be charged for. As a fact, they did remove, under special permits, such quantities as they from time to time required, leaving the question of liability open. They used the Brambletye as a magazine, and continued so to use the vessel from November until June of the next year, when the Government hired the Orissa, and converted her into a magazine, to which ship the remaining explosives were removed upon an agreement as to the rate of rent to be charged for the future. In the plea there is an allegation that the method of storing adopted by the Government was unreasonable and expensive, and the cost incurred unnecessary. As to the reasonableness of the method, Mr. Christian said he himself had contemplated hiring the Brambletye for this very purpose, but finding that the Government were going to take her up, he took no further action in the matter. As to the cost, it may well be that the Orissa has now been hired at a lower rate, but the evidence shows that no better arrangements could be made at the time. The Magistrate negotiated the hiring of the Brambletye at a considerably lower sum than was originally asked by the owners of the ship, and all the merchants, including the defendants, have been charged only the actual outlay incurred, so that the objection of unreasonable expense has also been answered. In the view I take of the facts and of the law, the whole claim of the Government must be allowed. Judgment will therefore be for the plaintiffs as prayed, with costs.

Mr. Justice Maasdorp concurred.

The Acting Chief Justice intimated that Mr. Justice Jones also concurred in the judgment.

[Plaintiffs' Attorneys, Messrs. Reid and Nephew; Defendants' Attorneys, Messrs. Van Zyl and Buissinné.]

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

POLICANSKY BROS. V. MILLER) 1901.
AND ANOTHER. (Sept. 18th.

Sir Henry Juta, for applicants, moved upon notice of motion calling upon respondents to show cause why an order should not be granted interdicting them from using a certain label and cover for cigarettes called "Sultan's Beauties," the same being an infringement of the trade mark registered in the name of the applicants. Copies of both labels were put in. Sir Henry Juta said that applicants' label was a blue one, marked "Sultan's Favourites," while respondents' was a green one, marked "Sultan's Beauties."

The affidavit of Phillip Policansky, partner in the firm of Policansky Brothers, was read, who deposed that he had several times remonstrated with respondents for using the label, which he (deponent) considered to be a palpable imitation. Respondents had maintained that they were entitled to use the label, providing there was a difference of the slightest description from applicants' label. The applicants' sale had suffered considerably from the imitation.

For the respondents, Mr. B. Upington read the affidavit of Hyman Smidt, member of the respondent firm of Miller and Smidt. Mr. Smidt denied that applicants remonstrated. The labels were printed in May and June, and he had no idea until August that defendant had registered the trade mark. Smidt further stated that Phillip Policansky was in his employ in London, when he (Smidt) was using the green label. He denied that applicants would suffer. The difference between the two makes was well-known to smokers. Differences in detail between the two labels were mentioned. The affidavit of the printer was read, showing the respondents' labels to have been printed in May and June.

Sir Henry Juta: There was a replying affidavit, but this apparently had not been served on respondents. Counsel contended that respondents' label was as near an imitation as it was possible to make of applicants' trade mark.

Mr. Upington: The test whether an ordinary purchaser would be deceived by having these green packages handed to him instead of the blue ones. The difference in colour

would (he contended) immediately strike the purchaser. Applicants had registered the trade mark on the 12th July, whereas the labels were printed in May and June for respondent. There were differences in the labels other than the colour which would enable purchasers to see that the "Beauties" were not "Favourites." He further pointed out the difference in the appearance of the cigarette. The only infringements that could be alleged were that the words "Sultan's Beauties" was an infringement of "Sultan's Favourites," and that the mark on the centre of respondents' packet was an infringement of the yellow mark on applicants' cover. The other matter was such as would be found on every cigarette packet. There was not shown to be such a resemblance between the packets as to entitle applicants to an interdict. There was no evidence to show that any person had been deceived. Respondents had offered to discontinue using the label after those they had printed had been used, or to destroy these if applicants would compensate them. If there has been an infringement, it was not intentional.

Sir H. Juta, K.C. (for applicant): We have registered this trade mark, and the trade mark of respondents is a colourable imitation of ours. The side of the boxes in each case is the same.

[Counsel was stopped by the Court.]

Mr. B. Upington (for respondents): The real question is, would an ordinary purchaser be deceived by this label of respondents? It was not the same colour as that of applicant, and the only resemblance between these trade marks was that there was a circle round each. Respondents' labels were printed before applicants registered their trade mark, so that there can be no question of fraudulent imitation. Respondent states, and his statement is not denied, that applicant was in his employ in London, and that he (respondent) then used the same trade mark. English trade-mark cases draw a distinction between cases in which a label in use has been copied, and those in which labels closely resembling each other have an independent origin. The applicant and not the respondent has copied the label.

[Maasdorp, J.: Still the applicant is the owner of the trade mark, and respondent is not.]

That is so, but as to accidental similarity of trade marks see *Sebastian on Trade Marks* (p. 129). The whole case is purely a question of fact as to whether one label is

such a close imitation of the other that an ordinary purchaser would be misled. The packets are not made up in the same way, and the quality is different. A great portion of applicant's label is not registerable, e.g., he cannot register "Ten Cigarettes," nor "High Class," "Extra Quality," "Egyptian Cigarettes." Applicant complains of the words "Sultan's Favourites" having been infringed. If applicants did not want the other words registered, they ought to have disclaimed them. The only question is, is "Sultan's Beauties" an infringement of "Sultan's Favourites"? This is not on all fours with the cases in *Sebastian*, in which a single word is changed, e.g., "Lacto-Peptide," to "Lacto-Pepsine." In the present case there is no resemblance between the two trade marks. Even if the resemblance is close enough to deceive, our label was first in use, and there is no proof that anybody has been deceived.

Sir H. Juta was not called upon in reply.

The Court granted an interdict as prayed, with costs.

Jones, J.: In this case applicants, who are tobacco merchants and cigarette manufacturers, have registered a particular trade mark, which they have produced in court. It is alleged that respondents have infringed this trade mark, and their (the respondents') packet has also been produced. I do not think there is anybody who can look at respondents' packets and not say they were intended as an imitation of the applicant's. It is true that the words "Sultan's Beauties" take the place of the words "Sultan's Favourites," but the words are exactly in the same form. The letters are the same, and are followed by the words "high class." That appears in both. Then there is the representation of a coin, which appears in both. Even the borders around the packets are exactly the same. It cannot possibly be said that there was no intention in this case to imitate, because the imitation is so obvious on the face of the thing that nobody looking at it could possibly think it was anything else but an imitation. In this case there is an exact imitation of the trade mark which was registered by the applicants. Of course it may be said that applicants are not entitled to all the words that they use. That must be admitted at once. That there was an intention to imitate the trade mark of the applicants is obvious, and an interdict will therefore be granted as prayed, with costs.

Mr. Justice Maasdorp concurred.

Ex parte THERON'S EXECUTORS. } 1901.
(Sept. 18th.

Will—Distribution of Capital.

The late T. had by will nominated his mother and his children as his sole heirs; the mother to receive the interest only arising out of the estate during her life-time and out of it to maintain and educate the children. Also one J.M.B. was to receive £5 per mensem out of the said interest and the children were not to receive any part of the capital until after the decease of both the testator's mother and of J.M.B. The mother being deceased and all the children being now majors the Court had ordered that the capital should be distributed among them after the death of J.M.B. This order had subsequently been suspended until the executors of the mother's estate could be heard as to their right to a share of the capital. J.M.B. consented to an immediate distribution. The executors now applied for an order directing amongst whom the capital of the estate should be distributed.

Held, that as certain of the parties interested were not before the Court no order could be made and that the order already granted must be cancelled.

This was a motion for an order directing the mode of distribution of the estate of the late Christian Cornelis Theron, of Cape Town, and for authority to the executors to make certain payments to parties thereunto entitled under the will of the deceased.

The applicants were Johanna Maria Brink and Davis Turnbull, in their capacity as executors testamentary to the estate of the late C. C. Theron. From the applicants' petition, it appeared that the said C. C. Theron died in or about March, 1882, leaving a last will and testament, whereby he appointed his mother, Elizabeth Christina Gerdina Theron (now deceased) and his children to be his sole heirs and heiress of his whole estate, to be by them enjoyed as sole and exclusive property, subject to the

condition that his (the testator's) mother, so long as she lives, shall only be entitled to and shall draw and receive the interest arising from and out of his estate. The said will further provided that the testator's children should not receive their shares of inheritances while his mother and the first-named petitioner remained alive. In terms of the will, the first-named petitioner was entitled to £5 a month during her lifetime, so long as she remained unmarried, but the payment was to cease on her marriage. No provision was made in the will as to what was to become of the interest after the death of the testator's mother. The petitioners now were desirous of distributing the estate, with the exception of a sum to be by them retained, sufficient to provide for the monthly payment to the aforesaid first-named petitioner, as the testator's children were all of age, and no one could in any way be prejudiced by the payment to them of the amounts due to them after making due provision for the monthly payment of £5, as aforesaid. Owing to the ambiguity in the terms of the will, petitioners were in doubt as to whether the testator's mother was to share equally with his children in the capital of the estate, or whether she was merely the usufructuary heiress under the will, and they therefore asked the Court to grant an order (a) directing amongst whom the capital of the estate was to be distributed; (b) authorising petitioners to pay the amount due to the said testator's children, after deducting capital sufficient to yield £60 per annum for account of the first-named petitioner, in terms of the will; or (c) in the alternative, authorising the payment to the testator's children of the interest accruing from time to time on their shares of the capital of the estate, after the monthly payment of the £5, as aforesaid.

Mr. Searle, K.C., for the applicants.

Sir H. Juta, K.C., *contra*.

Mr. Justice Jones, in giving judgment, said that it was perfectly clear that as far as the Court were at present advised, all the proper parties were not before the Court for the purpose of making an order such as requested. First, all the children were not properly represented; secondly, the Court did not know exactly what the terms of the deceased Mrs. Theron's will were and they did not know what parties might be interested in the distribution of that portion of the money in the hands of Mr. Steytler. Under these circumstances, the order which was made the other day would be cancelled, for this simple reason: that the proper

parties were not now before the Court, and the Court was not in a position to decide upon the exact rights of the parties who might take under that will. The order referred to was that the capital of the estate was to be divided among the children of the deceased after the death of Johanna Maria Brink, and that until that event the interest, after the payment of £5 per month to J. M. Brink, was to be paid to the children, and that costs were to be paid out of the estate. That order would now be cancelled, on the grounds stated, and respondents would have their costs.

[Applicants' Attorney, G. Trollip; Respondents' Attorneys, Messrs. Van Zyl and Buissinne.]

Ex parte MEYER AND OTHERS.

Mr. Close moved in this matter, which was an application for leave to the petitioners to enter into a certain agreement. The petitioner, Jan Abraham Meyer, was married in community of property, and there were seven children of the marriage. The wife was now deceased, and the assets in the joint estate were immovable property, of which the Divisional Council valuation amounted to £4,908, and immovables valued at £2,141. On the landed property there was a bond of £950, while against the immovable property there were liabilities amounting to £500. The agreement was that the landed property should be transferred to the children subject to the petitioner, J. A. Meyer (the father), remaining in possession during his lifetime and enjoying the usufruct of the same, he paying all rates and taxes. As to the immovables, he was to pay off the bond and all liabilities and retain the balance.

The Master reported that the agreement would be very much to the advantage of the children, and recommended that the prayer of the petition be granted.

An order was granted in terms of the prayer in the petition.

PETITION OF ANNA SOPHIA VAN WYK.

Mr. Close moved for the appointment of a *curator ad litem* to the minor children of the petitioner. Shares in certain properties had been bequeathed to the children subject to the life interest of the petitioner and the other owners of the farms had now given notice of their intention to have the farms sub-divided and transferred. It was suggested that a step-brother, D. M. J. van Rensburg, should be appointed *curator ad litem*. Counsel stated that there was no report from

the Master. The matter had been mentioned to the Master, and he had said that a report was not necessary, because this was a compulsory sub-division of the property. The only matter there could be to report about was the person to be appointed.

Mr. Justice Jones said that he thought there should be a report by the Master, and the matter was therefore referred to the Master for report.

ATTWELL V. ATTWELL.

Mr. Benjamin, who appeared for the applicant, said this was an application upon notice calling upon the respondent to show cause why he should not pay applicant the sum of £50 to enable her to defend a suit instituted against her by the respondent for divorce, and also why he should not in the meantime pay her the sum of £2 per week for maintenance. She also asked for the costs of the application. In her affidavit the petitioner said that she had a good defence to the suit, but that she was unable to defend it, as at present she had no funds available, and she was living on the charity of friends. On August 26 last the respondent obtained from a Judge in Chambers an order interdicting the applicant from dealing with certain moneys standing in her name in the Post-office Savings Bank. She denied that her husband had ever entrusted her with the sum of £700, and said that as a matter of fact the amount standing in her name at the bank had never been more than £360, and that was the result of their joint labours in keeping a boarding-house. She also alleged that the respondent had been strange in his manner, and had assaulted her many times. According to an arrangement between them, and to avoid further trouble, she paid to him the sum of £200 from the amount standing in her name, and it was agreed that she should have the balance. They were married at Brisbane, and came to this colony five years ago. There were no children of the marriage.

Mr. C. de Villiers appeared for the respondent, and read the original petition on which the application was granted, in which the husband stated that about two years ago he entrusted his wife with a sum of £757, from which he had since received the sum of £200 mentioned. He alleged that his wife had fallen into bad habits, and that he had since learned that the balance now standing in her name was only about £80, and he stated that he believed she was about to immediately withdraw that sum. In his replying affi-

davit, the respondent alleged that applicant had no defence to the suit he was instituting, as she was leading an immoral life.

A replying affidavit from the applicant was read, in which she specifically denied all the immoral acts alleged against her by her husband.

Mr. De Villiers, in the course of argument, said that at least the Court would not grant anything towards the maintenance of the applicant, and he further submitted that a sum of £10 paid over to the applicant's attorneys would be sufficient to pay towards the costs of the suit.

Mr. Benjamin contended that, as the interdiction had deprived the applicant of any means of livelihood, an order for maintenance should be made, or a sum granted which would cover that.

The Court made an order that £20 should be paid over to the applicant's attorneys, to enable her to defend the suit instituted against her.

In giving judgment, Mr. Justice Jones said that the Court was not inclined to make any order with reference to the maintenance of the applicant. As to the application for an order for money to defend the suit, looking at all the circumstances of the case, and especially at the fact that both parties were near the court, and could have access to it at any time, the Court thought it was unnecessary to make an order for any larger sum of money than £20, which would be ordered to be paid to applicant's attorneys for her defence in the suit. Costs of the application would abide the result of the suit.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

BROWN AND CO. V. DU PLE-SIS. 1901. Sept. 21th.

Mr. Alexander applied on behalf of defendant for his release from imprisonment. Applicant had surrendered his estate. Notice had been given to Messrs. Walker and Jacobson, who had been acting all along for the creditors, but they had refused to accept service as they were not now so act-

ing. The creditors were in Queen's Town. Applicant was in gaol at Lady Frere, district of Glen Grey.

The Acting Chief Justice intimated that notice would have to be given direct to the detaining creditors. Until this was done the application would stand over.

UNION-CASTLE CO. V. "THE ANDES." 1901. Sept. 20th.
EAST LONDON HARBOUR BOARD V. "THE ANDES."

Salvage Allocation of award between co-salvors.

Plaintiffs sued in these actions (consolidated by order of Court) for salvage in respect of the derelict vessel "Andes" which had been salvaged by the two tugs "Midge" and "Buffalo," the property of the Union-Castle Coy. and of the East London Harbour Board respectively. The "Buffalo" first went out, but did not succeed in finding the derelict. She was afterwards found and taken in tow by the "Midge." At the "Midge's" request the "Buffalo" helped to tow the derelict into port. The value of the "Buffalo" was about three times that of the "Midge" and the number of her crew about double. The derelict together with her cargo was worth about £6,000.

Held, that under the circumstances a little more than a third of the value of the ship and cargo should be awarded as salvage and that £1,250 together with £83 10s. 6d. (money disbursed) must be awarded to the "Midge" and £1,000 to the "Buffalo."

These were consolidated actions brought by the Union-Castle Company and the East London Harbour Board against the master of the British barque Andes for salvage services rendered to his ship on May 16 last.

The company's declaration alleged that on or about May 15, 1901, the barque Andes was in great distress and in a derelict and abandoned condition about 17 miles from the

port of East London, having lost her masts, sails, and bowsprit. That the Midge, a steam tug, the property of the company, proceeded to the assistance of the said barque, which was found by her in the condition above described and at the mercy of the winds and waves. That under circumstances of great difficulty and danger to the said tug, and to the crew thereof, owing to the roughness of the sea and the condition of the barque, two of the crew of the Midge were placed on board the said barque and a tow-line fastened to the Midge, and the said barque was towed a considerable distance towards the port of East London. Thereafter a certain tug called the Buffalo joined the Midge at the request of the master of the Midge, and the said barque was towed first by both tugs and then by the Buffalo into the said port with her cargo, which was of Jarrah wood, on board. The Midge also brought men from the port of East London to assist at the anchoring of the Andes, and certain of the crew of the Midge were thereafter placed on board the Andes, which vessel was thereafter brought from the roadstead into the Buffalo River, and thereafter remained in possession of the first plaintiffs until the attachment, hereinafter referred to. For and in respect of the salvage services rendered by the plaintiffs, they are entitled to claim the sum of £6,340. In addition to the above, the plaintiffs are entitled to claim the sum of £107 10s. 6d. for disbursements made and liabilities incurred in bringing the Andes from the roadstead into the Buffalo River, for port charges, for keeping a man on board to attend to the pumps and take charge, as will more fully appear from the account hereunto annexed marked A. The plaintiffs have demanded the said sums of 6,340 and £107 10s. 6d. from the defendant, but he has failed and neglected to pay the same, and the said vessel has, by order of this Hon. Court, been attached to found jurisdiction in this suit. The plaintiffs claim £6,340 and £107 10s. 6d., with interest *a tempore morae*, and costs.

The East London Harbour Board filed the following declaration:

The plaintiff is the East London Harbour Board, lawfully constituted under Act 36 of 1836.

The defendant is the master of the British barque Andes, and is sued in his said capacity as representing the owners of the said barque and of her cargo and freight. The said barque, her appurtenances, and cargo have been duly placed under attachment of

this Hon. Court for the purposes of this suit, and lie at East London, within the jurisdiction.

The plaintiff is the owner of the tug Buffalo, of great value, which tug on May 16, 1901, and off the coast near East London, came alongside of the said barque, which had been theretofore abandoned as derelict by the defendant and her crew, and which was then fast to the steam launch Midge, the property of the Union-Castle Mail Steamship Company (Limited).

The said last-mentioned launch, of less power and value than the tug Buffalo, was endeavouring but unable without assistance to save the said barque and her cargo, for the said barque was derelict as aforesaid, and drifting under an easterly wind and with a current running from the east towards and nearing the shore, and thereupon the master of the Buffalo, at great risk and with great difficulty, placed men of his crew on board the said barque, and passed on board and made fast a fit and proper towline and hawser; whereupon the aforesaid launch Midge, by agreement, cast off from the said barque, and returned to the port of East London, leaving two of her crew also on board the said barque. The tug Buffalo and her master and crew thereupon saved the said barque, and her cargo, as well as portion of her freight, and brought her and her cargo into the port of East London, where on the night of the 16th May, 1901, those on board the said barque safely cast her anchor. The services rendered by the said tug Buffalo and her master and crew are salvage services, which rescued, or contributed with the services rendered by the launch Midge to rescue, the said barque and her cargo and freight, all of great value, and the salvage services rendered by the said tug Buffalo and her master and crew entitle the plaintiff to the sum of £2,500 by way of salvage; but the defendant refuses to recognise the said services, and wrongfully and unlawfully contends that the said services were only towage, and not salvage services. Wherefore the plaintiff prays for judgment for the sum of £2,500 against the defendant and the barque Andes and her appurtenances, her cargo, and her freight, or for such further or other relief as to this Hon. Court may seem meet, with costs of suit, including costs and expenses necessary for obtaining and maintaining the attachment of the said barque, her appurtenances and cargo.

The Union-Castle Company declined to join in the action with the Harbour Board,

as they contended that the services rendered by the Buffalo were mere towage services, in respect of which they tendered £54 12s.

No pleas were filed by either the owners of the Andes or of the cargo.

Mr. Searle, K.C., and Mr. McGregor appeared for the Union-Castle Co.

Mr. Sheil, K.C. (with him Mr. Benjamin), for the East London Harbour Board.

Mr. Searle: The Union-Castle Co. claimed for services rendered by both ships.

Mr. Sheil: There is no allegation in the declaration to that effect. The position taken up by the Harbour Board is that they are joint salvors.

Mr. Searle said that the claim was based on the assumption that the vessel and cargo were worth £12,000. The company claimed half of this amount. The ship was now shown not to be worth more than about £6,000.

Thomas Scott Alston, manager for the Union-Castle Co. at East London, said he was in East London when the Andes came into the port. She had some of the crew of the Midge on board in charge of her, and they remained from the 16th May until the 6th July, when the vessel was taken possession of by the Sheriff. The company had to pay dues, which the Harbour Board had reduced by £16 12s. 6d. A further £2 2s. had been returned by the Sheriff. An account for £3 by the caretaker was not included in the claim. There was the charge of three guineas as survey fees. Witness considered a survey necessary. £3 8s. had been spent in cables to London to try and get a settlement.

Mr. Searle said the Harbour Board had opposed this, and he did not know whether the amount was chargeable.

The Acting Chief Justice said this would have to come off, as also would a charge of £1 17s. 6d. for coaling and labour. His lordship said that, after the deductions, £83 10s. 6d. was shown as spent.

Witness said that £50 had been tendered to the Harbour Board for towage. This was higher than the tariff.

The Acting Chief Justice asked Mr. Searle if the Buffalo did salvage services.

Mr. Searle said that the company said that the services rendered by the Buffalo were not salvage services. The point was whether the barque was already in safety when the Buffalo came to assist the Midge. Whatever services were rendered by the Buffalo were rendered at the company's request.

In cross-examination by Mr. Sheil, the witness said he based the tender upon evidence given by Captain Munn in a previous case.

James Oswald, master of the Midge, said he had been engaged in towing work in East London for eight years. On the 15th May a report with regard to the Andes was made by a ship called the "Vermont." In consequence of that, witness left the Harbour at 9 o'clock next morning. He found the Andes at 11.20. She was 15 miles from the shore, and 17 miles to the west from East London. Her position was marked on the chart produced. The vessel had lost her spars. Her bowsprit, fore-topmast, and fore-yards had gone. The main mast had gone eight or ten yards from the deck. The decks had been swept and her starboard bows had been stoven in. There was no cover on the hatch. No one was on board. The vessel was drifting south-east. The mizzen-sail was in good order. The wind was light from the east, with a heavy south-west swell. It was dangerous to get alongside on account of ropes and tackle hanging over the port side. Witness arranged for two men to jump as the vessel arose. They did so, and got on board. There was great danger in doing this. One of the men—the mate—was injured in getting on board. The men cut the wreckage. Another man was afterwards put on board. The rolling of the ship and the position in which witness was lying made it difficult to get the hawser on board. There was danger of the Midge's bilge being stoven in from the vessels knocking against each other. Witness had a crew of six, three of whom were on the Andes. Witness secured the line, and leaving two men on board the Andes, started to tow. He towed from 11.35 until 4.5. It took 15 minutes to get the tow-line aboard. On the same day a vessel named the Rubia had gone ashore about 12 miles from East London. Witness had spoken to this ship. The Braemar Castle went to the assistance of the Rubia. The Braemar Castle was not visible when witness was at the Andes. The Rubia was not in imminent danger when witness spoke to her. The captain did not ask witness for assistance. At about one o'clock witness caught sight of the Braemar Castle going to the Rubia. Witness had to tow the Andes at an angle towards shore, so as to get out of the current, which was against them. After signalling to the Braemar Castle witness saw the Buffalo, which came up to witness at about two o'clock. The pilot asked witness if he wanted towing. Witness said no. He drew the Buffalo's attention to

the Rubia. Afterwards the wind began to freshen, and witness recalled the Buffalo. The Buffalo came up. Witness asked Captain Macpherson, of the Buffalo, to give him a hand, so as to get in at night. Witness then thought he would not have been able to get in by himself until early morning. As it subsequently turned out, witness would have been able to get in that night. Captain Macpherson said he would have to get some men aboard the Andes. He told witness to let go, and get some men from the shore. Witness did so at 4.20. He got five or six men from the port office. He met the Andes a quarter of a mile from the mouth of the river at about 6.10. The vessel was put in the roadstead at about seven o'clock. Her own anchors were used. The weather then was fine. Before leaving the Andes witness had brought her 9 miles, and the Buffalo towed her 11 or 12 miles. As the weather turned out, witness would have got the vessel in before 12 o'clock. There was no question of being able to get the vessel in; it was a question of time. Witness wanted to get her in early. The Andes was under control all the time. Witness's man steered her until the Buffalo came. He did not know who steered her afterwards.

Cross-examined by Mr. Searle: The Midge was a passenger launch. She was about 35 tons; the Andes was 831 tons. The Midge was built in 1888. Witness did not know whether she was built for towing. She towed lighters occasionally from the river up to the anchorage. Witness knew the Buffalo had gone out the previous night at about 4.30 in search of the Andes. When witness went out he made for the Rubia. He remained alongside the Rubia for about five minutes. Witness told the captain of the Rubia that the Buffalo would be there. Witness knew that the Buffalo had passed the Andes in the night without seeing her. Witness knew the Rubia had no cargo on board.

Mr. Sheil: And so you left her to the Buffalo?

Witness: I left her with the Buffalo.

In further cross-examination, witness said he got his mate (Watson) and a Kafir labourer on board the Andes. The men cut away all the wreckage, got the hawser on board, secured her, and commenced towing, for fifteen minutes. The wind was light from the east. According to the log of the Midge, the wind was south-east, with a south-west swell. Witness put up the "W" signal, which was a signal for the Buffalo or Cecil Rhodes tugs. At that time the wind

had freshened, and the weather become more unsettled. The current and wind were then against witness. At 3.45 witness was 12 miles from East London. From 11.35 to 3.45 witness reckoned he did 9 miles. He was towing towards the land. He was not drifting towards the land. Witness's log was correct. Witness never drifted.

Mr. Sheil: You never drifted, although you took four hours to do 9 miles?

Witness: That is so.

Continuing, witness said the Midge was a single-screw vessel, and the Buffalo a twin-screw boat. The twin-screws were more exposed than the single screw, and the propellers were more liable to be fouled. It was true that Captain Macpherson had told witness to go ashore. Captain Macpherson did not say to witness that directly his hawser was taut witness would have to let go, otherwise he (Captain Macpherson) would have nothing to do with towing the Andes. Witness actually towed for a quarter of an hour after that, and then let go, at Captain Macpherson's request.

Mr. Sheil: Captain Macpherson was master of the situation then?

Witness: He was master of the Buffalo. Continuing, witness said that the Buffalo being a more powerful tug than the Midge, he was running along with a slack towline.

In reply to the Court, Mr. Sheil said they did not deny that the Midge was entitled to some salvage, and he was simply leading evidence as to the services rendered, owing to the position taken up by the co-plaintiffs that the Buffalo was simply entitled to payment of towage charges. He took it that it was necessary to show the Court that they were entitled to more than that.

Examination by Mr. Sheil (continued): Captain Macpherson succeeded in getting four men, including two natives, on board the Andes. Witness could not see that much risk was run in getting these men on board. The Andes was properly under control when these men were put on board.

The Acting Chief Justice said that, by their evidence, both counsel seemed to be doing their best to reduce the salvage to the utmost possible extent.

Examination continued: The men had to leap on board the Andes. She was not rocking much.

Mr. Justice Jones: Do you think the amount offered the Buffalo people amply sufficient?

Witness: Yes.

The Acting Chief Justice: Then I think £100 would be ample for the Midge. That is the effect of your evidence.

Mr. Justice Jones said the question was: If £50 was sufficient for the Buffalo, why should the Midge get £6,250?

John Watson, the mate of the Midge, deposed that he went out with that vessel on May 16 last, when she went to look for the Andes. His experience of the sea dated from 1857. He corroborated the evidence of the previous witness as to the condition of the Andes. The tackle hanging over the port side of the vessel made it impossible for them to come close to that side, and they had to come up by the bow. Then witness and a native went on board. They had to jump a difficult jump, in fact, witness missed his jump and fell on deck, injuring himself so that he had to wear a belt ever since. The ship would have perished if assistance had not been rendered in time. She was right in the track of vessels. The ship had apparently drifted thirty miles from the time she was abandoned until the Midge came up. Witness and the native remained on board the ship and steered her.

Cross-examined: When the men from the Andes came on board, the ship could get alongside. Witness had cut away all the rigging he could, and when the Buffalo came up there was only a little bit of rigging under the bow. The Andes did not drift after the Midge took her in tow. They would have got into East London that night, as there was no wind, and everything was in their favour.

John McAllister said he had been engineer of the Midge for the last eleven years, and altogether he had been engineer on tugs at East London for 16 or 17 years. When they went out to look for the Andes they took on board three tons of extra coal. There was some difficulty in getting alongside the Andes, and there was considerable bumping of the vessels. Witness did not see any wreckage, as he was down below when it was cut away. At that time they were a good 17 miles from East London, and about 15 miles from the coast. When the Buffalo came up witness reckoned they had towed 9 miles towards the shore, and 5 miles towards East London. They were going along at the rate of about 2 miles per hour. At first they got on well, then they fell off, but picked up again. There was no agreement between Captain Oswald and the master of the Buffalo. The first time the Buffalo came up Captain Oswald said he did not want any assistance. When the Buffalo

returned Oswald said he wanted them to tow the vessel to East London. Captain Macpherson said he would require to put some of his men on board, and Captain Oswald said "All right." Afterwards Captain Macpherson said it would be better for Captain Oswald to go and get a crew for the vessel. They did so, and returned with the crew. The Midge had a nominal horse-power of 20, but an indicated actual horse-power of 120.

Cross-examined: He reckoned they would have got into East London by ten o'clock that night. He was specially called up to hear the conversation between the captains. The reason was that if anything cropped up he could be called as a witness.

George Sole, the fireman on board the Midge, said that when he came on deck on the day in question the Midge was making fast to the Andes. The latter vessel was broadside on to the swell, and the vessels were rolling very heavily. He corroborated as to the course taken afterwards. They went at the rate of between two or three miles per hour, and the Andes was well under control. He was on deck when the Buffalo came up, but did not hear any of the conversation between the captains, as he had to run down and slow the engines. McAllister remained on deck.

Cross-examined: They never drifted at all. He knew nothing about the course taken, as he was a fireman.

Parsley, a native, deposed that he worked on board the Midge, and was there when they picked up the Andes. He jumped on board. The Andes was rolling heavily. Proceeding, witness corroborated as to what was then done. Witness steered all the time the Midge was towing the vessel. The sea was rough at that time.

By Mr. Sheil: While the Midge was towing the vessels were going direct for the shore, not for East London. There was not much wind.

William Craig, a civil engineer and assistant engineer in the Public Works Department, said he had just returned from Australia, where he had been sent by the Government to make inquiries into the value, etc., of Jarrah wood. He had looked through the bills of lading of the Andes, and he took the value of this cargo to be worth 2s. 6d. per foot all round. That was in ship's slings.

Mr. Searle said there were 43,900 cubic feet of Jarrah wood on board, and that would give the value of the cargo as £5,487 10s.

Examination continued: Jarrah wood would not be damaged by sea water.

By the Court: There would be a good market here for Jarrah wood.

Mr. Searle said this was all the evidence he had to call.

Mr. Sheil called

Angus Macpherson, who said he was captain of the tug Buffalo. He had had 32 years' experience of East London Harbour and roadstead. On May 15 he received certain instructions, and in consequence of these he went out to salve the barque Andes, which had been reported to be in a disabled condition. He did not see the Andes that day, but remained out all night. They went about 50 miles to the westward. As they did not see the Andes they came back in the morning, making a zig-zag course coming up against the current. They first sighted the Andes about midday. They saw some vessel had her in tow. They made for her, and came up about two o'clock. The Andes would then be about 13 miles from East London and 8 miles from the land. The wind was then easterly, and the current running to the west. Witness offered his services to Captain Oswald, of the Midge, but they were refused. Afterwards witness returned to the Midge as she was flying a signal, the "W," a local signal, which meant that they wanted the tug. When they got up to the Midge witness asked the master what the flag was flying for. He said he wanted the Buffalo to tow the vessel to East London. Witness refused to do so unless the Midge would cast off. He demurred a little, but eventually consented. He also consented to go alongside the Andes, so as to allow some of the Buffalo's men to get aboard. Then witness asked him to hold the vessel as she was until his men got on board, which Oswald did, and four of witness's crew jumped on board. The Andes was a complete wreck and derelict. The Midge was a single-screw vessel, but the Buffalo had a twin-screw. There was much more danger to a vessel with a twin-screw being fouled, or the screw striking against the vessel's side.

By the Court: He insisted upon the Midge casting off because he considered his tug sufficient for the work. There would have been no danger to the two tugs towing.

Examination continued: There was danger to the four men getting on board the Andes. It was necessary to get those men on board, as the two men of the Midge already there were not sufficient. There was wreckage, consisting of wire chain and

torn canvas, hanging over the bows of the vessel. There was wreckage there even when he left East London to come to Cape Town for this case. When witness returned to the Andes and Midge the second time they were further from East London and nearer the shore. The wind and current had set them back. The Midge, in witness's opinion, could not have got the Andes into East London that night if the weather had continued the same. When they took the Andes in tow she would be between 14 and 15 miles from East London, that was about 2 miles more than she was when he first came out to her at two o'clock. Witness's tug was out 26 hours altogether. During that time the Buffalo burned about 15 tons of coal. They had 15 men on board the Buffalo, being two more than the usual crew. The gross tonnage of the Buffalo was 251 tons, and the nominal horse-power 157, actual 850. The value of the Buffalo was £15,000. He believed that fourteen years ago, when she was new, the Midge was valued at £3,000.

Cross-examined by Mr. Searle: Witness never suggested that the Midge should go off and bring five men to anchor the vessel. He did not know she was going to do so. When witness had got his towline aboard the Andes, he reminded Captain Oswald of his promise to let go, and said he should go to East London and report. Witness wanted, according to the agreement, to take the whole towage out of the hands of the captain of the Midge.

By the Court: The Midge could not have got the Andes into East London that night.

By Mr. Searle: As it turned out, the weather changed, and the Midge might have got her in some time during the night.

Re-examined by Mr. Sheil: Witness's four men, as well as the two from the Midge, stayed on the Andes until she was anchored.

By the Court: Witness refused to tow until the other tug let go. The Buffalo was able to deal with the Andes alone. The other boat could not have kept up the rate of the Buffalo.

Ernest Charles Barry, assistant pilot to the East London Harbour, said he had been assistant pilot for the last four years, and was the holder of a master's certificate. He accompanied the Buffalo when she went out on the 15th May in search of the Andes. When they got out of the anchorage, they went the distance and in the direction stated by the captain. On the 16th they signalled the Andes. The Admiralty chart

produced was marked by witness. It showed the position of the Andes, the Rubia, and the Braemar Castle. When the Buffalo came up to the Andes, at about 2 o'clock, she was about $6\frac{1}{2}$ miles from land and 15 miles from East London. At 4 o'clock she was 16 miles from East London, and about 5 miles from land. The current was running from east to west. Witness was sure the current affected her. Witness considered that she drifted a matter of 2 miles between the hours stated. Witness, Von Gelden, and two natives got on the Andes. There was great danger to life and limb in doing so. There was a considerable swell at the time. They had to jump on. The size of the Buffalo made this difficult. The people in the Midge, which was smaller, could catch hold of the side as the Andes fell. Witness saw wreckage hanging to the ship. It was still hanging. It consisted of chain, rope, canvas—the worst material they could think of for fouling the propeller. There was great danger of fouling the propeller. The chances of fouling a twin-screw propeller was three times as great as that of fouling a single screw. The propellers on twin-screws were more exposed. At about 3.45 they saw the "W" signal up on the Midge. The captain of the Midge said he wanted assistance to tow the vessel. Captain Macpherson said that if they (the Midge) let go and cast her adrift the Buffalo would take her. Witness agreed with the previous evidence as to the condition in which the Andes was. The Midge and Buffalo did not tow together for a quarter of an hour. As soon as they made the ropes fast they let the Midge go. Witness did not hear anything said about the Midge going to East London to get more men. Had this been said witness would not have heard it. It would have been impossible for the Midge to have towed the Andes into the river without assistance unless the weather had changed. The current was running at the rate of between two and three knots. Currents varied, and were very deceptive. The Buffalo was a 12-knot boat, and could tow a barque of that description about 8 miles an hour.

By Mr. Searle: Witness went as navigating officer. Witness got on the ship at about what they called the fore-rigging. There was no wreckage at that spot above water. Wreckage hung down into the water from the fo'c'sle, about 20 or 30 feet away. The Buffalo could take the Andes in alone. They took in much bigger ships every day. At the river mouth, the Midge sent some

men aboard, and at 7 o'clock they let go the anchor. The Midge and the Buffalo only towed together for about two minutes, until the Buffalo ropes were made tight. The Rubia went ashore before the Buffalo came up. She must have gone ashore after the Midge left her. The Buffalo rendered assistance in towing the lifeboat of the Rubia to the Braemar Castle. Five persons on the Rubia were drowned. The Rubia was supposed to be shipping water. It was beached.

Mr. Sheil said he was told that the captain and carpenter of the Rubia went ashore before the Rubia was beached. He did not know why they did so.

Mr. Searle said the Rubia was apparently beached by the officer in charge to save sinking. She was in a water-logged condition.

Richard von Gelden, port boatman at East London, said he was one of the crew of the Buffalo on the 15th and 16th May. Witness was one of the men who jumped on board the Andes. He agreed with what Mr. Barry said as to the risk. On the first occasion upon which they saw the Andes she was edging towards the shore. Witness thought that in the two hours between the first and second occasions of speaking to the Midge she had lost a couple of miles. She had gone nearer the shore. Witness thought it impossible for the Andes to have been towed in by the Midge that night. Witness saw wreckage hanging from the fore part of the Andes. There was a risk of fouling the propeller, and of the two ships bumping. Witness dropped the anchor. The men whom the Midge brought from shore rendered assistance by going underneath the fo'c'sle and seeing that everything was clear for dropping the anchor.

Cross-examined by Mr. Searle: In witness's opinion the Midge would not have towed the Andes in until 8 or 9 in the morning. It would take at least a couple of hours to cut wreckage away.

Re-examined by Mr. Sheil: It wanted a chisel and a hammer to cut away all the wreckage. The Midge would not have gone in if the wind and current had continued as it was. If wind and current had gone down, she would have got in next day.

Philip Charles Morgan, lighthouse-keeper in charge of the Hood Point Lighthouse, said that on the morning of the 16th May, at about 9 o'clock, he noticed a dismasted vessel, which turned out to be the Andes. She was then about 13 miles from the port, and 10 from the land. Witness's duty was to

make a note of passing vessels. The Andes was drifting to the westward. He saw the Midge go out at 9.50. She passed the lighthouse at that time. She went to the Rubia first, and went thence to the Andes. When she took the Andes in tow, she was making no headway at all. Witness was sure of that. This was at 11.30. The wind then came to the east. From 11.30 until 4 o'clock she was losing ground. Witness signalled the Buffalo at 1 o'clock, when she left the Andes, and went to the Braemar Castle. She returned to the Andes at about 3.45. The Andes was then between 16 and 17 miles from East London. He actually made a note of this in his book at the time. Witness had had 16 years' experience as a lighthouse-keeper, and was a good judge of distances.

Cross-examined by Mr. Searle: Witness did not lose sight of the Andes. At about 11, the Andes was 10 miles from the shore. At 4, she was about 6 or 7 miles from the shore, and between 16 and 17 miles from the port. The Point Hood Lighthouse was about a mile to the west of East London. At 11 o'clock the Andes was only about 13 miles from the port, and about 10 miles from shore. It was more likely that she lost 9 miles, than that she gained 9 miles.

Re-examined by Mr. Sheil: Witness was in Government employment. Witness had the corner of his house and a rock on the beach as beacons. He took his bearings from these.

Peter Sutherland said he was the port signalman at the East Bank, East London, and had occupied that position for twenty years. He remembered about two o'clock on May 15 he read a signal from a passing steamer. In consequence of this he reported by telephone to the Harbourmaster, and thereupon the Buffalo went out about 5.30 that evening. On the morning of May 16, at 6.15 a.m., witness sighted a dismasted vessel. She was then between 11 and 12 miles away in a south-south-westerly direction. At 6.40 a.m. the weather cleared up, and then he made perfectly certain that it was a dismasted vessel. She was then heading south-south-east and lying broadside on to the swell. The vessel was in sight up to 12.30, and was constantly drifting in a south-westerly direction. At 11.30 he saw the Midge take the Andes in tow. She was edging in towards the shore, and almost on the lighthouse. In the morning the wind was light, but it began gradually to increase from the east, so that there was a head wind and the current against the vessel.

When taken in tow she was in about the same position with regard to distance from East London. He lost sight of her under the land at 12.30.

Cross-examined by Mr. Searle: The vessel was steering towards the lighthouse. That was the best the Midge could do.

By the Court: If the Midge had been a more powerful boat she would not have required to take that course. She could have made a straight course to the port if she had been powerful enough.

Lewis Alfred Mann, the Port Captain at East London, said he had held that position for about seven years. Prior to that he had been twenty years in the Union Company's service, and the last vessel he commanded was the R.M.S. Trojan. On the evening of May 15, in consequence of a telephone message from the signalman, the Buffalo was sent out to save the Andes. Witness knew the launch Midge. She was a steam passenger launch, and had no towing gear, properly so-called. She towed lighters. Witness had seen the Andes lying at East London. He knew the wind at East London on May 16, and would say that under the conditions then prevailing as to wind and current the Midge had not sufficient power to bring the Andes in. He should say that the value of the Andes now as a hulk would be £500 if there was no demand, and double that amount if there was a demand. As things were now, she might sell for £100. There was no towage tariff at East London except from the anchorage to the river. The Buffalo was actually out 26 hours. The crew were paid overtime.

Cross-examined by Mr. Searle: There would be greater credit to the Midge for tackling a ship than to the Buffalo, as the former was not so well adapted for towage as the latter. There were several courses open to those on board the Midge. One was that it would have been quite possible to take the ship near to the shore with the assistance of those on board the Midge and anchored, but of course there would have been some risk in that. If they had lain to the vessels might have been blown down to Port Elizabeth.

Mr. Searle: And to the mind of an East London man, that would be about the worst thing that could happen.

Further questioned, witness said that if the weather had moderated, as in fact it actually did afterwards, the Midge could have been got in that night.

James Georgeson, chairman of the East London Harbour Board, said he represented the Castle Company at East London for 22 years, and latterly he represented the amalgamated companies, from which position he retired in April last. The Buffalo was sold to the Harbour Board on the liquidation of the Boating Company for £15,539. The cargo had been offered at East London for 2s. 7½d. per cubic foot. The Andes he estimated would realise anything between £500 and £1,000. There was no such term as "special towage" used at East London, and he had never heard such a term applied to bringing in a disabled ship. He could not explain what the company meant by writing of "special towage" in the correspondence.

Captain Mann, recalled, put in his report of the survey of the ship.

Captain Oswald, recalled, said that on board the Midge when she left Buffalo River there were 9½ tons of coal. They burned coal at the rate of three tons in 24 hours, so that the amount on board would have lasted them about three days.

This concluded the evidence.

Mr. Searle, K.C. (for Union-Castle Co.): More than one vessel had stood by the Andes, and had attempted to tow her, but had to leave, in consequence of the heavy sea. It is clear that the ship was in a derelict condition. She had been abandoned by the crew, and had drifted some distance. The principles as to salvage must be governed by those applicable to derelicts. If not salvaged, the vessel would have foundered, and a valuable cargo, together with a ship valued at £500, would have been lost. The ship and cargo together are worth £6,000 at least. The Court will, I submit, not award less than one-third of the value of ship and cargo, i.e., £2,000. As to the relative value of the services rendered by the tugs, the Midge certainly found the ship, and got hold of her under circumstances of great difficulty. The Midge was towing from 11.30 a.m. till 4 p.m. The Buffalo then appeared on the scene, when the Midge was conducting the matter in a very satisfactory manner. The master of the Buffalo said that he would not tow unless the Midge cast off; they did, however, tow together for some time, and then the master of the Buffalo told the master of the Midge to go into port and get some men. It was assumed that the Midge was the salvor, and the Harbour Board never claimed possession of the vessel. They left the vessel in our possession, and it has so remained throughout. The Buffalo

may be entitled to something, but the Midge tackled the vessel as a derelict in open sea. The Buffalo rendered her services under great difficulties, no doubt, but *a fortiori*, so did the Midge. We were the first to get the ship under control, and the Court has always dealt liberally with the primary salvors. *Kennedy on Salvage* (p. 162). It is in favour of public policy to allow second salvors to come in. A first salvor is not necessarily entitled to more than the second. In this case the vessel had been got under control by the Midge, and the Midge would have brought the ship into harbour in time, but in order that she might be brought in before dark, they got the Buffalo. The vessel would not have been lost in any case, and hence the Midge is entitled to substantial salvage. *Associated Boating Co. v. Baardaen* (12 S.C.R., 330). In that case the vessel was not really a derelict; here the ship was abandoned. See the *Lirietta* (Prob. D., 1883, p. 24). In that case the Court awarded three-fifths of the value of the vessel salvaged. In the case of the *Hebe* (4 Prob. D., 217), the Court awarded nearly one-half. In the older case, one-half was generally awarded. In this case there had, moreover, been an actual disbursement of some £24.

Mr. Sheil, K.C.: It is not denied now by the owners of the Midge that the Buffalo is entitled to salvage reward, and that being so, the only two points which the Court has to decide is: (1) Which of the two tugs rendered the more meritorious services, and (2) how the salvage award should be apportioned. The tendency of the Courts in England is to deal liberally with the first salvor, but that principle is subject to a very important qualification, and that is, that the first salvors were in a position to perform their work. *Kennedy*, in the paragraph following that quoted by the other side, says that priority of time will not count for much where the balance of efficiency or merit is in favour of the second salvors. One of the most important ingredients in salvage services is success. Which boat in this case rendered most service? Which saved the Andes, saved her cargo, and brought her into port? The boat which did that was undoubtedly the Buffalo. It is not contested that the danger of the propeller being fouled was greater in the case of the Buffalo, it being a twin-screw vessel. The evidence is overwhelming that, having regard to the wind, the current, and other circumstances, it was physically impossible for a small launch like the Midge to have brought in the Andes. The evidence of the signalman

and lighthouse-keeper, and also that of Captain Macpherson, show that the *Andes* and the *Midge* lost ground before the *Buffalo* came up. As to the *Buffalo*, she brought the ship and cargo, valued at about £6,000, without a hitch into port, and was therefore entitled to a liberal remuneration. As to the amount, if a difference was to be made, special favour should be shown to the *Buffalo*, which actually brought the vessel in. As to the division of the salvage award, see: *The Scaramanga* (29 Sh. Gaz., W.S., 487, July 25, 1884); *The Lirietta* (8 P.D. 24); *The Jonge Bastiaan* (5 C. Rob., 322); *The Santipore* (1 Spks. E. and A., 231).

Mr. Searle, in reply.

The Acting Chief Justice, in giving judgment, said: The two actions before the Court are claims for salvage for saving an abandoned barque, the *Andes*, which was discovered in the offing at East London in a state of total wreck, having been abandoned by the master and crew. The work was done by two tugs, one belonging to each of the plaintiffs. First, the tug *Buffalo*, having heard the night before that a dismasted ship was in the offing, put out from the port of East London, and went in search of the vessel. She proceeded some 50 miles down the coast without discovering the barque. Next morning, the vessel having then drifted within sight of East London, the tug *Midge* put out. At that time the *Andes* was some 17 miles from the port, and some 15 miles out to sea. I think, on the evidence, there is not the slightest doubt that but for the services rendered by either or both these tugs, the *Andes* would have become a total loss to the owners, or to the underwriters, and that, but for the efforts of the two tugs, nothing whatever would have been recovered. Seeing that the vessel was a wreck, and abandoned, and a derelict, the Court is inclined to reward the efforts made in saving this property liberally, but at the same time we must always bear in mind the elements which render salvage services meritorious. There is enterprise exhibited by the salvors in this case. Each of the owners claims a greater credit for his own exertion than he is willing to allow to the other tug. On the question of enterprise, one might almost say that the *Buffalo* showed greater enterprise in putting out the night before, and in going on a long hunt for this vessel. However, she was unsuccessful, and her enterprise then did not meet with reward. There was certainly enterprise on the part of the *Midge*, a small vessel of only 20 horse-

power, in tackling this vessel under the then existing circumstances. Both the *Midge* and the *Buffalo*, when they came up to the vessel, at different times, had to put men on board to get tow-ropes and fasten them on the *Andes*. The *Midge* was first there, and besides having to put tow-ropes on board, had to cut away the wreckage overhanging the bows of the *Andes*, which made her task more difficult. Some risk was run by both tugs, but I do not think on the evidence it was a very serious risk. In both instances the crews from the tugs were able to board the vessel. One man fell down, and hurt himself somewhat in his fall, but beyond that, no damage was done to the parties in boarding the vessel. The two men from the *Midge* were able very quickly to cut away the wreckage sufficiently to enable the *Midge* to come alongside, and in a quarter of an hour from the *Midge* first coming alongside, the ship was in tow. The evidence seems to show that the *Midge* did not bring this vessel very much nearer the port than it was before. According to the captain's evidence, she was towed a distance of some nine miles, but the distance was not greatly reduced between the vessel and the port. She was certainly taken closer in towards the coast, and I think it possible that, but for the efforts of the *Midge* in bringing the vessel in close to shore, the *Buffalo* might have missed the *Andes* again. So that the *Midge* deserves some credit, at any rate, for having brought the vessel there. When the *Midge* brought the vessel in the weather was freshening, and the captain of the *Midge* called the other vessel to his assistance. Considering the slow rate of progress that the *Midge* had been able to make, the freshening of the wind, the waning of the day, and the distance from East London, I think the captain of the *Midge* acted very wisely for himself and for the ship—indeed, he considered that it was necessary to call for assistance. The efforts of the two vessels were successful, and the *Andes* was brought safely into port at East London, where she is now, awaiting the decision in this case. Having brought the vessel from danger, from being a derelict, and from almost a certainty of being a total loss, having done this work successfully, and with some enterprise, the Court thinks it is certainly a case for remuneration for salvage services. In the public interest, a case like this calls for some liberality of treatment. It is rather surprising, under the circum-

stances disclosed, now to see one tug showing jealousy to the other. However, the evidence shows that the services rendered by the Midge and by the Buffalo were very much the same. If one were to take the estimate of the Midge as to the value of the Buffalo's services, the value of the services rendered by the Midge would be very small indeed. But I think this jealousy may be put aside. The vessel and cargo may be taken to be worth about £6,000, which is a considerable sum of money. The work done was all done within a day. Some risk was run, not only by the crew, but by the vessels themselves. The Midge deserves special consideration for having first secured the barque and for bringing her nearer into shore, but the number of the men on the Midge was about half the number on the Buffalo, and the Buffalo's value was about three times that of the Midge. The efforts of both saved the property. No life in this case was at stake. Under these circumstances something about one-third, or a little more than a third of the value of the property, would be a fair amount to be awarded for salvage. The only remaining question is in what proportion this amount is to be divided between the salvors. We are of opinion that the plaintiffs, the Union-Castle Company, are entitled to judgment for £1,250 for services of the Midge, and for £83 10s. 6d. for expenses disbursed by them in connection with the barque in harbour, and judgment will be entered for them for that amount. For the East London Harbour Board, the owners of the Buffalo, we think £1,000 will be a fair remuneration. This judgment will carry all costs, and the ship and cargo now under attachment to found jurisdiction, will be declared executable in satisfaction of this judgment. In this case a number of interlocutory applications had been made on behalf of the owners without any result, and costs of these interlocutory applications will also be borne by the ship. The ship and cargo will bear the amounts of judgment in this case pro rata according to the amount realised on each respectively.

Mr. Sheil asked the Court to give some direction as to the amount to be awarded to the crew of the Buffalo.

The Acting Chief Justice said that as the evidence showed that some remuneration had been given the crew for overtime it was better to leave that in the hands of the employers.

[Attorneys for the Union-Castle Line, Messrs. Fairbridge, Arderne and Lawton;

for the East London Harbour Board, Messrs. Walker and Jacobson.]

ADMISSION. { 1901.
Sept. 23rd

Mr. Benjamin moved for the admission of Frederick William Greenwood as an attorney and notary of the Court.

An order was granted as prayed and the oaths administered.

GEORGE MORFEE AND OTHERS V. G. W. STEYTLE, M.O.

This was an application by George Morfee and the other executors in England of the late Charles B. Morfee for an order on respondent, George William Steytler, in his capacity as executor dative of the estate of the late Charles B. Morfee, to pay over to the applicants the amounts in his hands.

Mr. Benjamin appeared for the applicants, and said that deceased, who was the captain of the cable ship Great Northern, died here, but at the time of his death he was domiciled in England, although he had a little property here. An executor, Mr. Steytler, was appointed by the Court to wind up the estate here, and it was with regard to the net balance of the estate, now in the hands of the executor for distribution among those entitled to share, that an order was asked. The applicants were the executors appointed in England. Counsel further stated that the executor here had no objection to the order, but having been appointed by this Court, he considered it necessary for such an order to be obtained before he parted with the money.

An order was granted as prayed, costs to come out of the fund.

HUGHES V. HENNING.

Mr. Benjamin applied for an amendment of the order granted in this case, authorising the Sheriff to transfer certain property, it having been found on a fresh survey being made that there were ten morgen more land than set forth in the original order.

The order was amended as prayed.

REX V. ALTENKIRCH. { 1901.
Sept. 23rd.

Liquor laws — Natives — Permit —
Onus — Proclamation 255 of
1900.

This was an appeal against a conviction before the Resident Magis-

trate of Idutywa of having contravened Section 34 of Proclamation 255 of 1900, by obtaining half a bottle of brandy for a native who by the said proclamation was forbidden to be in possession of such intoxicant without a permit signed by the Magistrate. The ground of the appeal was that the record in the Court below did not show that the native in question was not entitled to a permit and had not got one.

Held, that as the onus of justifying his action was on appellant and as the fact of the native having or not having produced a permit was particularly within the knowledge of the appellant, the appeal must be dismissed.

- *Semle: No other person may buy liquor in his own name for a native in the Transkei, even should such native hold a permit to get liquor from a licensed dealer.*

This was an appeal from the Court of the Resident Magistrate of Idutywa, in which the appellant had been convicted of contravening section 34 of the Proclamation No. 255 of 1900, in that, upon or about May 10, 1901, and at or near Ibeka, he did wrongfully and unlawfully, and with or without remuneration, obtain a certain quantity of intoxicating liquor, to wit, one half-bottle of brandy, from John William Brooks, licensed dealer in intoxicating liquor, at Ibeka, for one Sodoza, a native, who is forbidden by this proclamation to have intoxicating liquor in his possession without a permit signed by a Resident Magistrate. The accused was convicted, and sentenced to pay a fine of £15, or, in default, to be imprisoned with hard labour for one month.

The section of the proclamation above referred to reads as follows: "Any person entitled to purchase intoxicating liquor without a permit, who shall, with or without remuneration, purchase or obtain intoxicating liquor for any person forbidden by this proclamation to have intoxicating liquor in his or her possession without a permit, shall be liable to a fine not exceeding £50, or in default of payment, imprisonment,

with or without hard labour, for a period not exceeding six months, or until such fine be sooner paid."

On June 6, 1901, Brooks, the licensed dealer, had been convicted in the Court below (in respect of the same set of facts with which appellant had been subsequently charged) with having sold the said liquor to Sodoza, and sentenced to pay a fine of £15, or to be imprisoned with hard labour for one month.

The appeal was founded on the contention that the offence with which Altenkirch stood charged was a single one with that for which Brooks had been recently convicted and sentenced in the same court, and that Brooks having been punished, it was not competent for the Court to punish Altenkirch. The defending attorney quoted *Queen v. Willem* (4 H.C., 242).

The evidence showed that the accused had sent Sodoza with a note to Brooks in the following terms:

"Dear Mr. Brooks,—Please send me half-bottle F.C. Cash, 1s. 6d.—(Signed) J. Altenkirch."

Sodoza was caught by detectives, and the brandy taken from him. Accused never received it. It was found as a fact that the brandy was intended for the native.

Sir H. Juta, K.C. (for appellant): The record does not show that appellant was not entitled to a permit.

[The Acting Chief Justice: On whom is the onus cast to prove a permit?]

Certainly not on us, for the matter is not peculiarly within our knowledge.

[The Acting Chief Justice: The rule is that natives are not allowed to have intoxicants?]

Oh, yes, with a permit. The point is as to whether the native had no permit, and fell under the proclamation. Section 30 shows that a native may be guilty of a breach of law even if he has a permit. Section 29 shows that a licensed dealer may also be guilty. The local dealer must send the permit to the Resident Magistrate, or he may be fined. We can claim under section 34. The whole question is: Had the native a permit? If the native had been charged, he would have had to produce his permit, which would have been peculiarly within his knowledge. Here they charge a third person, and it rests with respondent to prove that there was no permit.

Mr. Howel Jones (for the Crown): The onus of proof is on the appellant. He had no right to give liquor to Sodoza unless he was satisfied that Sodoza had a permit.

[Maasdorp, J.: Do you say that if a canteen keeper does not take a permit and hand it over to the Resident Magistrate, that is *prima facie* evidence of no permit?]

Yes, especially if there is a prior conviction against him.

[Buchanan, A.C.J.: What section refers to the giving of permits?]

Section 24.

Sir H. Juta (in reply): There is nothing on the record to show the occasion on which the brandy was given. The prosecution relies upon the statement of Brooks: "I was convicted and fined for letting the native have the brandy." That does not necessarily refer to section 29. Section 30 allows a man to be fined even if a native has a permit, if the dealer does not take the permit. Sodoza was a Crown witness. Why was he not asked whether he had a permit? The present record is not sufficient to sustain a conviction.

[Maasdorp, J.: If A, holding a licence, or being a white man, purchases for B (a native), is he bound to take B's permit?]

There is no such provision in the Act. I may buy for a native if he has a permit, and can buy for himself. The whole point in this case is: "Did the native have a permit, or did he not?"

The Court dismissed the appeal.

In giving judgment, the Acting Chief Justice said: The appellant in this case was prosecuted and convicted before the Resident Magistrate of Idutywa for contravening a proclamation regulating the trade in liquor in the Transkeian Territories. By this proclamation, speaking generally, no native in the Transkeian Territories is entitled to have sold to him, given to him, or supplied to him, intoxicating liquor, unless he has previously obtained from a Resident Magistrate a permit authorising him to buy or receive such liquor. If liquor is obtained by a native, not the holder of a permit, from a licensed dealer, such licensed dealer renders himself liable to a penalty for selling to the native. If the native had a permit, the proclamation requires the licensed dealer to take that permit from the native, to keep it, and to hand it over to the magistrate. But there is an additional section of the proclamation, which prohibits any person, who may not be a native, and who is therefore entitled to buy intoxicating liquor, from buying, with or without remuneration, intoxicating liquor for a native who has no permit. It is said this section implies that such person may buy for a native with a permit, but I think the section really means that this per-

son is not to lend himself to buying liquor for natives. If this were not so, this section would allow a person, on a native producing a permit to him, himself to buy liquor and to give it to the native, and no record would be kept of the permit. If a person, not himself a dealer, chooses to buy liquor for a native, to whom the sale of liquor is forbidden, the onus is clearly upon that person to justify his conduct. *Prima facie*, a native is not entitled to have liquor, and if a person gets liquor for a native, the onus is upon him to show that the native for whom he bought has a permit. In this case the accused has obtained liquor for a native. The native, the licensed dealer from whom the liquor was bought, and the accused himself gave evidence. The native describes how he got the note from defendant, upon which he got the liquor, and he does not in his evidence anywhere say he had a permit. True he was not formally asked if he had a permit, but no question about a permit was raised by the accused. The native said he went to Mr. Altenkirch and told him that his child was ill, and that he wanted brandy to mix with the medicine. There is no allegation at all that he had a permit from the Magistrate, and there is no allegation on the part of the person who gave the note for the liquor that the native produced such a permit. This matter was particularly within the cognisance of the defendant himself when he gave the order. He had no right to give an order without the production to him of a proper permit, even if he might give such an order at all. I think the Magistrate in this case was fully justified in convicting without calling any formal evidence to show that the native did not have a permit. I think the onus in this case was clearly upon defendant to show that the native had a permit, and he has not discharged that onus. It was easy for him to have done so. Even if he could have set up that defence, it is for him to establish it, and he has not done so. The conviction is really for obtaining liquor for a native who, by the proclamation, is not entitled to have such liquor. The appeal must be dismissed.

Mr. Justice Maasdorp concurred.

REX V. FADANA AND OTHERS. { 1901.
Sept. 23rd.

This was an appeal from the decision of the Assistant Resident Magistrate of Mid-

dledrift, by whom appellants were convicted of the theft of a pig and sentenced to six months' hard labour. There were two grounds of appeal. The first was that fresh evidence was called for the prosecution after the case for the defence had been closed, and the second was that sufficient weight was not given to the legal presumption of innocence. The record of evidence showed that complainant lost a black and white pig, and afterwards found prisoner scraping a pig which had just been killed, and which complainant said was the one he had lost. The defence was that Fadana had the pig which was killed given him by his mother.

After hearing Mr. Gardiner in argument, The Court dismissed the appeal.

In giving judgment, the Acting Chief Justice said that this was an appeal from the decision of the Resident Magistrate of Middledrift, in a case in which appellants were charged with the theft of a pig. At the hearing of the case evidence was given showing that complainant had lost a pig, and that he had traced it into possession of the prisoners. When plaintiff and his friends went to prisoners' huts the prisoners were scraping a pig which had been killed. As the pig had only been partly scraped, plaintiff and his friends were able to recognise it from its appearance. Defendants themselves gave evidence, and alleged that the pig was their own. After the case was concluded the Magistrate said he would read over the evidence and give his judgment later. When the Court met again another witness was called to contradict some of the statements made by prisoners as to the possession of the pig by them. No doubt there was some irregularity, *prima facie*, in so doing, but the Administration of Justice Act laid down that when a case came before a Court of Criminal Appeal, the conviction should not be set aside on the ground of irregularity unless the prisoners were prejudiced, or some substantial wrong had been done to them. In this case, the Court, looking at the record, was bound to say that no substantial wrong had been done to prisoners. The question was whether, even if there had been an irregularity, substantial wrong had been done to the prisoners by such irregularity. If they struck out the evidence taken on the second occasion altogether, there was ample evidence to convict in this case. No substantial wrong was done, and that was the test the Court had to apply. It was stated as another ground of appeal that sufficient weight had not

been given to the presumption of innocence, but this objection had not been much relied upon in argument, seeing that the evidence for the prosecution was so direct and positive. The appeal must be dismissed.

Mr. Justice Maasdorp concurred.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

KEANE V. COGHLAN. { 1901.
Sept. 21th.

Mr. Benjamin moved for the removal of Wm. James Coghlan from his position as executor testamentary of the estate of the late Michael Coghlan. Affidavits were read to the effect that the executor had taken to drink.

The Court ordered the removal of the executor, and authorised the Master to call a meeting of the next-of-kin for the appointment of an executor dative. Costs were ordered to be paid out of the estate.

FREEMAN AND OTHERS V. SIMON. { 1901.
Sept. 24th.
„ 25th.

Water—Natural flow—*Servitus Fluminis vel Stilicidii Recipiendi*.

Plaintiffs and defendant were neighbouring proprietors whose respective properties abutted on a certain private road over which they all had rights of user, but which was vested in the first plaintiff. Some seven years ago defendant had by raising the level of his own ground caused his storm water to flow into the said road. He had also made a sluice at one side of the road to carry off this water and had erected a fence which encroached on the road. In 1900 the road had been made up by plaintiffs and slightly raised, thereby blocking up a ventilator at the back of defendant's house. Plaintiffs now sued

(1) for an interdict to restrain defendant from allowing storm, and other water to flow from his property on to the above road.

(2) For an order directing him to fill up the said sluic and to remove the said fence where it encroached on the road. (3) To recover £3 from defendant, being his pro rata share of the cost incurred by plaintiffs in making up the said road. Defendant claimed £100 damages in reconviction for injury done to his house by alterations made in the level of the road.

Held, that as the natural flow of the water was not from defendant's ground to the road, and as defendant had failed to establish any servitude either by grant or by prescription entitling him to discharge his water on to the said common road, an interdict must be granted as prayed. As defendant had already removed the fence complained of and as the road had not been made up satisfactorily no order was made with respect to the other prayers of the declaration. Plaintiffs were, however, authorised to fill up the sluic should defendant fail to do so. Defendant's claim in reconviction was dismissed, the Court finding that the damage (if any) done to defendant's house was owing to his own negligence in not providing for the carrying off of his storm water after the road had been raised. Plaintiffs were allowed costs.

This was an action brought by Charles Freeman, Wm. Frederick Lehman, James Liston, John Foulds, and the South African Association, in its capacity as the executors in the estate of the late James William Attwell, against Frederick Simon for an interdict restraining him from allowing storm and other water to flow from his property on to a certain road

at Green Point, called Portswood-road; for an order on defendant to fill up a certain excavation made by him in the road; for an order to remove a certain fence which was alleged to encroach; and for the sum of £6, due under agreement by defendant for repairing the road. The declaration was as follows:

1. The plaintiffs and defendant are the registered owners of certain lots of property situated at Green Point, and abutting upon a road called the Portswood-road. The said lots were all formerly owned by the first named plaintiff, who sold to the other plaintiffs and defendant or their predecessors in title; the said road is a private road, and is vested in the said first-named plaintiff.

2. One of the conditions upon which the said lots abutting on the Portswood-road were sold and transferred was that the said road which was marked on the several diagrams should be a common road to the properties sold, and to the remainder thereof.

3. The defendant purchased in or about the year 1894 the property abutting on the said road, which he now owns, from one Jupp, to whom the first-named plaintiff had sold. At the date when defendant became owner of his property, the drainage and storm-water therefrom flowed along the western boundary thereof into the main road, and the stormwater from the Portswood-road flowed on to defendant's said property.

4. In or about the year 1900, the said road was in disrepair, and it was agreed between plaintiffs and defendant that one Eyres should be employed to repair the same, and that all the parties to the said agreement should contribute in a reasonable proportion towards the said expense. The defendant agreed to contribute, on condition that the road should be so repaired that the storm-water falling upon it should be diverted from his property. The said work has been done as agreed upon, but defendant has now refused to pay his reasonable share, which amounts to £6. In consequence of this refusal, plaintiffs have paid the said sum, and are now entitled to recover it from defendant.

5. In or about June, 1901, the defendant wrongfully and unlawfully excavated a hole in the said road, so as to allow drainage and other water to flow from his background into the said road, and has since dug a drain or trench down the said road, alongside his said property, down to the main road, to allow his drainage and other water to flow; he also wrongfully and unlawfully placed the stones and earth dug out from the said

excavation on to the said road, thus blocking it up, and has placed a drain pipe from the guttering of the roof of his house, so as to discharge water therefrom into the road. The effect of defendant digging the said excavation and trench, and discharging water as aforesaid, will be to cause serious injury to the said road.

6. The defendant has also wrongfully and unlawfully encroached and trespassed upon the said road, by placing portion of the iron fence erected by him round his backyard thereupon. The plaintiffs claim: (a) That the defendant be restrained by perpetual interdict from allowing storm and other water to flow from his property on to the Portwood-road; (b) that the defendant be ordered to fill up the said excavation and trench or gutter made by him in the said road, and to restore the said road to its previous state, and that he be restrained by perpetual interdict from cutting up or in any way damaging the said road; (c) that the defendant be ordered to remove a certain fence erected by him, in so far as the same encroaches upon the said road; (d) the sum of £6, being the *pro rata* share of the costs incurred by plaintiffs for repairing the said road in the year 1900, in accordance with the agreement made with defendant; (e) alternative relief; (f) costs of suit.

The defendant filed the following plea and claim in reconvention:

1. The defendant admits paragraph 1 up to the word "title," but denies the rest of the paragraph.

2. The defendant admits paragraph 2, save that he says the last word thereof should be the words "Erf No. 4."

3. The defendant admits paragraph 3 up to the word "sold," but, subject to the following, denies the remainder of the said paragraph. At the date when defendant became the owner of his said ground the drainage therefrom and part of the storm or rain water flowed along the western boundary into the main road, and still does so flow, and the remainder of the storm or rain water therefrom flowed along a sluit or excavation on the western side of the said Portwood-road, and continued to flow until the acts of the plaintiffs hereinafter mentioned. The defendant denies that at the said date the stormwater from the Portwood-road flowed on to his said property.

4. The defendant denies specifically the allegations in paragraph 4, and denies that he entered into the agreement alleged, and says that in the year 1900, and in his absence, and without his knowledge or consent, the plaintiffs, by themselves, their agents,

or servants, wrongfully and unlawfully altered the level of the said Portwood-road, filled up the said sluit or excavation aforementioned, deposited a quantity of earth and stones to the height of about 2 feet against the defendant's fence and walls of his house, thereby blocking up his kitchen ventilator, two down-pipes from his buildings, and an exit for rainwater from his back premises, and blocked up and made unusable certain gates opening from the defendant's back premises into the said Portwood-road. By reason of the said acts the defendant's fence was forced inwards and injured, the said soil and stones came in upon the defendant's ground, and the walls of his house were damaged by soakage and damp, and, by reason of the said blocking up of his said down-pipes and the said exit of rainwater, the defendant's premises were flooded, and injury and damage was done to his premises.

5. The defendant denies that he has allowed any drainage to flow down the said Portwood-road, but he says that, after the said acts in paragraph 4 mentioned, he called upon the first-named plaintiff, who represented the other plaintiffs in that behalf, to restore the said Portwood-road to its former condition so far as the defendant's premises and the said sluit or excavation were concerned, and, upon his refusal so to do, the defendant removed the earth and stones placed against his fence and buildings, and restored the said sluit or excavation to its former condition, as he was legally entitled to do, and he denies that by so doing any injury has been or will be caused to the said road. He denies that he has blocked up the said road. He admits that when his house was built, which was prior to the acts in paragraph 4 set forth, he, to the knowledge of the plaintiffs and without objection, put a down-pipe from the guttering of his roof on the Portwood-road side of his house, but he says there is no other way for the said water to flow; that prior to his building his said house there was in existence a building on the same foundation, and that a down-pipe ran from the guttering of the roof of such building on the same side as and in a straight line with the present down-pipe down which the rainwater ran into the sluit or excavation aforementioned. He denies that such rainwater does or will injure the road, and he says that he is entitled to keep the said down-pipe as it is, and that it is on his own property.

6. The defendant denies that he trespassed upon the said road by placing the iron fence

thereon. He says there was a fence there before he became the owner, but he admits that the said fence does encroach a few inches on the said road, and says it has been there without objection for five years, and that before issue of summons upon the plaintiffs, or some of them, objecting to the said fence, he offered to set it back, and he hereby again tenders to set it back, and has commenced to do so.

7. Save as aforesaid, the defendant denies the allegations in paragraphs 5 and 6.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs. For a claim in reconvention, the defendant begs to refer to the matters set out in convention, and says that, by reason of the said wrongful and unlawful acts of the plaintiffs, their servants, or agents, in paragraph 4 of his plea set forth, he has sustained damage to the extent of £100. Wherefore the defendant claims: (a) The sum of £100 as and for damages aforesaid; (b) alternative relief; (c) costs of suit.

Mr. Searle, K.C. (with him Mr. J. E. R. de Villiers), for the plaintiffs.

Sir H. Juta, K.C. (with him Mr. Benjamin), for the defendant.

Mr. Searle said that since issue of the summons the fence complained of had been set back. That was now out of the case.

The first witness called for the plaintiff was

Charles Freeman, architect, who said he occupied a house at the top part of Portswood-road, where he had lived for nineteen years. He formerly owned all the plaintiffs' property, which he had sold from time to time. The plan produced was a correct sketch of the property. The road was there when witness bought the property. No one but witness then had a right to use the road. Witness bought from Inglis's estate and William's estate. Witness originally owned defendant's property, which he sold to one Jupp in 1855. The deed of transfer and diagram were produced. The only house then on the whole of the property was that now occupied by Lehman. Jupp built a single-storied house on the property. His drainage ran down the west side, alongside Bevan's, on to the main road. None of his water ran into Portswood-road. Jupp sold to defendant about six or seven years ago. The drainage was then going the same way. There was no down pipe on the Portswood-road side in Jupp's time. There was on Bevan's side. When defendant bought, he put a double-storied house and stables up. Until quite recently, there was no sluic or

excavation on the Portswood-road side of the property. The rain water which fell on the road got to the gutter along Attwell's property by an irregular course, the road being rough and uneven, until properly made in 1900. As long as witness had known the property, this water fell into Attwell's gutter. A small portion of the water falling on the road went on to Simon's ground. The road was never made up properly—never formed or metalled—until Eyres made it about eighteen months ago. About two or three years ago a sewage pipe was put under the road by the Municipality. The road was made very bad by this, especially by Simon's place. Witness complained, and defendant put some stones where the connection had been made with his property. About eighteen months ago witness took steps to have the road put in proper repair, as after the work of laying the pipes, it was in a bad condition. Previous to this, witness had always repaired the road. Witness asked Eyres to go around and see three of the owners, and instructed him to tell them that he would not do the repairs unless the owners paid a proportionate share. Witness gave Eyres a paper showing the respective shares. Simon was one of the three owners. Witness considered £6 a reasonable share for Simon. Everyone else had paid. Witness apportioned about one-twelfth of the road to Simon. Eyres, who was the head gardener at Attwell's, did the work, which witness thought was well done. The road was slightly raised on the west side. That condition, he understood, defendant made. The work was completed in about August last year. Everyone was satisfied with the road, including the defendant. In June last witness wrote to Simon complaining of his allowing drainage and storm water to run into the road, of the fence encroaching, and of the £6 not having been paid. The fence had been removed since the declaration was filed. Simon had cut a drain which went from the back of his stable into the road. It brought water from the back of the stable to the road, down which it flowed. Shortly before witness wrote the letter of June, defendant made a sluic all the way down alongside his property. Correspondence (produced) followed witness's letter of June. The stuff taken out by defendant when he cut the drain was thrown all over the road. The consequence was that witness had to go round another road to get to his house. Before the road could be used witness had to move some stones, and then he could come

down with his cart. He levelled the road a little. It gradually wore better, but it was still rough, and worse than they left it. The gutter entirely spoilt the road. The footpath was gone, and besides, when the storm-water came down and pipes became choked, it would damage his building. At times a considerable quantity of stormwater came down. Witness had a gutter on each side. These each came into pipes, which were taken under the road and emptied into Attwell's gutter. The vegetable matter brought down by the stormwater sometimes choked the pipes. Cows were kept in the shed shown on the plan of defendant's property, and a corrugated iron fence ran along the road behind the stables, and at the courtyard. Defendant had opened outlets in the corrugated iron through into his gutter or sluit. Witness did not mean that the regular water from the stables ran into the road, as defendant had drainage, but still a lot of water ran into the road. That water used to discharge on Bevan's side. Witness deposed as to other openings shown on the plan through which water which formerly discharged on Bevan's place now discharged into the road. The Municipal authorities had written to witness, as the land was in his name, but he had replied that this dispute was pending. Defendant complained of an air-grating or ventilator in the back portion of his house being closed up by the repairing of the road. That air-grating was put in too low when the house was built. That could be remedied at the cost of a very few shillings. Defendant's complaint that his yard gate was blocked was not correct. That yard was always below the level of the road. As a matter of fact, it had been partly filled up when the house was built, but it was still below the level of the road.

Cross-examined: When witness sold this land to Jupp he knew he was going to build upon it. Before the building was erected some of the stormwater coming down Portswood-road flowed over Jupp's ground all along, sometimes a good deal. When the house was built the water still ran the same way, not of course where the house was, but at the back of it. It was a continual source of trouble to Jupp. Mr. Fripp was not correct if he said that while he lived in the house water always ran in a natural gutter at the side of the house, as at present. There might have been a hole there, but not a proper gutter, as the road at that time had never been properly made up. Witness had not seen the plans for drainage passed by the Municipality. All the stable drain-

age did not go into the main sewer. It should do so, but it did not. Witness did not put soil to the depth of one foot anywhere on the road. The ventilator was partly covered by the soil. He did not fill up the down-pipes. There was a down-pipe there years ago, but that was a long way from the ventilator. It was a small thing, but he never objected. It did harm to the road, but it was not of sufficient importance for witness to raise an objection. It was brought in now along with the other things when defendant had made the road impassable. It depended upon the nature of the road whether or not it was advisable to construct a road raised in the centre. This road was too small for a gutter at each side, and if they had them they would take away the footpath which the people using that road wanted. This footpath was made at the same time as the road a year and a half ago. The footpath was just a raised part of the lee-side of the road. The water came through a hole in the corrugated iron fence made by defendant. That was now possible because defendant had raised the yard at the back of the stable. That hole now formed portion of the gutter complained of. The road was used for vehicular traffic many times every day. On August 23 witness received a complaint from the Municipal Council. Mr. Gibbs might have been Mayor of Sea Point at that time. Mr. Gibbs was not related to witness, and did not occupy any land belonging to him.

Re-examined: The road would get worse if the gutter was allowed to remain. It was only in the winter months that water flowed on Jupp's land.

Henry George Jupp said that at present he was employed in Ohlsson's Cape Breweries. He purchased the land in question in this case from Mr. Freeman, and afterwards sold it to defendant. When witness purchased the land there were no houses there, but witness built a single-storied house. The only other building was a small wooden shed for garden tools, etc. He put up a wooden fence at the top. Witness put in down-pipes on the side next to Bevan's. These took the water down to the road, under the footpath, to the Municipal gutter. There was at that time no gutter down the side where one had now been cut by defendant. No water from witness's property ran on to the Portswood-road. His property was lower than the level of the Portswood-road. Witness put on one side boards six or eight inches high to keep out the

water from Portswood-road. That was pretty much the condition of things when he sold to defendant. In heavy rains witness's yard and premises were very much flooded. After he put the boarding down he was not troubled by the water flowing over.

Cross-examined: The effect of the boards might have been to make the water run alongside the fence and it might have made a small sluit, but he did not notice any.

By the Court: After witness put up the boards the water during heavy rains would throw off against the boards and run across to Attwell's gutter.

Richard Henry Heward, Sea Point Municipal Engineer, said that in August last he noticed that the Municipal footpath on the main road at the foot of Portswood-road had been washed away, and that caused him to examine the latter road, when he found that the gutter now in question had been made. He communicated with Mr. Freeman, to whom he understood the property belonged. There was no previous communication from Mr. Freeman. There was a Municipal regulation prohibiting gutters across the footpaths, and water coming down had to be taken underneath the footpath by pipes. The gutter must be of recent construction, because witness first noticed the damage to the footpath in August last. Before this gutter was constructed, the road was properly made. It was made with a slope down towards Attwell's gutter. He considered that the best form of construction for that particular road. As to defendant's gutter, if heavy rains came, they would wash a trench in Portswood-road, and damage the foundations of the houses. He saw the air-grating, and in his opinion it would only cost a few shillings to raise it.

George Eyres said he was head gardener at the late Mr. Attwell's property. He had known the property for the last ten or eleven years. Before Simon came on the property, no water was discharged from there on to the Portswood-road. In time of exceptionally heavy rain, water flowed over the top part, but ordinarily all the water found its way to the gutter on the Attwell side. There was never a sluit down the road on the other side. The yard was still lower than the road; ten years ago it was 2 feet lower, but it had since been raised. Witness repaired the road. Witness saw Mr. Simon at Mr. Freeman's request in about May last year. Defendant said he was willing to pay a Defendant said he was willing to pay a small share, providing his side was kept cut. Witness agreed to

do that. He did the work, which was finished about August. Simon, after the conversation, went to Caledon. After the road was finished, witness saw defendant, who said he had put a few cartloads in the road himself, and thought that was his share. This was done the previous winter, when the road had sunk in the centre, where the drain had been put. Witness considered £6 was a fair share for Simon. The whole work cost £60 or £70 up to the boundary. Simon was not asked to pay a share of the top part. This year Simon cut a hole in the road. Witness had seen manure water running down. Then Simon complained about the work, saying to witness, when he was digging the sluit, "See what you've cost me." The gutter affected the road in that there was now no footpath. There had previously been a footpath, which was always dry.

Cross-examined by Sir Henry Juta: The water which came along the palings at the top did not make a proper sluit. It flowed everywhere. Before witness made the road the overflow from Simon's down pipe ran down the middle of the road. The down pipe was in the same position now. In raising the level of the road on Simon's side, witness covered the outlet from a down pipe. Witness's idea was to take pipes across under the road from Simon's place to the Portswood gutter. Simon was away at the time. In repairing the road witness threw soil against Simon's wall. Witness blocked the ventilator. Had there been a complaint witness would have remedied this. He could easily have done so. Material was not piled against Simon's gate.

Re-examined by Mr. Searle: Simon wanted the road raised on his side, so that the water should run down on the Portswood side. He objected to a round road being made.

By the Court: Simon cut the gutter in the road about two or three months ago. He threw the stuff he took out on to the road, which was made rugged thereby.

James Liston, builder and contractor, said he bought land at the top of Portswood-road four years ago from Mr. Freeman. He remembered the road when Jupp had the land. There was never any gutter on Jupp's side of the road. The road sloped towards the cement gutter. It was not a first-class road, but it was repaired as intended. The slope was what was intended. The road was in a very bad state before Eyres commenced. The defendant cut a trench from the down

pipe into the road, and discharged water there. That made the road dangerous for anyone passing up on a dark night. That was cut up and a sluit made up the side, the material being thrown on to the road. The road was now considerably better than it had been, owing to the traffic. The gutter was still there. The defendant's ventilator was too low for the ground at present. It could be remedied for a few shillings. What was done by Eyres could not damage defendant's premises.

Cross-examined by Sir Henry Juta: Witness did not object to the down pipes. He objected to the sluit. The trench was cut at the down pipe from the stable. This down pipe was covered up by Eyres's work. This could have been remedied by shortening the down pipe. The other remedy was to excavate the ground above the down pipe, as defendant had done. The higher side of the road had always been used as a footpath. It could not be so used now. Witness did not mind a gutter on Simon's side if a footpath was put there.

George Kinnes said he lived near the top of Portswood-road. He had been there for eighteen months, and consequently was there before the road was made up. Previous to that water used, with the exception of some at the corner, to flow across to the sluit there. The way the road was made up caused the water to flow away from defendant's property. He remembered defendant making the gutter now complained of. The material taken out was just thrown in the middle of the road, which was consequently in such a condition that witness could not drive his horse and cart up, having as a rule to get out and lead the horse. Before that, except in exceptionally heavy weather, witness could always drive up to his house.

Cross-examined: Witness was living in Portswood-road some months before the road was made up. Witness knew about the flow of the water on the road, because before he went to live there he had often been to visit Mr. Liston.

Re-examined: Until recently there was never any gutter, such as was there now, on that side of the road.

Mr. Searle closed his case.

Sir Henry Juta called

Henry Edward Fripp, a photographer, carrying on business in Cape Town, who said he owned a portion of ground formerly belonging to Mr. Freeman. His ordinary means of approach was by Portswood-road. Before that he lived in Mr. Jupp's house from June, 1892, until February, 1898. He

bought ground from Mr. Freeman in 1891, and went to live in his present house in 1898, before Simon rebuilt. Since witness had lived on his own property there he had gone up and down Portswood-road. While witness was in Jupp's house there was a small irregular sluit, which brought the water down from Mr. Freeman's trees. Mr. Freeman being in the habit of watering his trees night and day, there was always a flow of water. In front of the side door of Mr. Jupp's house there was a small channel, and this was covered by a stone slab to allow them to get out and in. Some of the water collecting on the property flowed on to Portswood-road at a small gate in the fence, where the yard ended at the top portion of the building. There was a yard behind the house with a wall constructed partly of brick and partly of galvanised iron.

By the Court: There was at present a drain taking the slops and household water down by Bevan's side.

Examination continued: The water which went out of the gate passed under the footpath into Portswood-road. As far as witness could recollect, there was a channel all the way alongside Simon's house before it was altered. The condition of the road between that time and now had varied. After the making up of the road was finished, the kitchen ventilator was covered up by the soil, and all the down pipes, except one near the main road, were blocked up. The ground was piled up from 9 inches at places to 2 feet at the portion where the fence was gradually sloping down towards the stables. The galvanised-iron fence was pressed in by the piled-up metal to such an extent that a rafter in it was almost broken in half. A small sluit was excavated from the down pipe, to enable the water to run away. The road was not blocked up when Mr. Simon made the alterations. Witness never heard of anyone being prevented from coming up. The road now was not so nice-looking as it was, but it was never a good road. The sluit made it neither better nor worse. Witness, as an upper proprietor, raised no objection to the sluit. It had existed as long as witness knew the place. The gutter did not impede witness's use of the road. The so-called footpath was clayey and slippery, and it was even better walking in the sluit. The road should have been raised in the centre. In wet weather it was just a quagmire.

Cross-examined: Mr. Freeman had treated witness very badly, as he had treated Mr. Jacobs and others also. Witness had been

very busy in this case. There was always a channel across the footpath. When the road was made, witness thought it was to be raised in the middle. He never gave any instructions for the making of this road, although he paid his share of the cost. In the photograph produced the slab in front of the side-door was not shown. That photograph must have been taken before witness lived in the house. Witness was not at all satisfied with the way in which the road was made. The sluit was not shown on the photograph, as it had been taken before the fence was put up, and the gutter had been made by the water running alongside the fence.

[The Acting Chief Justice: That is the important part: that the sluit could not have been there when the house was built.]

By the Court: The present gutter was made by Mr. Simon three months ago.

Alfred Ernest Jacob said he lived on what was part of Freeman's property, and was interested in the road. He remembered the place when the single-storied house was there. Water then ran down along the palings, through a water-way, and crossed the Municipal footpath. This was the condition of affairs until last year, when Eyres made the road. Witness saw the place after Eyres finished his work. The ventilator and down pipe were covered up with soil. As long as witness had known the down pipe, it always discharged into the water-way, as also did the stormwater from Simon's back premises. The exit of this also was blocked up. Witness did not consider Simon had injured the road by what he had done. The road was rougher immediately after, but witness thought it was now better. Witness paid his share towards repairing the road to Eyres. The opening of the water-way by Simon had not injured the road. Witness did not object to it.

Cross-examined by Mr. Searle: Witness paid £19 towards the repairing of the road. There was not previously so distinct a gutter down Simon's side of the road as there was now. Water was always trickling down. Witness did not know how Jupp's drainage water was conveyed.

John Stonier, architect, said he knew Mr. Simon's house and Portswood-road. He had known the Portswood-road for ten years. There was an irregular watercourse down the road, down which the water used to run. The water from Simon's buildings used to come into the Portswood-road. The use of the road was not interfered with by Simon's opening the water-way.

Cross-examined by Mr. Searle: The old water-way was about 6 inches by 3. It was not so big as at present. Water used to come down this way from the direction of Freeman's trees.

Re-examined: The water came down all over the road, as well as in that channel, in winter.

Albert Christian Frederick Smith, architect, said he examined Mr. Simon's property about two months ago. The walls on the Portswood-road had been damaged by damp. Earth had been piled against the walls of the house, and the ventilator had been covered. The ventilator was in the proper place, and the effect of it being covered up would be to injure the floors. The effect of the soil being left against the walls would be to create damp, and injure the bricks. Witness had found some walls cracked, and injury had been done by placing the soil against the walls to the extent of not less than £100.

Cross-examined by Mr. Searle: Witness had never previously examined the property. The effect in summer of placing soil against the walls would be to damage the plaster.

By the Court: Witness examined all the walls in the house. He examined those at the Sea Point side of the house. The walls at the back of the house were also damp. The water dammed at the down pipe ran to the back part.

William Brooks, master builder, said he examined the house of defendant two or three weeks ago. He examined the Portswood-road walls, and the back walls—the latter not so minutely. The walls on the Portswood-road side were injured by damp. It was injurious to put the soil against the house. The stopping-up of the down pipe and stormwater exits would have the effect of damming the water back and causing it to run over the walls.

Frederick Simon, the defendant, said he bought from Jupp in 1894 and took possession in 1896. There was then a single-storied house on the property. On Attwell's side there was a sluit, and on witness's side there was a small sluit. Mr. Freeman's water from the watering of the trees came down this small sluit. Witness built a stable, and afterwards a double-storied house. There were down pipes from the stable and the house discharging into the sluit in the road. The drainage water ran in the pipes between witness's place and Bevan's. Witness had never sent drainage into Portswood-road. Only stormwater ran into the road. There was a

down pipe on the Portswood-road side of the old house. Eyres never spoke to witness about making the road. Witness never agreed to pay; he was never asked. Witness was away when the road was repaired. The road was raised against his premises, and when the rains began witness found his water exits blocked up. The only stormwater system was to discharge into the sluic in the road. The walls were made damp by the stopping of the exits. The walls were never damp before the soil was piled up against the house. One of the walls of the second story cracked, and the back walls were also injured. When witness found that the damage was caused by this earth being piled up he communicated with Mr. Freeman, and gave him ten days' notice to remove it, but nothing was done. Witness waited nine days, and then made an opening in the fence to allow the water to escape. Afterwards he removed the soil away from the walls of his house, and cleared the little gutter which used to run. The soil had also bent back the iron of the fence so that the water ran into his place. Witness could not say exactly the amount of damage which had been done, but he claimed £100.

Cross-examined: Witness commenced putting the second story on the house in 1896. He had never lived in the old single-storied house. When he bought the house there was a lease running, and Mr. Duncan was in occupation. When witness came to the house there was a pipe underneath the footpath in the main road. That took away a great portion of the stormwater. The pipes were still in his garden, and they still took portion of the stormwater. Witness never saw Mr. Eyres about the making-up of Portswood-road. Mr. Eyres came to him after the work was done, but witness said that owing to the manner in which the road had been made he would not pay any share of the cost. He also told Eyres that he had already done work on the road. Witness did not suffer any inconvenience except with regard to the back gate, until May, because the weather was dry. He did not notice that there were heavy rains in January. After witness made the opening Mr. Freeman wrote to him, and then witness knew who was the neighbour responsible, and wrote to him. Witness claimed the right to send the water into the road; there was no other way to get rid of the water. The photograph put in (although put in on his behalf) was not correct, as there was no hole in the fence as shown in the photograph. He knew nothing about the trench in the road. Witness did

not cut a hole in the corrugated iron. There was a hole, and he only took the earth away so that the water could run out.

Re-examined: There were other so-called private roads from which water was discharged across, not underneath, the Municipal footpaths to a much greater extent than at the place now in question. Witness's stable drainage ran into the Municipal sewer.

Sir H. Juta closed his case.

The Court granted prayer A of the declaration, viz., for an interdict restraining defendant from allowing storm and other water to flow from his property on to the Portswood-road, with costs, and dismissed the claim in reconvention.

[N.B.—There was no argument in this case, save on the *facts*.]

The Acting Chief Justice, in giving judgment, said: The parties to this action are the registered owners of certain lots of property at Green Point, abutting upon a road called Portswood-road. The real plaintiff is Charles Freeman, and the defendant is Frederick Simon. Freeman was the original owner of the whole of the property, but he sold a portion of it in different lots, part to the other plaintiffs, and the piece now in the possession of defendant to one Jupp. The Portswood-road is part of the remaining extent still vested in Freeman, and it abuts on the narrow slip of ground sold to Jupp, which also faces the main road between Cape Town and Sea Point. It is contended that this property was sold for the purpose of erecting buildings thereon, and this seems to have been the intention of the parties, for shortly after purchasing Jupp built his houses. Before and after the sale and after Jupp had built his house, a part of the water which came down Portswood-road, which is on a steep slope, ran over on to Jupp's property. I think the evidence is clear that at no time before Simon became possessed of this property was there any natural flow of water from any part of the property so sold on to Portswood-road. Jupp being troubled by water which came naturally on to his land, fenced the upper portion of it, and also put some wood underneath his fence so as to check the flow both from the higher property and from the road itself. On the other, or east, side of Portswood-road, a cemented gutter had been placed down the whole length of the road, into which the water, both from the higher property and from the road itself, finds its way, and is then taken down the road and underneath the Municipal

footpath into the main road by means of proper pipes. It is alleged by defendant that when Jupp's house was built there were down-pipes which discharged the water on to Portswood-road, and also that there was a gutter or ditch running alongside Jupp's property which carried off the water. It is fortunate in this case that we have photographs of the property after Jupp had built his house, which enable the Court to see exactly how the property stood at that time. These photographs corroborate plaintiff's evidence that there were formerly neither down-pipes nor gutter. When defendant bought the property in 1896, he enlarged and extended it. The stormwater which fell on this property before this extension by Simon was carried off by means of pipes along the western boundary of the property sold, that is, on the side farthest away from Portswood-road. Simon, when he built or improved his property, filled up a portion of the ground, put up a double-storied house, and raised the level of a portion of his property so as for the first time to discharge the water from his yard on to Portswood-road, and he also put down pipes from his roof, which carried the rainwater on to Portswood-road. This was done some time in 1896. It is said that Simon was now entitled to do this because the plaintiff, Freeman, has lain by for five years and not objected. It is clear by our law that five years' discharge of water on to another person's property gives no right at all, but that there must be thirty years' user to establish a servitude. But it is also said that there was an implied grant by Freeman of this right, because he knew at the time he sold it that this land was going to be built upon. Admitting that he knew this land was going to be built upon, there is nothing to show any necessary inference that there was to be a grant to Jupp of the right to allow the stormwater from his land to flow over on to the road or the land which was the remaining extent of the property. There is no express grant of that land, nor can an implied grant be gathered by the circumstances as necessary to the contract. As a matter of fact, Jupp showed by building as he did that it was not a necessary incident; and he did not discharge any water, either by down pipes or otherwise, from his property on to Portswood-road. There is therefore no grant and no servitude in this case which gives the defendant any right to discharge water from his land on to Freeman's property, seeing especially that there never was a

natural flow of water in that direction, and that the water could not have flowed as it now does until defendant raised the level of his property and constructed these down pipes. Recently the adjoining proprietors decided to have this road repaired and made up, and one Eyres was employed by Freeman and the other proprietors, including, I think, the defendant himself, to do this work. What transpired between Eyres and defendant is in dispute, but even assuming that the defendant joined in this agreement to make up this road, it is clear that the road was not made up in such a way as the defendant was entitled to expect. By his title deed the defendant was bound to contribute *pro rata* with the other abutting proprietors towards the expense of repairing the road, but independently of any such contract I do not consider he was bound to pay any part of the expense of repairing and making up this road unless the work was done in a proper way. One portion of the claim which has been made in this case is for defendant's proportion of the expenses of Eyres in making up and repairing the road. Now, I think Eyres was not justified in throwing earth and material against Simon's wall, although he said defendant consented to this, and thus to bring up the road above the level it was originally to the detriment of defendant's building. As to this contract, Eyres was not entitled to payment unless the repairing of the road had been properly done, and in our opinion, under the circumstances proved in this case, the road was not properly repaired, and consequently Freeman, whose agent Eyres was, is not entitled to recover payment of the expenses incurred. But Freeman is clearly entitled to an interdict restraining defendant from discharging the rainwater on to his property. It is true Freeman has made this road a common road to the abutting properties, but this is for the common user of it as a road. It is hardly necessary to show that the discharging of water in the way defendant has discharged it necessarily injures the road, and causes a deterioration of the surface, as well as rendering Freeman liable to interference by the Municipality for cutting up the footpath where Portswood-road joins the Municipal road. Under these circumstances, as defendant has utterly failed to show any right, either by the natural lay of the land, by contract, by servitude or user, or by implied contract, he must be interdicted from discharging the water on to that road. These are two of the claims made in the declaration. There

was a third claim, for an order to remove a certain fence, but it is common cause now that this fence has been removed, and this claim has been allowed to drop out of the case. I ought to have referred to one further contention set up by the defendant, namely, that plaintiff having allowed defendant to alter his position, it would not be equitable to interdict defendant now from sending water on to the road, but to leave plaintiff to his remedy in damages. Now there is no reason shown why defendant should not have collected the whole of his surface water, and sent it down the same way, and along the same course as Jupp sent it down before the alterations made by defendant. As far as one can judge from the evidence, he can still do this. He has put in a plan made by an architect when he wished to connect with the Municipal sewer, and as far as one can gather from this plan, if ratification of the scheme by the Municipality had any weight, this ratification is in favour of the view that it was intended that the stormwater should flow between Bevan's and defendant's properties, and not into the Portswood-road. I quite admit Sir Henry Juta's argument that, if a person who sees another encroaching upon his land stands by and allows that person to alter his position in such a way that it cannot easily be remedied, the Court would not readily grant an interdict, but would rather allow damages. But this is not the case here, and damages will not meet the requisites of this case. Damages will not be a sufficient compensation for sending water down on to the road, and so constantly rendering the road liable to injury. Plaintiff said in the box, and counsel has repeated, that he did not wish to be hard on defendant, and was quite willing to allow him to run his stormwater through a pipe passing underneath the road into the gutter on Attwell's side of the road. I hope some such arrangements as that will be made, but as far as his legal rights are concerned, we must grant an interdict restraining defendant, unless he can make some such arrangement as has been suggested. Defendant, after the road had been made up by Eyres, has himself directly injured the surface of the road by cutting a ditch or gutter alongside his property. His object in cutting this was to carry off the stormwater; but it has been shown that he is not entitled to discharge the water there; he had no right to cut up the road in this way. An interdict is also prayed in regard to this injury, but in so far as the gutter is concerned, this is certainly a matter which can

be compensated by damages. It can be remedied by filling up the ditch, and if defendant does not fill it up as he ought to do, plaintiffs can do the work and claim damages. So no interdict will be granted in regard to this. This disposes of the plaintiffs' claims, but there is a claim in reconvention for £100 for damages alleged to have been done to the house through the action of Eyres in throwing up the earth against the house and stopping the outflow from the pipes on to the road. As defendant had no right to lay the down-pipes into the road, there was nothing wrong in stopping them and preventing the water from running from them on to the road. Damage is alleged to have resulted through the dampness cracking the walls and injuring the floors. An architect, Mr. Smith, has been called. He says the damages amount to over £100, but he could give no particulars, and his evidence was most unsatisfactory as to how he arrived at this amount. Mr. Brooks and other witnesses said that the damage was done to the pantry, the scullery, and other offices. Even supposing plaintiff is liable, it would be very difficult to say if any substantial damage had accrued from placing the soil against the side of the house. I think the damage was caused in consequence of the defendant omitting to provide for carrying off the stormwater, but allowing it to accumulate after the flow into the road had been stopped. It is not as though he had any right to send the water down the road; he ought to have provided for it going somewhere else, and having suffered damages for his own neglect to look after his own interests, he cannot now recover those damages from another person. The claim in reconvention must therefore be dismissed. Judgment will be given on prayer (a) of the declaration for an interdict restraining defendant from allowing storm and other water to flow from his property on to the Portswood-road. As to defendant's liability to fill up the ditch, if defendant does not do so, plaintiff can, and it will be left to him to bring an action for damages in that respect. Judgment will be for plaintiff in terms of prayer (a) of the declaration, and there will be no order as to the other claims. Now, having given judgment, I trust the parties will be sensible enough to come to some arrangement, such as that suggested, by which defendant can discharge the stormwater into Attwell's gutter by means of pipes taken underneath the road, and in that way no damage would be done to the road. That, however, is a matter of arrangement

between the parties, and is not a matter upon which the Court can make any order. As plaintiffs have succeeded in their substantial prayer, this judgment will carry costs.

Mr. Justice Maasdorp concurred.

Sir Henry Juta said he took it that the interdict would not come into operation at once, but that reasonable time would be allowed the defendant to make the necessary arrangements.

The Acting Chief Justice said that as the rainy season had passed, the interdict would not come into operation until the 31st December. That would give defendant ample time.

[Plaintiff's Attorneys, Messrs. Sauer and Standen; Defendant's Attorneys, Messrs. Friedlander and Du Toit.]

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

SASS V. WHEELER. { 1901.
Sept. 26th.

This matter originally came before the Court on a motion calling upon respondents to show cause why they should not be restrained from playing, representing, or performing in any part of this colony the theatrical play called "Heimath" or "Magda."

Sir H. Juta, K.C. (for applicant), read the following affidavit by James Murray Wilson:

1. That the above-named applicant, Edward Sass, is an actor, and has on several occasions performed in Cape Town, and is at present in Durban, Natal, carrying out an engagement with a company brought to South Africa by Sass and Nelson (Limited), of which he is the manager director. That I am the sub-manager in Cape Town for the said Edward Sass and Sass and Nelson (Limited).

2. That George Alexander, of St. James's Theatre, King-street, London, holds the English-speaking rights of Herr Sudermann's theatrical play "Heimath," called in English "Magda," which said rights have been duly registered in London at the hall of the Stationers' Company, as I am informed and verily believe.

3. That the said Edward Sass is the assignee from the said George Alexander of the sole liberty of representation or performance in South Africa of the said play,

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all which will more fully appear from the copy agreement hereunto annexed dated the 9th day of September, 1900, to which deponent craves leave to refer this Hon. Court.

4. That the said respondents have during the course of this week announced through advertisements in the "Cape Times" (copy of which is annexed) that Monday, the 16th of September instant, has been fixed for the performance of the above-mentioned play.

5. That on the 9th September instant deponent, acting for his principals, instructed the applicant's attorneys to write to the respondents the letter, copy of which is hereunto annexed, to which, with the reply received on the following date (also hereunto annexed) deponent craves leave to refer this Hon. Court.

6. That application for an interdict was delayed to afford the respondents an opportunity to go into the question of rights with Miss O'Neil, who is referred to in the letter of the respondents, and who was expected to arrive in Cape Town on the 12th instant by the steamship Nineveh.

7. The respondents now refuse to withdraw the said advertisement or give the guarantee demanded, and have notified their intention to proceed with the performance of the play as advertised.

8. The said Sass and Nelson (Limited), when last in Cape Town, advertised the said play "Magda," but owing to their not being able to obtain a continuance of the lease of the Opera House, they were unable to play the said piece.

9. That it is the intention of the applicant (after his return to Cape Town in October next) to perform the said play, and his said firm have already made the necessary arrangements to produce the same.

10. That the said play "Magda" has not yet been played in the Cape Colony, and it is difficult to estimate the amount of damage the applicant will sustain if the performance takes place as advertised, but deponent has no doubt that serious loss will result.

The applicant therefore applies for an interdict restraining the respondents' companies from performing in any part of the Cape Colony the said play, or any portions thereof, pending an action to be instituted against the said respondents to have the rights declared and for damages.

The correspondence annexed to the affidavit was as follows:

To Messrs. B. and F. Wheeler. Gentlemen,
—In this morning's issue of the "Cape Times" you advertise that on and after the 16th inst. you intend to play Sudermann's

"Magda." We are instructed by Messrs. Sass and Nelson to intimate that they hold the sole right to perform this play in the Cape Colony, and they have further instructed us to call upon you forthwith to withdraw the advertisement referred to, and to give a guarantee that the performance will not take place. If this is not done by to-morrow morning, proceedings in the Supreme Court will be instituted against you for an interdict and damages.—Tredgold, McIntyre and Bisset. September 9, 1901.

To Messrs. Tredgold, McIntyre and Bisset. Gentlemen,—In reply to your letter of the 9th inst., received re the play "Magda," I am informed by Mr. Sinclair, Miss O'Neil's representative, that Miss O'Neil holds rights for all the English colonies. I ascertained this previous to advertising the play. It will, of course, require corroboration from the lady herself, who will arrive per *Nineveh* to-day or to-morrow, and if the matter in question is not made clear to us, and if we are not thoroughly assured that Miss O'Neil has the right to produce the above play, we will certainly cancel the advertisements and prohibit the performance of same. We know Miss O'Neil has been playing this piece in Australia for the last eighteen months, and we can hardly think it possible that she would desire to produce it here without the necessary authority.—(Signed) F. Wheeler. September 10, 1901.

The following is a copy of the agreement referred to in the affidavit: Memorandum of agreement made this 9th day of September, 1900, between George Alexander, of the St. James's Theatre, London, hereinafter called the party of the first part, and Edward Sass, of 18, The Limes, Croxted-road, Herne Hill, S.E., hereinafter called the party of the second part; whereby the party of the first part vests in the party of the second part, the entire acting rights for South Africa of the play, entitled "Magda," by Herr Suderman, for a period of one year, from February 1, 1901, to January 31, 1902, on the following terms and conditions: The party of the second part shall pay to the party of the first part the sum of £50 (fifty pounds) in advance of fees for the aforesaid period, which amount shall be payable on the signing of this contract, and shall not be recoverable. The fees shall be £2 (two pounds) per performance. The party of the second part shall be allowed to sublet the play, always provided he pays to the party of the first part terms stated above. The renewal of this contract shall be given by the party of the first part if he deems it satisfactory. When the afore-

said sum of £50 (fifty pounds) is exhausted by fees due to the party of the first part, the party of the second part shall pay all fees monthly. A statement of all performances, with programme and day bill, to be forwarded to the party of the first part monthly. A manuscript copy of the play will be provided by the party of the first part, to be returned at the expiration of the contract. In witness of all of which the parties have hereto set their hands this 9th day of September, 1900.—(Signed) George Alexander.

Mr. Searle, K.C. (for respondent), read the following affidavit by Frank Wheeler:

1. I am one of the respondents in this matter.

2. I have been for many years theatrical manager, and have endeavoured to respect the legal rights of all playowners during my connection with the profession.

3. I have on several occasions made applications to this Hon. Court for interdicts restraining others from infringing the copy rights which I had acquired from playwrights.

4. I have perused a copy of the notice of motion and supporting affidavit of Wilson, served upon me on Saturday, and in reply thereto I would refer the Court to the affidavit of McKee Rankin, who is the proprietor and manager of the Nance O'Neil Company.

5. My firm are the lessees of the Good Hope Hall, and we have come to an arrangement whereby the O'Neil Company are under our auspices allowed to use the hall to reproduce their *repertoire*.

6. As far as I can ascertain, McKee Rankin holds the rights from the owners of the play to reproduce it in South Africa, and he accepts the full responsibility of establishing his legal right so to do.

7. I need hardly state that my firm will loyally accept and abide by whatever the decision of this Hon. Court may be regarding this application.

The following affidavit by McKee Rankin was also read:

1. I have for over forty years been engaged in theatrical business in one capacity or another, and have been a manager for thirty-four years.

2. I have built, owned, leased, and managed theatres in America and England and the provinces, and have had experience in Australasia as well.

3. More than ten years ago a German author, Hermann Sudermann, wrote and produced in German a play, which he

styled "Heimath." This met with considerable success in Germany, where it was first produced.

4. In the ordinary course, Hermann Sudermann took the precaution of copy-writing his German work in the United States of America, and it is possible, although I am not in a position to depose to the fact, he also copy righted his German work in England.

5. In New York there is a person of the name of Emanuel Lederer, who runs a "Foreign and American Play Bureau," and acquires manuscript plays and operas direct from the authors and composers in Europe. I have been acquainted with Lederer for over twenty years, and I know him as a person who has large dealings with the very best people in the theatrical business in America. He was appointed the agent of Herman Sudermann, and represented him as the owner of the play "Heimath."

6. Finding "Heimath" a success in Germany, Lederer arranged for an English version to be prepared, and this was done by a person whose name I cannot call to mind. At any rate, I recollect that the translation made by this individual was produced by Madam Modjeska in America, and that that lady, not being satisfied with the piece, called it after the name of the heroine, "Magda," and by that name it was known and played in English about the year 1892, in several large cities of the United States. She did not copyright the title "Magda."

7. In or about the year 1895 another translation from the German appeared in a series of publications known as the "Sack and Buskin Library," from the pen of Charles Edward Amory Winslow, published by Lamson, Wolfe and Co., Boston and New York. When this version appeared, Madam Modjeska's contracts had expired. I have in my possession a copy of this translation, which was copyrighted in 1895, as appears from the title-page thereof.

8. When I took the direction of Miss O'Neil's business, I approached Lederer on her behalf for the right to play "Magda," and as I preferred Winslow's translation, which I considered preserved the German atmosphere more thoroughly than any other English translation, I stipulated for the rights appertaining thereto. This version had been copyrighted under the title of "Magda."

9. Since the year 1898 Miss O'Neil has acted and produced this play all over the United States, in Australasia, the Sandwich Islands, and I have also acquired on Miss O'Neil's behalf, from Lederer, the rights to produce it in India and South Africa.

10. I am aware of my own knowledge that Lederer is the agent and representative of Sudermann, and the correspondence which is annexed confirms this.

11. Before starting from America, I had several interviews with Lederer, and there were negotiations between us for the acquisition of rights, and, amongst others, those relating to "Magda," for English-speaking countries. I understood from him that he could let me have the rights of reproduction in the United States, Canada, Australasia, South Africa, and that portion of China and Japan where English is spoken. He informed me that, as far as England was concerned, which I understood included the British Isles only, these rights had been ceded to George Alexander, manager of St. James's Theatre, London, and that I would have to apply to that gentleman if I wished to produce "Magda" in London.

12. As a matter of fact, Miss O'Neil did at one time contemplate appearing in "Magda" in England, and I personally approached Alexander; but owing to objections raised by Mrs. Patrick Campbell, I was not successful in securing the right for Miss O'Neil's appearance in the play "Magda" in London.

13. Armed with Lederer's authority, Miss O'Neil has produced "Magda" in Australasia more than fifty times, and I was very much surprised on arriving here to discover that anyone claimed to interfere with her right to produce it in South Africa.

14. From the correspondence which is annexed, it appears clearly that, whilst I was in New Zealand, I cabled to Lederer, and secured from him, for a consideration mentioned in the correspondence, the right to produce "Magda" in South Africa.

15. Under the terms of my agreement with Lederer, I now hold all the rights appertaining to "Magda" for the United States, Canada, Australasia, and South Africa, which I either hold subject to the payment of a royalty, or have purchased out and out.

16. I have perused a copy of the affidavit of James Murray Wilson, and say with regard thereto, that there must be some mis-

apprehension when it is alleged that George Alexander holds the English-speaking rights of "Magda." All that he has acquired are the rights appertaining to the British Isles, as distinct from the British colonies.

17. I notice that a copy of the assignment or agreement between George Alexander and Lederer or Sudermann is not produced, and I am convinced that, on inspection, it will be found that it has been misread.

18. I might also inform the Court that the rights acquired by George Alexander from Lederer relate to a different translation, viz., one by Gilbert Parker, and not to the version which I acquired, viz., by Mr. Winslow.

19. Perhaps I might as well point out that Wilson has clearly overstated George Alexander's rights, because the United States is recognised as English-speaking, and if he is accurate in his affidavit, then George Alexander's rights conflict with those that I hold for the United States, to say nothing of the British colonies, of Canada and Australia.

Counsel read a letter dated Christmas Day, 1900, addressed to Mr. Lederer by Mr. McKee Rankin, containing the following: "Now this is what I propose to you: I have played "Magda" so far just 35 times, and will most likely play it 15 times more before I leave the colonies. I will give you a lump sum of \$1,250, or £250 for the rights to Australia and New Zealand, and another £150 for the rights to South Africa. I think these terms just and fair, and if they are agreeable to you and you will be kind enough to cable the following words to Wellington, N.Z., "Rankin send," I will cable you the £250 for this country, and send you the £150 by mail as soon as I reach Cape Town, S.A." Mr. Lederer wrote back on January 18: "My Dear Mr. Rankin,—In receipt of your letter of Christmas Day. Permit me, before touching other matters, to remind you that I at first offered you "Magda" for Australia for a lump sum, which you declined by expressly demanding the same contract as you hold for the United States. In complying with your request, I also informed the author you will pay 6 per cent. as heretofore. Now you changed your mind, and I again have to break to the author that I accepted different terms, which doubtless he will and must construe as an arrangement in your favour. . . . To avoid further delay in sending him royalties from Australia I accepted your offer to cable me \$1,250 on receipt of my cablegram, which reads as follows: 'McKee Rankin, Wellington, New Zealand. Send.—Lederer. And on arrival in Cape Town, £250 for South

Africa, by mail." On April 28 Mr. Lederer wrote: "Dear Mr. Rankin,—To my letter of January the 18th ult., I expected a reply. and a statement in what Australasian towns the 50 performances of "Magda" took place, for which I received £250 through Reuter, but failed to get it. Meantime your letter of February 4 came to hand, and had it not have been for those statements I am expecting you would have got a reply long ago, especially as I made a mistake in my previous letter regarding the amount for South Africa, which should read £150 instead of £250 you promised to send on your arrival there. Mr. Alexander, of the St. James's, London, owns the rights for "Magda" in England, and from him you will have to get it."

Sir Henry Juta read the following replying affidavit:

I, Robert Alfred McIntyre, of Cape Town, partner of Tredgold, McIntyre and Bisset, attorneys at law, make oath and say that my firm are acting for the applicant in the above-mentioned matter. That after respondents, through Miss Nance O'Neil, claimed to have the South African rights of the play "Magda," deponent's firm communicated with applicant by telegraph. That in reply to our telegram, applicant telegraphed that he had cabled to George Alexander, of London, from whom he claimed his rights to the said play. Thereafter deponent's firm requested the said applicant to telegraph the exact words of the cable he had sent to the said Alexander. To this the telegram hereunto annexed marked A was received. Deponent further annexes hereto a cablegram, marked B, which applicant has informed my firm that he received from said Alexander in reply to his cable message, above referred to, to all which deponent respectively craves leave to refer this Hon. Court.

The cables annexed were as follows:

"Alexander. Nance O'Neil claims African rights of 'Magda' from author and translator. Please explain."

"Liverpool. To Sass, Theatre, Durban. Natal.—Entire 'Magda' rights mine for British colonies in Africa.—Alexander."

Sir Henry Juta said the play had been performed and it was applicant's intention to institute an action for damages. Under these circumstances, seeing that the play had now been performed, he thought the matter should stand over because it was only a question of costs now.

Mr. Searle said he objected because the applicant had not, he submitted, made out a case. There was nothing to show he had

any right from the original author. Telegrams were not evidence. Applicant had not established a clear right. Beyond the telegram there was not one tittle of evidence before the Court to justify applicant coming into court. The matter could not be decided by motion, and it ought not to have been brought by motion at all.

In answer to the Court, Mr. Searle said he would undertake to keep an account. Applicant could have moved for this, but he (Mr. Searle) submitted he was not justified in coming into court on motion without a proper case.

In giving judgment, the Acting Chief Justice said: The applicants in this case state that they hold a cession from Mr. Alexander, who is sworn to be the concessionaire and holder from the author of the play "Heimath," known in England as "Magda," of the sole right to act this play in the English-speaking colonies in South Africa, and they produced documents in support of their allegations. The respondents advertised that they were going to perform this play in Cape Town, whereupon applicants wrote giving notice of their rights, and asking respondents to withdraw the advertisement and give a guarantee that they would not perform the play in the Colony. Respondents, after several letters had passed, refused to give this undertaking, and applicants then gave notice of this application for an interdict. Meanwhile, before they could get the interdict, respondents performed the play several times in Cape Town. The play has now been withdrawn, and applicants are willing that the question of costs of this application should stand until the hearing of an action which is about to be commenced by them for damages. Had the play still been running in Cape Town, I think, on the affidavits before us, that the Court would have been justified in granting an interdict and stopping the performance of the play until the rights of the parties had been decided. However, this is not now necessary. Respondents undertake to keep an account, so an interdict will not now be granted, but as applicants have made out a strong *prima facie* case, the question of costs will stand over until the action is heard. To save further costs, notice of motion will stand in place of summons.

Mr. Justice Maasdorp concurred.

[Applicants' Attorneys, Tredgold, McIntyre and Bisset; Respondents' Attorneys, Reid and Nephew.]

REINECKE V. THE ATTORNEY-GENERAL AND OTHERS. } 1901.
 } Sept. 26th.

Habeas Corpus—Martial law—Civil gaoler.

On the application of Mrs. R., whose husband had been arrested at Ceres by the Military and lodged in the civil gaol at Malmesbury, the Court ordered him to be released, holding that a civil gaoler has no right to hold a prisoner save on the order of a duly constituted officer of the Crown. The Court refused to grant an order interdicting the Military Authorities from trying applicant's husband under Martial Law.

This was an application on notice of motion addressed to the Attorney-General, to the gaoler in charge of the Malmesbury gaol, to the Military Commandant at Malmesbury, and to the General Commanding the Lines of Communication, for an order of Court commanding the immediate release of applicant's husband from the custody of the gaoler at Malmesbury, to which he had been committed by the military authorities, and for an order restraining the said military authorities from trying applicant's said husband for certain alleged offences by martial law.

Mr. Currey appeared for the petitioner, and Mr. Ward for the Attorney-General. The other respondents were in default.

The petition was as follows:

Your petitioner is the wife of Reinhard Johann Reinecke, a doctor, practising at Ceres. That the said Reinhard Johann Reinecke is a British subject. That on the 27th August last, at 5 p.m., an orderly of the Military Commandant stationed at Ceres came to her said husband's house, in the village of Ceres, with a letter from the Commandant to the effect that both her husband and petitioner must report themselves at the Commandant's office at 10 a.m. the following morning, as they were going to be sent away. That petitioner and her said husband went to see the said Commandant, and asked him the reason for this order, and if there was any charge against them, and were informed by him that as far as he knew there was nothing against them. That your petitioner then asked for 48 hours to be given them, as she had a young baby who was not

fit to travel, which extension of time was granted. That your petitioner later obtained permission to remain at Ceres, and subsequently to come to Cape Town. That your petitioner's said husband was on the morning of the 27th August taken with a Mr. Reynolds under armed escort to Malmesbury, where he was lodged in the common gaol, and has since been kept there in solitary confinement. That petitioner left Ceres on the 12th inst., and between the date of the arrest of her said husband and the date of her departure about 20 of the leading Dutch inhabitants of Ceres were similarly arrested and sent away. That on the 18th inst. petitioner's said husband was brought before the Military Commandant at Malmesbury, and charged with infringing Martial Law Regulations No. 26, paragraph 2, which is to the effect that he is guilty of an act of misconduct, disorder, or neglect to the prejudice of good order or public safety. No evidence was lead, but petitioner's said husband was informed that his case was being considered by the Government, and he was remanded for seven days. That legal advisers of petitioner's said husband have applied to the authorities for leave to see him, but have been denied access, as will be seen from the correspondence hereto annexed. That there is only one other medical practitioner at Ceres, and your petitioner's said husband has a number of serious cases under his care, which require his immediate attention. That the ordinary courts of law exercise full, free, and undisturbed jurisdiction in the districts of Ceres and Malmesbury. That petitioner submits that the arrest and imprisonment of her said husband, which has been carried out by military violence and without warrant, are in violation of the fundamental liberties of subjects of His Majesty the King secured to them by numerous solemn engagements. And further, that it is not competent for any military court to try your petitioner's said husband on the charge they brought against him. Wherefore your petitioner humbly prays that your lordships will be pleased to order the immediate liberation and discharge of your petitioner's said husband, and to restrain the Commandant of Malmesbury and all other military officers professing to act as a court-martial or military court under the power of martial law from trying him on the charge they have brought against him or otherwise that your lordships will be pleased to make such other order in the premises as to your lordships may seem meet.

The correspondence annexed to the petition was as follows:

To the Issuer of Permits, Cape Town.—We beg to request that you will be good enough to grant a permit enabling our Mr. Van der Horst to proceed to Malmesbury on Friday next, and return the following day, for the purpose of conferring as their legal adviser with Rev. Alheit, Dr. Reynecke, and Mr. Reynolds, who are confined in gaol there.—Yours truly, (Signed) Van der Byl and Van der Horst.—Cape Town, September 11, 1901.

To the Commandant, Malmesbury.—Sir.—We have the honour to inform you that we have applied to the Issuer of Permits here for a pass to our Mr. Van der Horst to proceed to Malmesbury on Friday morning, for the purpose of conferring as legal adviser with Rev. Alheit, Dr. Reynecke, and Mr. Reynolds, who are confined in gaol there. We write in advance to ask you to be good enough to grant him the usual facilities granted to legal advisers to the clients in gaol, so as to prevent the possibility of his being disappointed in the event of your not being in town or being otherwise engaged.—(Signed) Van der Byl and Van der Horst.—September 11, 1901.

To Messrs. Van der Byl and Van der Horst.—I have no objection to your representative coming to Malmesbury, but I cannot allow him to hold interviews with any of the martial law prisoners confined in the gaol here.—(Signed) Chas. C. Collier, Captain, Commandant.—Malmesbury, September 12, 1901.

To the General Commanding Lines of Communication, The Castle, Cape Town.—Sir,—We have the honour to forward you a copy of a letter addressed by us to the Commandant at Malmesbury, which has been returned to us with the following endorsed on it: Messrs. Van der Byl and Van der Horst.—“I have no objection to your representative coming to Malmesbury, but I cannot allow him to hold interviews with any of the martial law prisoners confined in the gaol here.—(Signed) Chas. C. Collier, Captain, Commandant.” We shall be glad if you will kindly advise us if this decision refusing access to our clients is a final one.—(Signed) Van der Byl and Van der Horst.—Cape Town, September 13, 1901.

To Messrs. Van der Byl and Van der Horst.—Gentlemen.—I have the honour to acknowledge the receipt of your letter of the 13th September, 1901, and to state that General Wynne is not disposed to interfere with the discretion of the Commandant in the matter referred to at the present stage.—Cockrill, Captain, D.A.A.G., Cape Colony

District.—The Castle, Cape Town, September 17, 1901.

Mr. Ward read the following affidavit by John Huxham, the gaoler at Malmesbury: (1) I am gaoler of the gaol at Malmesbury. (2) As such gaoler, I received into my custody Dr. R. J. Reinecke on the annexed warrant, marked "A," dated August 28, 1901, granted by Captain Watson. (3) As such gaoler, I also received the annexed document, marked "B," stating that the said Dr. Reinecke, amongst others, is charged with a contravention of Martial Law Regulations No. 26, paragraph 2. (4) As such gaoler, I also received the annexed document, marked "C," stating that the said John Reinecke, or John Renecke, amongst others, was remanded on the 18th September, 1901, for one week.—(Signed) J. Huxham.

The following was the annexure marked "A":

Malmesbury, August 28, 1901.—The Gaoler, Malmesbury.—This is my warrant for you to receive the bodies of Carl Reynolds and Dr. R. J. Reinecke, and hold them in safe custody until further notice.—(Signed) H. F. Watson, Captain, for Commandant.

In reply to the Court, Mr. Ward said the gaoler acted as an officer of the military.

The Acting Chief Justice said this ought to have been put on affidavit.

Mr. Ward said the practice adopted in previous cases had been followed.

Mr. Currey referred to the statement in the petition that Dr. Reinecke was informed that his case was being considered by the Government.

Mr. Ward: I am instructed that the case is not before the Colonial Government. They know nothing about it at all.

Mr. Currey (for the petitioner): The military are not represented, but the reply to the application says that the petition has been considered by the Government.

[Mr. Ward (for the Attorney-General): The Government know nothing of the case.]

This differs from all other applications previously made to this Court. The petition for an order interdicting the military Court from trying prisoner is also novel. This petition discloses a truly extraordinary state of things. The Commandant has nothing to say against petitioner, but in spite of this petitioner has been taken to Malmesbury, kept in solitary confinement for four weeks, and refused permission to see his legal advisers. From the fact that the

military have not appeared, they would seem to be under the impression that this Court will never interfere in any case within a martial law district. The Court, however, has never gone so far as that. In Fourie's case and in that of Marais' (the last application), the Acting Chief Justice said that if petitioners had been in the Paarl district the Court would have gone into the question as to the necessity of martial law. In the district of Malmesbury (of which Ceres practically forms a part) the Civil Courts are open, and the Circuit is about to visit the district. The whole question of martial law is a question of necessity. It is for this Court to judge of the question of necessity, and it has as much jurisdiction in Malmesbury as it has in Cape Town. The military must show a necessity for martial law. (*Cloile*, p. 187.) What applies to Malmesbury applies to Ceres, which is practically a part of Worcester. Again, there is no proof that this martial law regulation is in force in Ceres. It is not stated to be so, no charge has been laid against accused, and the Commandant of Ceres says he knows no reason why the petitioner should be imprisoned. We do not know by whose orders this was done. This state of things is perfectly intolerable. If prisoner has been guilty of any offence he should have been brought before the Circuit Court of Malmesbury. For aught we know, petitioner may be tried this very day, without his witnesses and without legal advice; or the petitioner may be spirited away from one district to another, as has been done in other cases. The Court must either exercise its full jurisdiction, or no jurisdiction at all. Here it is, by the Circuit Court, exercising full jurisdiction.

[Buchanan, A.C.J.: Mr. Ward, do you consent to this order?]

[Mr. Ward: I submit to any order the Court may make.]

[Buchanan, A.C.J.: Then if you do not oppose, you consent?]

[Mr. Ward: I have no instructions.]

In giving judgment, the Acting Chief Justice said: The applicant in this case is the wife of one Reinecke, who was taken prisoner by the military authorities at Ceres and who is now confined in gaol at Malmesbury. Notice of this application has been given to the gaoler and to the military authorities. The gaoler, through the Attorney-General, appears in court, and has filed an affidavit in which he says that he holds this man a prisoner under a warrant

received from one Captain Watson. The gaoler, as a Civil Servant of the law, has no right to hold a prisoner on the order of anybody except of a duly constituted civil officer of the Crown, and as he has no warrant from any such officer, he is not entitled to keep custody of this person. The Crown does not oppose the granting of this application, so far as the civil gaoler is concerned, and an order for the release of applicant's husband will therefore be granted. The second prayer of the petition is that the military authorities be interdicted from trying applicant's husband under military law. As has been repeatedly pointed out in previous applications of this nature, the Court, under circumstances which exist in this district, feels itself constrained to restrain its hand, and cannot under the present circumstances interfere with the military authorities in the discharge of the duties entrusted to them by the Crown. The learned counsel has stated that an intolerable state of things existed in this district. That certainly seems likely, but it is due to the fact of the invasion of the country, and to the insurrection and unrest prevailing throughout the country. Counsel has argued that there was a social compact existing between the Crown and its subject. Even assuming there was such a compact, from what we know, it has been broken by the subject, and the subject having broken this compact, he could not complain of the natural consequences following the efforts of the Crown in insisting on its rights being preserved. It is one of the misfortunes of insurrection, rebellion, and unrest that loyal subjects have to suffer with the disloyal subjects. It is not a thing brought upon them by the Crown, but it is the result of the unfortunate conduct of subjects, who have broken away from their allegiance, and have done that which they had no right to do. The Court will not interfere with the military authorities in districts in which the Crown has entrusted them with supreme power to restore peace and order where insurrection, unrest, and rebellion have necessitated martial law being proclaimed. Consequently we will make no order at all on the second prayer of the petition. The Court will confine the order simply to the civil officer, who will be ordered to release the prisoner. What the military authorities intend to do, I do not know, and I cannot now restrain them.

Mr. Justice Maasdorp concurred.

[Applicant's Attorneys, Van der Byl and Van der Horst.]

ISAACS AND CO. V. MCKENZIE AND CO. { 1901.
Sept. 26th.
" 27th.

Dock Agent—Negligence.

Defendants, who are licensed landing agents, had landed at Cape Town Docks a certain crate consigned to plaintiffs. The evidence showed that by the custom obtaining at the Docks (1) goods packed in crates were treated as non-perishable and were not warehoused. (2) The defendants were bound to place goods in such place as the wharfinger might point out, and that they had done so in this case. The consignees did not take delivery till 16 days after their goods had been landed and in the interim they not having been warehoused were injured by rain. The plaintiffs now sued for damages, alleging that defendants had been guilty of negligence.

Held, that as defendants could not be supposed to know these goods were perishable, and as they had followed the custom of the port (which plaintiffs must be presumed to have known) and the directions of the wharfinger, they had not been guilty of negligence and that judgment must be given for defendants, with costs.

This was an action brought by David Isaacs and Richard Rothkugel, carrying on business in partnership as D. Isaacs and Co., against Andrew Ritchie McKenzie, carrying on business as A. R. McKenzie and Co., for damages alleged to have been sustained through defendant's negligence.

The plaintiffs' declaration was as follows:

1. The plaintiffs carry on business in partnership in Cape Town under the style or firm of D. Isaacs and Co.

2. The defendant carries on business at Cape Town under the style or firm of A. R. McKenzie and Co., and is licensed by the Harbour Board as a dock agent, and as such is authorised when thereto appointed by the master or agents of a ship on behalf of the consignees to land and deliver cargo for the port of Cape Town.

3. In the month of May, 1901, the defendant was duly appointed as agent for and on behalf of consignees of cargo for this port to land and deliver the said cargo ex Tintagel Castle, and the defendant as such agent undertook for reward to land and deliver, *inter alia*, for and on behalf of the plaintiffs, certain twelve crates containing Japan ware, consigned to and the property of the plaintiffs.

4. In accordance with the regulations and practice at this port, it became and was the duty of the defendant as such agent as aforesaid, diligently and carefully to receive the said crates, and unless or until the same were placed upon trucks or wagons and then delivered to Divine, Gates and Co. (agents of the plaintiffs to clear and deliver the same at plaintiffs' stores); it was further his duty diligently and carefully to place the same in stores in conformity with the orders and directions of the Dock Superintendent, or of one or other of the wharfingers, who are duly appointed as his assistants.

5. The defendant, not regarding his duty in that behalf, and acting negligently and carelessly as such agent as aforesaid, and without such order or direction, placed the said crates when landed by him at or near the side of the road at the West Quay, in the Cape Town Docks, and further, acting negligently and carelessly as aforesaid, there placed and left the same without dunnage and without cover, and further, thereafter acting negligently and carelessly as aforesaid, failed or refused to obey the order or direction of one of the said wharfingers to remove the said crates from the said place and place them in a store of the Harbour Board.

6. In consequence of the disregard of duty, negligence, and carelessness on the part of the defendant as aforesaid, the said crates and their contents were at the said place exposed without cover to and damaged by heavy rains, and the said crates and their contents, when thereafter delivered by the defendant to the plaintiffs, were thereby injured and damaged to the extent of £35 15s., and the plaintiffs have thereby sustained loss and damage accordingly in the said sum of £35 15s., and in the sum of £1 1s., being the reasonable fee of the assessor who estimated the amount of the said damage.

7. The defendant, after lawful demand, has wrongfully and unlawfully repudiated liability for the said sums, amounting to £36 16s., or any part thereof.

Wherefore the plaintiffs pray for judgment for £36 16s., or that they may have such

further or other relief in the premises as to this Hon. Court may seem meet, together with costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraph 1, and that he carries on business in Cape Town under the style or firm of A. R. McKenzie and Co., and that he is licensed by the Harbour Board as a dock agent, but he denies the other allegations in paragraph 2.

2. He admits that in May, 1901, he was appointed as dock agent for and on behalf of consignees of cargo for this port to land the said cargo ex Tintagel Castle, but he says that his duties as dock agent are to take goods from the ship's slings, to land the same safely, and to place in store or on trucks and wagons, as may be ordered by the Port Captain and Dock Superintendent or his assistants, or after sorting and storing to load the said goods on trucks or wagons when required, and that he undertook to do this for and on behalf of the plaintiffs as to certain twelve crates containing alleged japan-ware consigned to the plaintiffs.

3. The defendant duly and diligently received the said crates, and in accordance with the instructions received by him from the Harbour Board, by which no crates are to be placed in the stores, which are solely under the control of the Harbour Board, placed the said crates on the open quay. He says it was his duty to place the crates upon landing where directed by the Harbour Board until called upon or required to put them on wagons, and he denies that it was his duty to place them in stores unless so directed by the Harbour Board, and he says he did his duty and carried out his instructions. He denies that it was his duty or any part of his contract to provide dunnage and cover, but he says that he reported the matter to the Harbour Board, who were unable to supply tarpaulins.

4. He says that after the said crates had been on the open quay for three days the Dock Superintendent did request him to place the crates in a store, but he says that having placed them where ordered by the Harbour Board, he was not in duty bound, nor was it part of his contract, again to store them elsewhere, and he says that it is in accordance with his obligations as dock agent, and the regulations, practice, and custom of this port, that where he as dock agent has once placed goods as directed by the Harbour Board, all subsequent removals into Harbour Board stores and sheds are done by the Harbour Board itself with its own wagons and men.

5. He denies that there was any disregard of duty, negligence, or carelessness on his part. He is not aware whether the crates were damaged or not. He admits he refuses to pay the sum of £36 16s., or any part thereof, and subject to the above he denies the allegations in paragraphs 3, 4, 5, 6, and 7 of the declaration.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed, with costs.

Mr. Searle, K.C. (with him Mr. Gardiner), for plaintiffs, and Sir H. Juta, K.C. (with him Mr. Benjamin), for defendants.

[Buchanan, A.C.J.: Defendant says that he did his duty, and that there was no negligence on his part.]

Mr. Searle: Yes, my lord, that is the real question.

Charles Henry Taylor Rothkugel said he was the manager of the chinaware department of the firm of Isaacs and Co., the plaintiffs in this case. The defendants were the agents for the landing of the cargo of the Tintagel Castle, and among the goods were twelve crates of earthenware for plaintiffs, whose clearing agents, Messrs. Divine, Gates and Co., brought the goods from defendant's to plaintiffs' stores. In consequence of the goods being damaged, certain notice was given to the defendant. With regard to this, correspondence had passed between Divine, Gates and Co. and the defendant, the first letter being dated June 4, and contained the following: "Kindly note that the following goods, of which we hold the bill of lading, have been landed damaged, owing to having been allowed to remain in wet on the West Quay." After another letter an inspection of the goods was made, at which defendant was represented by Mr. Brittain. Witness was also present at the inspection, but the damage was actually assessed by Mr. Hay. The damage was caused through water, straw, and paper having, through the damp, rotted and adhered to the japan-ware, which became rusted. The goods had the appearance of having been in the water for a considerable time. Some of the goods had subsequently been sold by Messrs. Isaacs and Co. from their store. Not quite one-half had been sold, and the loss, as tested by the actual sale of these goods, was about the same as the estimate of the damage. It was advisable to sell the goods as quickly as possible, because the longer they remained in the shop the worse they became. The goods were sold to the best advantage. Defendants, in August, wrote asking to inspect the crates

again; but it was stated that that could not be done then, as some of the goods had been sold. Mr. Brittain was present when the goods were unpacked.

Cross-examined: The steamer began to discharge the goods in the early part of May. As soon as plaintiffs received the papers they were handed over to their agents to clear the goods. They would have the papers when the ship arrived, as the papers would come by the mail.

John H. Hay said he was at present residing in South Africa, which he visited once a year, as the representative of English and Continental manufacturers. He had a good knowledge of the Japan ware trade, having been in it eighteen years. He was called in, and inspected certain crates of such goods at plaintiffs' premises. The contents were damaged by rain, and the longer they were kept, the worse they would get. As far as witness could gather from his inspection, they appeared to have been damaged within a fortnight. He made an estimate of the damage, and considered £35 15s. a fair estimate. As they could not be sold as first-class goods, he took half the selling price as their value, which he considered fair. Witness charged a guinea as his fee for inspection.

The Acting Chief Justice: It is only a question whether they are liable or not. You don't dispute the amount, Sir Henry? It is a small amount.

Sir Henry Juta: That is so, my lord.

Sidney James Castleman said he was in the employ of the Union-Castle Co. He produced the manifesto and discrepancy list of the Tintagel Castle. He found that from that vessel there were landed certain ten crates and two cases of hollow-ware, consigned to plaintiffs. The goods were not mentioned on the discrepancy or damaged list, and therefore must have arrived all right.

Thomas Edward McIntosh, the wharfinger in charge of the West Quay at the Cape Town Docks, said that the discharging and landing of goods from the Tintagel Castle began on May 19, and finished on May 24. The vessel discharged at the South Arm, and a portion of the cargo was taken by trawler to the East Quay, and another portion to the West Quay. The goods could not be left on the South Arm, as that was in the possession of the military. McKenzie discharged the ship, and brought the goods from the South Arm to the West Quay. Witness remembered the crates for plaintiffs being among those goods. Mc-

Kenzie's foreman, Jansen, who was engaged in landing the goods, placed these crates on the West Quay, about 25 yards from the Harbour Board store. Witness did not, in the first instance, give any instruction as to where the goods were to be placed. He had the right to give such instructions, but in practice that could not always be done, owing to the amount of goods there. At the time he saw them, these goods appeared to be in good condition. He first saw them shortly after they were put on the quay, about May 20. When the weather appeared threatening, witness instructed the storeman to request Jansen to remove all damagable and perishable goods into the store. That would be three or four days after the goods were landed. Witness had given general instructions to Jansen and every other foreman to the effect that no perishable or damagable goods were to be left on the quay, but were to be placed in the store. There was sufficient room in the store at the time. Crates were occasionally put in the store, but if there were dry goods to be placed there, witness gave such goods preference. Up to the time witness gave instructions, there was no rain, but after that there was heavy rain, and the goods were left out in this rain. The practice was that if goods were left outside the stores, McKenzie's people covered them with tarpaulins. So far as witness recollected, no request was made by McKenzie's people for tarpaulins to cover up the goods in question when the rain came on. There was a general order that tarpaulins were, on request, to be supplied to McKenzie's people, provided the Harbour Board had any. Such goods as those for plaintiffs should have been placed on dunnage—pieces of wood under the crates. Witness had had to complain about Jansen refusing to place goods where he was instructed to put them, and after that Jansen ceased to be McKenzie's foreman at the West Quay. Jansen was the only one of McKenzie's foremen that witness had had trouble with.

Cross-examined: Witness had complained about Jansen to Mr. Underwood and to Mr. Leibrandt, one of Mr. McKenzie's foremen or managers. It was witness's business to be on the West Quay during the day, and see where the goods were placed. Witness never said at a consultation that it was a rule of the Harbour Board that crates should be left outside the stores, perishables being given preference. Witness saw these goods standing outside, but he would scarcely,

from the appearance of the crates, have regarded them as damageable goods, and he gave no instructions as to putting the goods in the store as long as the weather was fine. After Divine, Gates and Co. drew his attention to these goods, he instructed McKenzie's people to put all damageable and perishable goods into the store. He mentioned some goods specially, but he did not mention the goods now in question. The tarpaulins were in charge of a tarpaulin storeman, and witness believed McKenzie did not have any tarpaulins of his own except for his trailers. Sometimes there was not enough, and then the goods were left outside and covered by Harbour Board tarpaulins without the consignees being charged for use of such tarpaulins. Consignees had to begin clearing goods within twenty-four hours of the vessel commencing to discharge cargo, and goods remaining on the Board's quay seventy-two hours after being landed were subject to rent, which went to the Harbour Board. After the seventy-two hours were up, and the rent began to be payable, the Harbour Board, with its own wagons and horses, removed the goods from the quays to its depositing store. The cost of that was charged by the Board to the consignees. If the delivery agents had come and taken these goods away within the three days, there would have been no damage done, or if they had been taken to the depositing store at the end of the three days no damage would have been done.

By the Court: The consignees could take away the goods immediately they were landed, provided the dock charges, etc., were paid.

Re-examined: If the goods were placed in the store at the quay, or left on the quay, it was the agent of the ship (Mr. McKenzie) who would have to hand over the goods to the delivery agent. At present goods were often left more than seventy-two hours before being taken to the depositing stores. The first time Divine, Gates and Co. communicated with witness was after the heavy rain commenced. That was more than three days after the goods were landed. When these crates were landed there was no room in the stores, but before the rain came on there was room, and that was the reason he gave instructions for the crates to be removed into the store.

By the Court: McKenzie's people had to place the goods where witness directed. After giving instructions for the goods to be

placed in a certain place, he could again instruct McKenzie's people to remove the goods if he had reason to do so.

John Dibbs, clerk in the employ of Divine, Gates and Co., said that in May last his firm were instructed to clear and deliver certain goods from the Tintagel Castle. Witness had charge of the work. When the clerk went to take delivery, on or about the 2nd June, he found the crates in a damp condition. Witness saw them afterwards. They were lying on the West Quay—soaking wet. Witness communicated with the Union-Castle Co., to see if the goods were on the discrepancy list, and afterwards wrote to McKenzie's. Witness would not give a clean receipt for the goods. According to practice, McKenzie should send in the account to Divine, Gates and Co., and they would charge Isaacs and Co. Witness's firm were landing agents, but they did not do much in that line. It was arranged that the goods should be taken to plaintiffs' stores. They were afterwards removed. Ordinarily McKenzie would sort the goods, and would deliver them to the firm. All goods were placed in a store when possible. No damage was sustained to the goods while they were in witness's firm's custody. Water was running from the crates when they were loaded on the wagon. These were not the only crates which were damp. The stores belonged to the Harbour Board—not McKenzie. As far as witness knew, it was the practice when agents took goods from vessels to cover them up from the wet. There was no sea-water damage about these goods.

Cross-examined by Sir Henry Juta: Witness believed that they cleared the goods before the ship came into dock. Until the 2nd of June, witness never went to the West Quay to look for the goods. Witness placed a clerk named Gabb to look after the goods from that ship. Between the 20th May and the 2nd June witness had ample time to deliver. Witness did not know where the goods were; he knew they had been landed. When the rain came, witness did not go to look at the goods. It was a practice to deliver at the quays when there were heavy blocks. Witness constantly went to take delivery at the quays. The Dock agents did not know who the goods belonged to. It was Divine, Gates and Co.'s duty to take the bill of lading down. Witness did not know there were goods on the quay. The practice was to first go to the stores for goods, and then to go for any odd packages on the quay.

Witness was with McKenzie for eighteen months. While he was with Mr. McKenzie, McKenzie had been paid for removing from the landing place to a particular quay, at the request of the Harbour Board. This was because the quay was long.

Re-examined: If the goods were put on the quay, and then ordered by the Harbour Board to be removed to the store, witness would not remove them until he had consulted his employers. Witness considered when at McKenzie's that they were liable for damages sustained before the goods were delivered.

By the Court: If goods were three days in the store or on the quay the Harbour Board could remove them. Witness thought McKenzie and Co. were answerable for goods until they were delivered, even if they were allowed to remain for a month.

John Thompson, storeman in charge of the store at the West Quay, said the crates landed from the Tintagel Castle were placed 25 yards outside the store. McKenzie's trailers brought them there. The crates were then dry, and no apparent damage had been done to them. McIntosh instructed witness to tell Jansen to take the perishable goods inside the store. Several cases of Isaacs's were brought in afterwards. The crates were covered up before the rain. He could not say whether they were sufficiently covered. When they were uncovered, the bottoms were found to be wet. No dunnage had been placed under them. As a rule, McKenzie's people covered up crates and put dunnage under them. The Harbour Board did not do it; the Board supplied dunnage when asked, if they had it. It had been a practice to put crates outside when there was a big cargo to be taken in in order that the cases should be stored.

Cross-examined by Sir Henry Juta: Crates as a rule were left outside. Witness did not as a rule consider crates contained perishable goods, unless the manifest said they were so. He ordered Jansen to put in all cased goods. It was usual to dunnage cases. All goods were covered up every night with tarpaulins in the same way that these were. It was only usual to dunnage crates when it was threatening rain. Witness saw these goods, when it was raining. Witness thought they were in a good place.

Re-examined: It was McKenzie's duty to cover up the goods. Lately the Harbour Board had been employing labour for covering up. Up to June the covering up was

done by McKenzie. McKenzie's people put the dunnage under the goods.

By the Court: When the goods came from the South Arm there was no room in the stores, and they were put outside. Afterwards, when part of the store was emptied, and rain threatened, cases were put inside.

Frank Robb, secretary to the Table Bay Harbour Board, said he had been secretary for 10½ years. In regard to the practice with respect to the duties of landing agents at the Docks, when they took goods from the ship witness said the landing agents' duties were to take the goods, place them in the stores, sort them, and load them on the delivery agents' wagons. Whether the goods were taken from the quay or from the stores, the practice was for the delivery agents to give receipts to the landing agent. A wharfinger had the control of a district, and his duty was to point out a place most convenient to the stores, where goods had to be placed. In practice, when he wanted the position of goods changed, he asked McKenzie's men to shift the goods and if McKenzie's people would not do so, then the Board's officials would immediately write to the consignees calling upon them to remove the goods. The Board had never paid for the removal of goods under such circumstances, and he had never until the present case heard of McKenzie's people refusing to move the goods when requested. The regulations did not contemplate all goods going into the stores. Undamageable goods would not go into the stores at all, earthenware pipes, for instance, and goods like that, which rain would not damage. The Board had never taken up the work of moving the goods on the spare ground. If, for the purpose of traffic, they required the goods to be removed after 72 hours, the Board would do so; if not, they would not be removed, but the rent would be charged. The Harbour Board provided the dunnage to whoever applied for it. If the Harbour Board had not dunnage it would either not be provided or the person who applied would get it elsewhere. The Harbour Board men never put the dunnage under the goods. It was clear that the delivery agent could not get hold of the goods from the Harbour Board, but had to go to McKenzie, who had to sort out the goods for handing over to the delivery agents. It had been difficult to get delivery of goods recently in consequence of the congestion of traffic, and in this case, especially where the goods had to be taken from the South Arm to two different quays.

Cross-examined: Witness had found that some of the merchants were not very ready

to take the goods into their stores if they could keep them in the Harbour Board's stores. The Harbour Board was now clearing away all stray packages lying about the stores and quays, and removing them with its own men and plant to the depositing store, but he did not wish it to be understood that the general practice of the Harbour Board was to seize all goods and have them removed to other places. No rent was charged for goods lying on spare ground. Witness said they had never paid McKenzie or any other body for removing goods once landed, from one place to another. Since the military had been in occupation of the South Arm, recognising that it was a hardship that mercantile vessels berthed at the South Arm should have to pay 2s. for carting the cargo to the West Quay or some other place where there were stores, the Board agreed to pay half the cost, not exceeding 1s. per ton. They held that the landing agents' duties did not cease until he gave delivery to the delivery agents. If the delivery agents never came the goods would be removed to the depositing store, and then he would get a receipt, which would relieve him from responsibility. The sheds were under the Board's control, but they could not compel McKenzie to put the goods in the store, and he could take them away if he chose, provided the dock dues were paid. Their contention was that McKenzie was liable for the goods in the store, and the regulations were framed with that view. McKenzie kept tarpaulins at the Docks. The Harbour Board, under an agreement with McKenzie, kept tarpaulins, which they issued to him for the protection of goods on the Loch, Breakwater, and East Jetties. The agreement referred to the previous afternoon was with any dock agent who might be the landing agent of any ship discharging at the jetties. There was no agreement referring to the West Quay. The agreement did not refer to places where the Board had stores. A wharfinger was a servant of the Board, and his duties were to see that the traffic was conducted properly, and that the Board's revenues were protected. He had nothing to do with the landing of the goods. He had authority to order the goods to be placed at certain places, or put into stores, so as to keep the quays clear. It was the forwarding agent's duty to take away the goods. The landing agent had simply to land the goods, and when the delivery agent came, put them on the wagon. In the meantime, the person who had authority to say that the goods must be put in one place or another was the

wharfinger. The Board's contention was that they did not take the goods out of the custody of the landing agent. What might be spare ground, as pointed out by the Dock Superintendent, one day would not necessarily be spare ground the next day. It all depended upon whether or not the ground was required. Quay space was the space opposite a ship used for landing the goods on, and the Board did not allow any goods to remain there. Spare ground was any vacant space convenient that the Dock Superintendent might appoint for cargo to be placed upon. Witness did not know the facts connected with the charge for storage of some telegraph material. If a charge of 6d. per week was made, the goods must have been on the jetty or at the foot of the jetty, and this penalty was imposed with a view to making them remove the material. Imposing this heavy penalty was the only lever the Board had to make consignees remove their goods from the quays.

[Buchanan, A.C.J.: You could come into court and compel the consignees to remove the goods; by charging rent, you consent to the goods remaining there.]

Cross-examination continued: The Gaul's cargo might have lain on the jetties for 32 days, but witness knew nothing about that. The usual charge for receiving goods at the South Arm, and taking them round and unloading them where stores might be available, was 2s. per ton, and towards this the Board paid 1s., owing to there being no stores available at the South Arm. It would have been unreasonable to expect the landing agents to remove goods from there for nothing. The Board contended that, theoretically, the goods, although discharged at the South Arm, were not landed until taken round to the stores. Some goods were at present being placed on spare ground to the westward of the quarry, not in the quarry. There were no sheds or anything of that sort. Witness was not aware whether or not the goods were perishable.

Re-examined: The Board did not wish to evade all responsibility for goods at the Docks, but the position they had taken up had been forced upon them, because as they had not the control of the whole work they could not take the responsibility, and then be cast in heavy damages for the neglect of some person over whom they had no control. Since the previous day witness had looked up the accounts of the Harbour Board for the last fifteen months with regard to the charges made for removing goods from part of the Docks to another, and the only pay-

charges made for removing goods from one part of the Docks to another, and the only payments made had been for removals from the Loch, East, and Breakwater Jetties, where there were no stores, to places where there were stores. They had never paid McKenzie for removing goods under circumstances such as stated in this case, that was to remove them from the outside to the inside of the store. The position the Board took up was that they assumed that there were stores or places where the goods could be placed at the spot where the goods were discharged. If there were no sheds at that place or places where the goods could be put, then the removal was paid for. That was to obviate any hardship to ships which might have to discharge at places where there were no sheds.

By the Court: For the safety of the goods while in the stores, not the depositing store, a watchman might be appointed by the consignees or landing agents if required. At night the stores were locked by the Customs officials for the protection of the revenue. There was no regulation dealing with the appointment of watchmen to look after the sheds, but so far as witness knew there was no objection to such being appointed. He had never known of consignees appointing watchmen, but there were certainly cases where they ought to have been appointed. The defendant being the responsible party, should have appointed the watchman in this instance. The consignee had to pay the rent for goods left more than 72 hours at the Docks, and they never had looked to the dock agent for anything.

Mr. Searle closed his case.

Sir Henry Juta called

Andrew Ritchie McKenzie, the defendant, who said that he carried on business as a landing and forwarding agent. He had a dock agent's licence, and had had experience of Cape Town Docks since their formation. His duties as dock agent were to take goods from the ship's slings and place them either in stores or on spare ground, according to the instructions of the wharfinger. Afterwards he either loaded the goods on his own wagons, if he was also appointed by the consignees as forwarding agent, or loaded them on the wagons of other parties sent to take away the goods. When goods were once put in a place indicated by the wharfinger witness had nothing to do with removing them to another place unless paid by the Harbour Board to do so. For such removals the Harbour Board paid him 6d. per ton. It would be

impossible for witness to do such handling at the price allowed without the extra 6d. All sheds and stores were in the jurisdiction of the Harbour Board. Witness had no control over these sheds, and was not allowed to interfere with them in any way. If they attempted to interfere the doors were locked upon them. They had been so locked on many occasions. The instructions of the wharfinger had to be obeyed. Not long ago the doors of the stores were locked upon them because they wanted to put in the stores goods to save them from damage by the rain. During the daytime they could have a watchman to go into the stores and look after the goods, but at night the Customs officials had the keys. The Harbour Board's men and wagons removed goods from the stores and quays to the depositing store and charged 2s. 6d. per ton for such removal, in addition to the rent of the stores. Witness had no stores at the Docks. He had no arrangement with the Harbour Board with regard to tarpaulins. As stated by a previous witness, there was an arrangement for the Harbour Board supplying tarpaulins free for goods at certain jetties, but the Harbour Board had had no tarpaulins to supply the public for the past twelve or eighteen months, and witness's men had had to take them from railway wagons and from their own trailers. As to dunnage, there was none at the Docks, except when some boards or old broken timber from jetties, etc., were available, or something of that kind. If any such was available the Harbour Board gave it, if not, then they had to do without. Notice had been given that all perishable goods were to go into the store if possible. Crates had never been put into store except in cases where they were broken, when they would be put in to prevent their contents being taken away; otherwise they were put on spare ground. The delivery agent was supposed to take away the goods when they were landed. Witness, in his capacity as delivery agent, had had to pay for goods damaged by rain. The telegraph material previously referred to had been lying on ground which for more than twenty years had been known as waste ground, and yet it had to pay the full rate to the Board. The goods placed at the side of the quay comprised wheat, oats, and a large quantity of forage, which was now standing in the open.

Cross-examined: If any request was made to put these crates into a store it would be made to Mr. Beattie. Witness had to get a receipt from the delivery agent for goods

handed over to him, but a survey was only held in special cases. In this case the delivery agent came and took away the goods himself, loading them up with his own men. Witness would have objected to these goods being taken away unless he got a receipt. It was the duty of the delivery agent to have removed the goods before he did. Witness did not think the Harbour Board would be liable for the condition of these goods. If witness had had the delivery of the goods, he would have been responsible for damage. If one man had been appointed to take the goods from a ship to the merchant's stores everything would have gone on swimmingly. Witness had difficulty in getting receipts from the delivery agents if they could avoid giving them. It was witness's duty to do many things which he could not carry out owing to the state of affairs. He was well acquainted with the regulations under which he acted. He did all he could under the circumstances, and made no distinction between one person's goods and another's. The foreman Jansen had been removed to another quay owing to friction between him and the wharfinger.

Wm. Beattie, in charge of the cargo department for defendant, said that, when they took goods from the ship's slings, they placed them where instructed by the wharfinger. There were special instructions to put perishables in the store, and if the store was full, they were placed where directed by the wharfinger. The Harbour Board kept boys to go around and clear goods off the quays. They had not for a long time ordered witness's firm to do this. When they did, McKenzie's were paid for it. The Harbour Board had removed goods from the quays for about ten months. McKenzie's only kept tarpaulins for their own wagons and trailers. McKenzie's had no control over the quays or waste lands.

Cross-examined by Mr. Searle: Witness gave instructions when they came from the ship to put perishables in the store, unless the wharfinger ordered otherwise.

Percy Labron, clerk in the employ of defendant, said he had to deal with the manifest of the ship. These goods did not appear in the manifest, and witness made out a discrepancy list, showing these goods landed in excess. The list produced was the one supplied to the company. In witness's book there was an entry on the 19th January of a charge against the Harbour Board for shifting bales of hemp from quay to store.

Sir Henry Juta closed his case by putting in a statement showing the rainfall.

Mr. Searle, K.C. (for plaintiff): The point in this case is a very simple one, viz.: "In whose custody were these goods?" If defendant was our agent (and he admits that he was), and they were damaged in his custody, he is responsible.

[Buchanan, A.C.J.: Suppose he put them into a Harbour Board store, and the store leaked?]

In that case they would not be in his custody. See *Lister v. McKenzie* (10 Sheil, 480). It is common cause that the goods were safely landed, and afterwards were damaged some time between the 20th and the 28th May, while lying at the West Quay. The amount of damage (£36 10s.) is not disputed. They were in defendant's custody. (See Harbour Board Regulations as to Landing Agent.)

[Maasdorp, J.: Should not the delivery agent be there to take the goods when the landing agent had put them where the wharfinger told him to?]

That is not defendant's case. Section 2 of his plea admits that he is bound to load goods on trucks when required. It is admitted that he was asked to put the goods into a store, and refused to do so because (he says) it was not his duty; that is his case. The question of payment for so storing them is not raised on the pleadings. If goods are damaged while in an agent's possession, he is liable to his principal unless he can show *ris major*. The people who actually had charge of these goods have not been called, and therefore the evidence of Thomson and of Jansen is uncontradicted. In all previous cases the responsibility of the landing agent while the goods were in his possession was assumed, unless (as in *Lister's case*) the goods are taken physically out of his possession for a time. In *Duk v. McKenzie* (8 Sheil, 494) the plaintiff failed to prove that his goods were not damaged on their way from the Docks, while in charge of the delivery agent.

[Maasdorp, J.: May not the consignee himself be responsible for damage?]

That has never been held, and such a defence should certainly be raised on the pleadings. See the judgment of De Villiers, C.J., in *Duk v. McKenzie* (8 Sheil, 499). There the Court clearly held that the goods were either in McKenzie's possession or in that of the delivery agent. McKenzie gives the ship a receipt for the goods, and is clearly responsible until he gets a clean receipt from the delivery agent. If there was any undue delay in taking delivery it

was for McKenzie to act. He could not lie by and do nothing. The responsibility of landing agents can be seen from *Lister v. McKenzie*. There the question was whether the goods had been left in McKenzie's custody, and the decision of that question turned on the point, as to whether they had been put into a store or not. Now, McKenzie takes up the position that he gets rid of all responsibility as soon as he has put the goods on the wharf. See *Duk v. McKenzie*—Regulation 31 of the Harbour Board, par. 3, and also section 36, as to the power of the Harbour Board to remove goods after 72 hours, that cannot affect the responsibility of the landing agent if the Harbour Board do not take the goods and give a receipt for them.

[The Court observed that the whole question seemed to be that of negligence, and asked Sir H. Juta to address himself to that.]

Sir H. Juta (for defendant): Plaintiff's counsel has not argued on the question of negligence, and he could hardly do so when it was admitted that the goods were covered with tarpaulins. I do not admit that we had the care and custody of these goods. The Harbour Board had a lien on them; it charged rent for them, and it looks after goods. Surely, then, it and not we had the custody of them. In any case there was no negligence on our part. They were in crates, and the evidence of Thomson went to show that it was the ordinary rule not to treat crates as perishables, but to leave them outside. We could not have been guilty of negligence unless the goods were in our custody, and that question opens up the whole case.

Mr. Searle (in reply): I thought it was admitted that it was someone's duty to see that the crates were covered up; but defendant now takes up the position that nobody was negligent, and that the injury to the goods was a pure accident. Somebody was evidently negligent, and the whole question is who was that somebody? Clearly the person who had the custody of the goods. If then I have shown that (1) the goods were in the custody of the defendant, and (2) that the injury to them could have been prevented, he must be liable.

In giving judgment, the Acting Chief Justice said: The plaintiffs in this case are importers, who had certain cargo on board the Tintagel Castle, which arrived in Table Bay in May last. The defendants are a firm of licensed Harbour Board dock agents, and they were appointed as such dock agents by the master of the vessel to land and deliver

cargo from the vessel. The declaration alleges that defendants, not regarding their duty in that behalf, namely, that of landing and delivering the cargo to the owners, acted negligently and carelessly as such agents, in consequence of which negligence and carelessness goods which were entrusted to them to land and deliver were injured to the extent of £35 15s., for which amount plaintiffs ask for judgment. The action is founded entirely upon disregard of duty, negligence, and carelessness on the part of the defendants. The defendants denied that there was any negligence on their part, and it is necessary to look at both the law and the circumstances proved in this case to ascertain whether negligence was brought home to the defendants or not. Act No. 36 of 1896 regulates the management of the principal harbours of the Colony—Table Bay, Port Elizabeth, and East London. This Act provides for the appointment of Harbour Boards at these different ports, and these Harbour Boards, by the 30th section of the Act, have authority to land, warehouse, deliver, or ship goods or merchandise by themselves or through their duly constituted agents. By section 79 of the Act, the Table Bay Harbour Board specially are authorised to regulate that no importation or exportation shall take place in Table Bay except by persons authorised by the Table Bay Harbour Board. The 31st section allows the Harbour Board to make regulations to regulate the landing and shipping, transshipping, or warehousing of goods of these ports, and they are also authorised to construct and maintain such warehouses and other appliances and conveniences for the purpose of receiving goods at the different ports. From the evidence given in this case, it appears that the Table Bay Harbour Board would not themselves undertake the powers with which they were entrusted by the Act, and would not themselves undertake any responsibility they could possibly avoid in connection with the landing and delivery of cargo. They would not themselves land goods, but they passed regulations providing that goods shall be landed only by dock agents licensed by them; and also that the agents of the ships should appoint one dock agent and one dock agent only for each ship, to receive and land the cargo on behalf of consignees, and to grant to the master of the ship receipts for the cargo so landed. The regulations then provide that consignees or owners may appoint any dock agent for

the delivery of their goods from or to the Docks; that is, one dock agent is appointed by the master or agent of the ship to land goods on behalf of the consignees, and another dock agent, or forwarding agent, as he is called in this case, is appointed by the consignees themselves to receive goods so landed and deliver them to the consignees wherever the latter may direct. Defendants in this case were appointed dock agents on behalf of the consignees to land the goods, but they were not appointed by the consignees as dock agents or forwarding agents to receive the goods when so landed and deliver them to the owners. By the practice prevailing at this port, the dock agent who is employed to land the goods is obliged to place these goods when so landed at such a place as he may be directed to place them by the wharfinger or officer placed in charge by the Harbour Board. It was admitted that the dock agents had no stores within the Docks or any places of their own where they could keep the goods. The Harbour Board had provided a certain amount of store accommodation. Now it was in the knowledge of the parties at the time that this store accommodation was utterly insufficient to receive all goods landed at Table Bay at the time these goods came. It has been a custom for the last two years, more especially, not to put all goods landed into the stores, but in consequence of the dearth of accommodation only to put into the stores, at any rate until the stores were full, such goods as are known as perishables, and other goods—non-perishables—were placed outside, as were also perishable goods when there was no accommodation in the stores. The goods in this case were hollow-ware, which was always reckoned, according to the evidence of the Harbour Board officials, as non-perishable. The Tintagel Castle was allowed to discharge at the South Arm, where there are stores into which goods could be taken; but owing to the exigencies of the war, the military had taken possession of these stores, and therefore the goods landed from the Tintagel Castle, instead of being placed in the stores at the South Arm, had to be carried, in accordance with instructions from the Harbour Board officials, from the South Arm to the East and West Quays, and there deposited. At the time the cargo was taken to the West Quay, the stores on the West Quay were, according to the wharfinger's own evidence, full, and could not receive the whole of this cargo, and by the wharfinger's directions, given either impliedly or

directly, part of the cargo was placed on what is sometimes called the quay space, and sometimes spare ground near the West Quay. At the time it was so placed there, the weather was fine, and there was no anticipation of any injury to the goods; the spot was selected by the wharfinger, and it is not said to have been an unsuitable spot. Some days after the goods were so placed by the dock agent as it threatened to rain, they were covered by him with tarpaulins. Now there is no doubt that a certain amount of responsibility is undertaken by the dock agent who undertakes to receive goods on behalf of the consignees, and that he is responsible when he receives the goods to account for them, and he must also show that he had done all he was required to do, and authorised to do, under the Dock regulations. The regulations have been under consideration in two previous cases tried in this Court, which have been cited during the argument. One was known as *Duk's case*. In *Duk's case* certain goods were landed by the present defendants from a ship, and these goods, after delivery to the consignee, and examination by him at his place of business, were found to be in a damaged condition. He sued defendants for injury done to the goods while in their custody, and the Court in that case held that plaintiff had not discharged the onus which was upon him to show that the goods were damaged while in the custody and under the control of the defendants, and consequently defendant was not held liable. In the other case known as *Lister's case*, certain goods were consigned to the plaintiff, and he employed defendants—they were also the dock agents employed by the ship in that case—to deliver goods to him. Defendants admitted having received the goods from the ship, but they did not deliver them to the owner. They were under the double duty to account for these goods, being both the landing and the forwarding agents. They were under the obligation to deliver the goods, which they admitted they had received, to the person who had employed them to deliver them at his stores. Defendants, in that case, attempted to get out of this responsibility by saying that they had placed the goods in the custody of the Harbour Board, but their evidence was weak upon that point, and the Court held they had not discharged the onus upon them, and that as a fact they had not proved that they had delivered the goods to the Harbour Board. The defendants failed to show what had become of the

goods left in their possession, and consequently the Court held—and necessarily held—that defendants were liable for the goods which had been traced to them, and which could not be traced any further. That, however, was not this case. In this case the goods in question, after being landed, were taken away, and received by the consignees, and taken to their stores. When they were about to be removed from the Docks, the crates were found to be damaged and on inspection after delivery the goods inside the crates were found to have suffered injury by water and to have deteriorated in value to the extent of about £35. We come back to the question of whether, under the circumstances disclosed in this case, there was negligence and carelessness on the part of the defendants, while they had these goods in their custody, which rendered them liable for this deterioration. When defendants were engaged as dock agents, it must be taken to have been in contemplation of the parties that the nature of the employment and all the known conditions under which the services were undertaken were to be considered in the performance of the contract. It was known that no dock agent was allowed to have stores in the Docks; it was known that the dock agent had to work under the Harbour Board Regulations; and it was known that the dock agent had to place goods either in the stores or in such other places as the wharfinger pointed out to him. These circumstances must be taken into consideration in construing the contract entered into between the parties. I do not say that defendants, as dock agents, were entirely relieved from any further responsibility as soon as they had deposited these goods in such place as they were told to do by the wharfinger, but we must take the contract as being subject to the conditions which were known to exist at the Docks. It was known to the parties that the Harbour Board had stores, and that these stores were limited in their accommodation. It was known to the parties that goods were sometimes deposited in these stores, and sometimes at the quays, or at such place as was pointed out by the wharfinger. It was also known to the parties that, according to the regulations of the Docks, 72 hours are allowed parties within which to remove goods after they are landed from the vessel. At any time after the landing of the goods, they may take delivery. If they left them longer than 72 hours, the harbour authori-

ties could come in and say, "We must now impose a fine, because we cannot have them remain at the Docks longer than 72 hours." These goods, so far as the evidence goes, were landed and put on the place indicated by the wharfinger on or about the 20th May, and it was not until the 6th of June, more than a fortnight afterwards (on the 4th June the first letter was written by the forwarding agents), that these goods were removed. The 72 hours referred to in the regulations had then long since passed. During the 72 hours no injury of any kind had accrued to these goods. The dock agent is required by the regulations, when he lands goods, to receive them, to store them, or stack them, in such place as indicated, and to give a receipt to the ship for the goods; and he is also required, when the consignee sends for the goods, to put them on the consignee's wagon. All this was done. There is nothing in these regulations which puts the dock agent in the position of either a warehouseman or a common carrier. He is not in the position of a warehouseman, who must keep the goods safe, nor is he entrusted with them as a common carrier, who, if there is one in the case, would be the person appointed by the owner to receive the goods, and take them to the owner's stores. All that a dock agent can be expected to do is to make the best of the accommodation provided by the Harbour Board and to do his best while the goods are in his custody to see that no injury arises to them from any act or negligence on his part. I cannot find any negligence proved against defendants in this case in placing the goods where they were placed. It was proved that this was a suitable place, and was pointed out by the wharfinger. The goods were in good condition when placed there, and they remained in good condition for more than the 72 hours specified. After they had remained there more than that time, when the rain threatened, defendants took the further precaution of obtaining tarpaulins and covering these goods. It is said that the goods were damaged owing to no dunnage being provided when the rain came, but it was not proved in this case that this was a class of goods which ought to have been dunnaged. If they were a class of goods which should have been dunnaged, and that was not done, then there might have been negligence. All the goods that required to be dunnaged were dunnaged,

and I cannot lay hold of any one act or any fact proved in this case to bring home the negligence which is the sole foundation of this action. Mr. Searle's argument is that the goods having been damaged there must have been negligence somewhere. We cannot say now with whom the negligence lies, but we must say there is no evidence of negligence on the part of the defendants. A good deal may be said as to whether there was negligence on the part of the consignees, or on the part of the agents employed by them to take the goods from the Docks, in leaving them there instead of removing them at once. Whose negligence was it that the goods were not removed before the rain came on? Certainly not defendants'. There is one statement in the plea which has been relied upon as being against the defendants, and that is that after the goods had been put on the quay space they received instructions to remove them into the store, and that had they done so there would have been no damage. Defendants admit in their plea that they had received such instructions, but when we come to the evidence we find that the instructions were to put perishable goods into the store. There is evidence also that when goods have once been deposited where required to be deposited by the Harbour Board officials, if the Harbour Board required them to be removed again, the Harbour Board paid for such removal. Defendants could not remove them without the authority of the Harbour Board, and the Harbour Board had given no written authority in this case on which defendants could act. That the defendants are bound to obey the Harbour Board as to the place in which the goods shall be placed when landed has been proved by the evidence of the correspondence which was referred to in the cross-examination of Mr. McKenzie. This correspondence went to show that in another case the defendants had landed goods from another ship and put them in a store in the absence of the wharfinger. The wharfinger objected to them being placed there, and required defendants to take out the goods. Defendants did so at their own cost, but afterwards when the wharfinger came and said that rain was coming on and that the goods must be put back into the store, defendants would not put them back into the store without being paid for doing so, and an order was then given, and the Harbour Board paid for the removal of these goods into the

store. This incident shows that defendants were not bound to put back goods into the store without being paid for doing so. That was a totally different contract to the contract under which the defendants as landing agents had to receive the goods and to put them into the store. It was under a totally different contract that the Harbour Board paid them to remove goods back from the spot selected by the wharfinger on which they had been placed under the original contract. The parties must bear in mind that defendants must not be considered to be insurers of these goods in any way. Defendants had a certain duty conferred upon them, and so long as they carried out that duty they had discharged the office which they had undertaken by accepting the appointment of dock agents. I see no fact in this case upon which we can find the defendants guilty of negligence. Judgment will therefore be given for defendants, with costs.

Mr. Justice Maasdorp concurred.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SAJIRA (OR SANJEENAH) AND
OTHERS V. EXECUTORS OF
THE ESTATE OF THE LATE
AJOUHAAR. 1901.
Feb. 25th.
May 6th.

Will—Interpretation.

Ajouhaar had left a will by which certain land was bequeathed to his wife Alima "she to remain in full and undisturbed possession thereof and of the rents and profits during her natural life." After her demise the property was to be divided among the seven children of the testator and "such other child or children as might still be begotten and which should then be living, being the issue of the testator and the said Alima, by whom the property should be held under the like conditions, and after their death become the absolute and unconditional property of the grandchildren of the said Alima, being the issue of her children or such other child or children as may be begotten by the said Alima and the testator."

Held, that after the death of all the children of the testator and

Alima, the whole of the estate must be divided per capita amongst all the grand-children of the said testator and Alima.

This was an argument on a special case submitted to the Court in the following terms:

1. The plaintiffs are (1) Sajira (or Sanjeenah), (2) Ali Ajouhaar, children of Ajouhaar, hereinafter called the testator, and of Alima, to whom the testator was married according to Mohammedan rites; (3) Bagie and (4) Mossa, grandchildren of the testator.

2. The testator, on or about July 6, 1847, made his last will and testament, a copy whereof is hereunto annexed marked "A," and on August 22, 1856, he died without having revoked or altered it.

3. Under the said will the testator bequeathed to the said Alima certain land at Claremont, she to remain in the full and undisturbed possession thereof and of the rents and profits thereof during her natural life; after her demise the said property to be divided among the testator's children named Ysa, Atika, Enon, Abdol, Kariem, Sajira, and Sitse, and such other child or children as might still be begotten, and which should then be living, being the issue of him the testator and the said Alima, by whom the property should be held under the like condition, and after their death become the absolute and unconditional property of the grandchildren of the said Alima, being the issue of her children, or such other child or children as may be begotten by the said Alima and the testator.

4. There were eight children issue of the testator and Alima, all of whom survived the testator; their names were Ysa, Atika, Enon (or Yuven), Sajua, Abdol, Ali, Rahiba and Mogamat; but no child named Sitse (as stated in the will) is known or can be discovered as having existed.

5. The said Alima died on or about April 7, 1875; of the said eight children, two, to wit, Enon and Rahiba, predeceased her; Enon left three children her surviving, whereof two are now living; Rahiba left no issue.

6. Of the other six children, three, to wit, Ysa, Atika and Mogamat, have died since the death of Alima; Ysa left children, lawful issue, of whom the third and fourth plaintiffs are two; Atika left one child, lawful issue, and Mogamat none; the other three of the testator's children survive; two of them are the first and second plaintiffs; the third has no lawful issue.

7. The first plaintiff has lawful issue, one child, three having already died; and the second plaintiff has lawful issue, nine children.

8. The first and second plaintiffs are desirous that the said land should now be sold and the proceeds divided among all those who are by law entitled thereto, and they are willing to renounce their share in the life interest which they have enjoyed since the death of Alima, jointly with their brothers and sisters who survived Alima, in favour of their children.

The plaintiffs contend that at the death of Alima the six children of the testator who survived her became jointly entitled to the whole of the life interest in the said landed property, to the exclusion of grandchildren then living whose parents had predeceased Alima; and that thereafter upon the death of any of the said six children or upon the renunciation by any of the said children of their rights in favour of their children the grandchildren of testator succeeded absolutely to the share of their parents dying or renouncing as aforesaid, each set of grandchildren succeeding *per stirpes*; that the property should now be sold by defendants and the proceeds equally divided into six parts, that the third and fourth plaintiffs are entitled jointly with such of their brothers and sisters as survived their mother to receive one-sixth, the child of Sajira one-sixth, and the children of Ali one-sixth; the other three sixths belonging to the child of Atika, to Abdol during his lifetime, and to Mogamet's estate respectively.

The defendants contend:

1. (a) That on the death of Alima the whole of the life interest vested in the surviving children of the testator and Alima, jointly with the surviving children *per stirpes*, of such children of the said testator and Alima as predeceased Alima; or otherwise

(b) That after the death of all the children of the testator and Alima the whole of the estate is to be divided *per stirpes* among all the grandchildren of the said testator and Alima; or otherwise

(c) That after the death of all the children of the testator and Alima, the whole of the estate is to be divided *per capita* among all the grandchildren of the said testator and Alima.

2. That the property cannot yet be divided, as the portions accruing to testator's descendants are not yet ascertainable, and it is impossible for any of the testator's children to renounce in favour of their children.

Mr. Searle, K.C., for the plaintiffs; Mr. Joubert for the defendants.

Counsel having been heard in argument, *Cur. adr. vult.*

Postea (May 6th).

The Acting Chief Justice delivered judgment in this case as follows: This special case raises the question of the construction of the will of the late Ajouhaar, in which a bequest is made of a piece of ground, with the buildings thereon situated, at Claremont. The will was executed in 1847, and the clause which has given rise to the dispute is brief. The testator was married according to Mohammedan rights, and it seems probable that his intention was, as far as possible, to provide a residence for the use of all his descendants. These, however, have now become numerous, and have scattered abroad. By his will the testator sought to benefit three generations—first his widow, next his children, and lastly his grandchildren, and it is the rights of this third class which more particularly it is now sought to have determined. The property was first bequeathed to the testator's wife Alima, who was to remain in the full and undisturbed possession thereof, and in the enjoyment of the rents and profits for the term of her natural life. This bequest was duly enjoyed by the widow until her death in 1875. The will next provided that the property should, after her demise, be divided among the children issue of the testator and of Alima, which should then be living, by whom the property was to be held "under the like conditions." This must mean under the same conditions as the property was enjoyed by Alima, that is, a life interest therein. Eight children survived the testator, two of whom predeceased Alima (one only, a daughter named Enon, leaving issue); and three survive, only two of whom have issue. The third survivor, Abdol, who is without issue, was not originally a party to this suit, but has now been joined, so that all the parties are now represented. No disputes arose between the children as to their respective rights under the will. The property remained intact, the children occupying the same in common. The children now living are willing to renounce their life interest, and they and the executors wish to sell the property and to have the proceeds distributed among the ultimate beneficiaries. As to them, the will provides that the estate, after the death of the children, shall "become the absolute and unconditional property of the grandchildren of the said Alima, being the issue of her children, or such other child or children as may be begotten (i.e., after the execution of the

will and before the death of the testator), by the said Alima and the testator aforesaid." In construing this clause, the plaintiffs wish, in the first place, to exclude from its benefits the grandchildren issue of Enon, the child who predeceased Alima. They next contend that the other grandchildren must take *per stirpes*; and thirdly, that one-sixth *pro rata* share of the proceeds should be assigned both to the estate of Mogamet, who died after Alima, but who left no issue, and to the surviving child Abdol, who is without issue. What the rights were of the children *inter se* is not now in question, except in so far as they affect the grandchildren; but as the will gives a life interest only to the children, on their death or renunciation of their rights they cease to have any further interest in the bequest. On this simple ground the third of the plaintiff's contentions, viz., claiming a share of the proceeds from the estate of Mogamet, and as the property of Abdol, cannot be sustained. Next, as to the first contention. Whether or not the bequest to the children was limited to those of them who survived Alima, it will be seen that the clause relating to the grandchildren is in the most general and unrestricted terms, and is wide enough to include all the grandchildren in being at the death of all the children. There is no other clause in the will containing any indication of any intention to disinherit any of the grandchildren, or to make their succession depend on their parent surviving the widow. In the absence of any indication of such an intention, and with a general institution of the grandchildren without any restriction, there is no ground upon which to pass over the children of Enon; and therefore the plaintiff's first contention must also fail. There only remains, then, the question whether or not the grandchildren take *per stirpes* or *per capita*. It may be the general rule in cases of intestacy that grandchildren would inherit *per stirpes*, but in this case we have a will, and must be guided by the language used by the testator. The bequest is to "the grandchildren of Alima, being the issue of her children." These grandchildren are thus instituted as a class, without limitation. The will was drawn by a notary, and contains no reference to a succession *per stirpes*, nor any declaration that the grandchildren were to take by virtue of any representation. A doubt is created by the previous provision of the will that the property, after the death of the widow, was to be divided among the children who shall then be living, but if

this was construed to mean a splitting up of the estate among the children, we should have expected to find each set of grandchildren instituted heirs on the death of their parents, and this would also have shut out the grandchildren already born to the daughter Enon, who predeceased the widow. But this was not done, and as already stated, the words of the bequest do not warrant the exclusion of the grandchildren born to Enon. If, as has been suggested, the testator wished to provide a home for his descendants, it would be in accordance with that wish only to hold that all his grandchildren took equal rights. In our opinion the testator intended all his grandchildren to take individually. Under these circumstances the alternative (c) of the defendants' first contention appears to the Court to give the correct interpretation of the will, viz., "that after the death of all the children of the testator and Alima, the whole of the estate is to be divided *per capita* among all the grandchildren of the said testator and Alima." To make the decision perfectly clear, the words "alive at such time" should be added. This being so, it follows that the defendants' second contention must also be upheld, at least in part, viz., "that the property cannot yet be divided, as the portions accruing to the testator's descendants are not yet ascertainable." Judgment will therefore be given for the defendants in the terms stated, the costs to come out of the estate.

[Plaintiffs' Attorneys, Messrs. Innes and Hutton; Defendants' Attorney, C. W. Herold.]

APPENDIX.

This case was in error omitted from the reports for 1900.

J.D.S

COMMISSIONERS OF THE BEAUFORT WEST MUNICIPALITY { 1900.
V. MADDISON. { Feb. 27th.

Deed of transfer—Diagram—River
—Change of course—Onus of
proving change of course.

Defendant was the owner of certain land which was described in the transfer deed as being bounded on the "west by the river

Gamka" and was shown on the diagram to be bounded by a line B C some distance from the river, which took a zig-zag course. [On the diagram there was a note by the surveyor that the western boundary was the river Gamka.] Plaintiffs, by whom the land was originally granted to E.J. in 1878, claimed that the line B C was the true boundary of the land; or in the alternative alleged that, if the Court found that the river was the true boundary, the river had changed its course, and now ran 75 feet further to the west than it did at the date of the original transfer, and that therefore the old course of the river was the boundary.

Held, that as the successive owners since 1878 had occupied the land right up to the river without let or hindrance from the plaintiffs, and the deed described the land as being bounded on the "west by the river Gamrka," the river bank must be taken to be the boundary of the land.

Held further, that the onus of proving that the river had changed its course was on the plaintiffs, and that as they had failed to satisfactorily prove this, the judgment would be absolute from the instance with costs.

This was an action for a declaration of rights regarding the true boundary between certain land vested in the plaintiffs, and situate at Beaufort West, and the property of the defendant.

The plaintiffs declared as follows:

1. The plaintiffs are the Commissioners of the Beaufort West Municipality, the defendant resides at Beaufort West aforesaid.

2. The defendant is the registered owner of certain land, being lot H, situate in the town of Beaufort West. A copy of the defendant's title-deeds to the said lot and of the diagram thereof are annexed hereto, and the plaintiffs pray that they may be considered as forming part of this declaration.

3. The said lot H is part of certain freehold land which, on the 29th November, 1873, was duly granted by the Crown to the Commissioners of the Municipality of Beaufort West. The said lot H was cut off from the said land and transferred to one Eliza Jones, the predecessor of the defendant, in or about the year 1878; by her it was transferred to one Jacobs, and by him to the defendant. In the transfer and diagram issued to the said Eliza Jones the said lot H is described and delineated in terms identical with those of the present title and diagram of the defendant.

4. The land to the west of Gamka River and opposite to the defendant's land is and was municipal pasture land, and duly vested in the plaintiffs in their said capacity, and the plaintiffs say that the true boundary of the said lot H is the line B C shown upon the diagram, which line was duly indicated by pegs placed at the spots on the ground corresponding with the points B and C.

5. Alternatively, in case this Honourable Court should hold that the line B C is not the true boundary of the said lot the plaintiffs will contend that such boundary is the eastern bank of the Gamka River, as it flowed in the year 1878, being the date of the original transfer of the said land.

6. Since the year 1878, the course of the said river has changed, and it now flows considerably to the west of that part of its old channel which adjoined the defendant's land, and there is a considerable extent of land which falls between the old and the new course of the said river at the said place.

7. The land comprised between the lines B C and the new course of the river is vested in the plaintiffs, but the defendant has for some time past trespassed upon and occupied the said land, and unlawfully claims that the western boundary of the said lot H is the middle of the present channel of the Gamka River.

The plaintiffs claim:

(a) An order declaring that the said lot H is bounded on its western side by the line B C, as indicated in the defendant's diagrams and by pegs on the spots;

(b) Or, should this Honourable Court refuse the said order, then an order that it is bounded by the east bank of the Gamka River as it flowed in the year 1878;

(c) An order that the land between the said boundary and the present eastern bank of the said river is vested in the plaintiffs;

(d) Alternative relief;

(e) Costs of suit.

Defendant's plea and claim in reconvention:

1. He admits the allegations contained in paragraphs 1 and 2, save that he does not admit that the diagram therein referred to correctly represents the defendant's property.

2. He admits the allegations contained in paragraph 3.

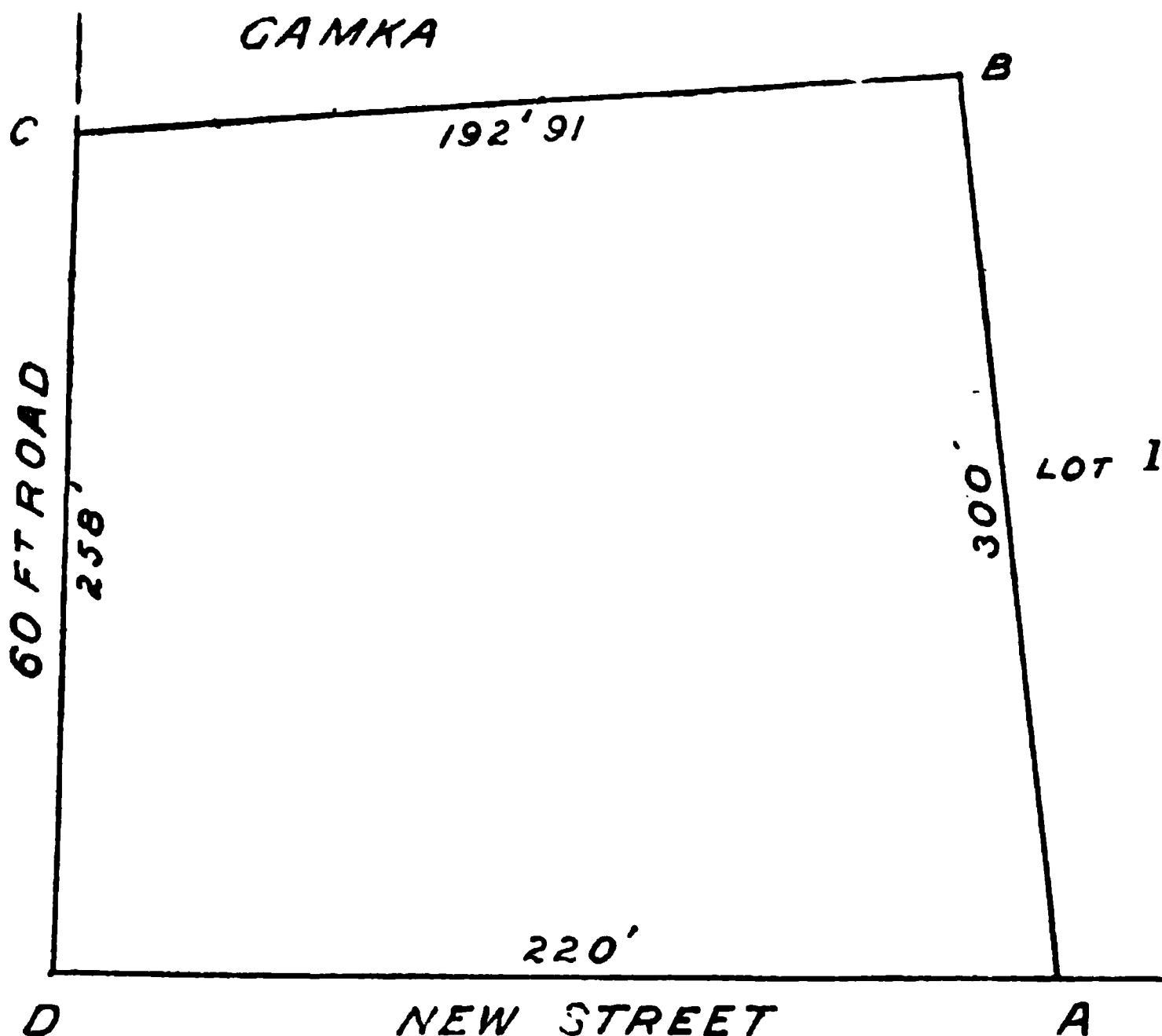
3. He admits that the land to the west of the Gamka River and opposite to the defendant's land is and was municipal pasture land and duly vested in the plaintiffs in their said capacity, he denies the remaining allegations in paragraph 4.

4. He denies the allegations in paragraphs 5, 6, and 7, and says that the true boundary

possessed by him as aforesaid since the year 1882, and that the said improvements are of the value of £150 and upwards, and in no case can the plaintiffs succeed in their action or compel the defendant to give up possession of the said portion of the said land so claimed by them without paying or tendering to pay by way of compensation for the said improvements the sum of £150 sterling.

Save as above he prays that the plaintiffs' claim may be dismissed with costs, and for a claim in reconvention the defendant says:

1. He begs leave to refer to the matters hereinbefore pleaded and prays that they



on the west side of the said lot H is the existing eastern bank of the said Gamka River.

5. And the defendant further says that if the course of the said river has been changed as described in paragraph 6 of the declaration, which he denies, the defendant is by law entitled to the land falling between the old and the new course of the said river.

And for a further plea in case the above plea be deemed insufficient but not otherwise the defendant says that he has effected permanent improvements on that portion of the land so *bona-fide* occupied and pos-

may be considered as inserted herein, wherefore he prays:

(a) For a declaration that the true western boundary of the defendant's property is the existing eastern bank of the Gamka River.

In the alternative in case the above claim be dismissed:

(b) Payment of the sum of £150 as compensation for improvements effected as aforesaid.

(c) Alternative relief.

(d) Costs of suit.

The replication was general.

Sir Henry Juta, K.C. (with him Mr. Buchanan), for the plaintiffs; Mr. Gardiner (with Mr. Graham, K.C.) for the defendant.

The deed of transfer to Eliza Jones described the land as being "bounded north by lot I, south by road, east by New-street, and west by River Gamka, as will more fully appear by the annexed diagram."

The deed of transfer to Jacobs was governed by the deed to Eliza Jones and diagram attached.

Charles Barnard Blore, a Government land surveyor, said he had been practising since 1870. He lived in Beaufort West for a year or two, and in 1874 and 1875 he was employed to survey certain lots, which witness believed had been deducted from the ground granted in 1873. Witness's plan correctly described the course of the river as it ran in December, 1874, when he surveyed it. The diagram described a straight line B C as the western boundary. Witness put in the pegs marked. At that time a cutting was being made to alter the course of the Gamka River as the river was encroaching upon the town. Witness took a straight line as the boundary instead of the natural features, as he knew it was the intention of the Municipal authorities to reclaim the western bank. In May last year witness re-surveyed the lots, and found the straight line to give the correct boundary as laid down by him. On witness's diagram the boundary was shown 15 or 20 feet from the river. If witness had had to give the river as the boundary his diagram would not have been in the same form, as instead of a straight line there would have been a rectilinear line and a curvilinear line, and the whole thing would have been coloured up to the river. The river was very much further from the boundary now. The plan of Mr. Dale had been examined by him, and he found it correct as to the old and the present courses of the river. At one place the new course was seventy feet from the old course. The cutting that was being made when witness surveyed would have taken the river away from the boundary. Witness had instructions from the Municipal Council to keep the boundary away from the river.

Cross-examined: An ordinary man reading the notes on witness's diagram would understand the boundary as extending to the river. The old course of the river could be traced just up to the boundary of Lot H, but he could not trace it on that lot. From where witness found the old course entered

Lot H to the new course was between 20 and 30 feet. Witness resurveyed on his old 1875 data. Witness when he surveyed in 1875 found an old bank of stones close to the river. Witness was not aware that that bank had been there since 1857. It had been built up considerably since then. Witness did not particularly notice any old mimosa trees near the bank. Mr. Maddison had cultivated a considerable piece of ground between the line B C which the Municipality claimed and the present course of the river. Witness could not give the present value of the land as he had been away from Beaufort West for a long time. It was of little value in 1875.

Re-examined: The well referred to was now on the other side of the river, so that it was evident that the river had changed its course.

By the Court: Witness could by his diagram trace the old course of the river, so that if the Court awarded that as the boundary he could trace it.

Percy Stroud Dale, a Government land surveyor, residing in Beaufort West, deposed that in 1898 he made a survey, going on Mr. Blore's plan. Witness was able to determine the points B and C, and they gave the proper angles of the ground according to the transfer, and were correct with Mr. Blore's diagram. Mr. Maddison showed witness where the peg had been to within 15 feet or so. The place where the peg had been was not near the new river bank. Witness verified the position of the river in parts, as it appeared on Mr. Blore's plan. Above Lot H he could trace the old boundary of the river more or less, but not across that lot. Between the line B C and the old river course would be from 15 to 20 feet, and the distance of the line from the present course would be about 100 feet. Witness was at Beaufort West in 1879, 1881, and knew that the Municipality had been engaged on cuttings for the purpose of diverting the river. Certain commonage lots had been sold between the old and the new courses of the river. These had been sold as part of the commonage right up to Blore's straight lines.

Cross-examined: Witness did not measure on Lot H the distance from the old to the new course of the river. He could not find the old course. It was only surmise on his part that there was an old course on Lot H. There was a stone wall and some old mimosa trees. That might be an indication that this was not reclaimed land. The words "extended to the river" on Mr. Blore's

plan would lead witness as a surveyor to think that the line B C was the bank of the river, and the curved line he would take to be the bed of the river.

Re-examined: If they took to the present bank of the river, Mr. Maddison would be occupying 111 rods more than he had by the line B C.

By the Court: Mr. Maddison had been occupying that land ever since witness went to reside in Beaufort. The line B C was cut through a certain stable.

Jacobus P. Verster, a member of the Municipal Council, said he was now fifty-nine years old, and had lived in the Beaufort West district since he was six years old. He had lived in the village for the last six years. Before then he was often in the village, and frequently went on Lot H while one Jacobs had it. Jacobs did not point out exactly to witness the pegs, but he said he had enclosed a piece of municipal land. Maddison had now more enclosed land than Jacobs had. Witness remembered the course of the river being altered about forty years ago, and it had been altered several times since then, always pushing it further away from the town. Since witness had been a member of the Municipal Council it had been altered in places four or five times, always in the same direction. Witness believed the course of the river had been altered about forty yards at Lot H since Jacobs's time. The value of the ground without the improvements would have been about £30, and about £150 with the improvements.

Cross-examined: Witness himself had had a dispute with another man in which this very same point came up. Witness, as one of the Municipal Councillors, was anxious to have this action brought, as he wished to settle his own action out of court. All the Commissioners agreed. If the Municipality won this action, witness would have no more trouble about his own little lot.

By the Court: The river was much nearer to the lot when Jacobs had the land than it was now.

Re-examined: If the Municipality won this case witness would lose a lot of ground.

Ishmael Galie, a contractor and mason living at Beaufort West, said he was forty-five years old, and had lived in Beaufort West all his life. The river had not altered its course very much near Mr. Maddison's lot since Jacobs's time. The course of the river had been altered from time to time, always pushing it further away from the town.

Cross-examined: The river had not changed its course at Mr. Maddison's place. He meant he was not certain whether the course of the river was nearer or further away from Mr. Maddison's place. Witness could not say whether Maddison had more ground than Jacobs. The wall mentioned was built before Jacobs's time.

Jacobus Bosman said he had been living at Beaufort West since 1881. He lived opposite Mr. Maddison's. Since witness had lived in Beaufort West the river had considerably changed its course. He thought the river was closer up to Mr. Maddison's place in 1881 than it was now. So far as his knowledge went, the river had shifted 25 yards further to the west. The value of the land in dispute, without improvements, would be £30, and with improvements £100.

By the Court: The value of the land between the old and the new boundaries of the river would be £15 without improvements and £50 with improvements. Witness was a member of the Municipal Council.

This closed the case for the plaintiff.

For the defence,

Thomas Watson Maddison said he was the defendant in this case, and had lived in Beaufort West since 1855, and was now sixty-five years of age. Witness was a member of the Municipality up to several years ago. He was first a member in 1866 or 1867, and was on a committee which had to do with the sale of the lots in question in 1877. The advertisement inserted in the local paper by the committee said the lots extended to the river. The river had not changed its course at witness's lot. Witness had seen a wall built in 1867 or 1868 by one Kinnear, C. Jones being the overseer. That was the same wall now on the lot. It was on the bank of the river. The only change in the river at witness's place was that it was deeper. There were certain mimosa trees at the wall, and if the bed of the river had been there, the mimosa trees would not have grown. Witness proceeded to give evidence as to the improvements effected by him on the land claimed by the Municipality. There were forty fruit trees which witness would not sell for 15s. each. Then there was a well which cost from £35 to £40, and a stable, part of which was built on that ground, costing £50. Witness had never seen any pegs or beacons. Mr. Dale was wrong in what he said as to witness pointing out a peg.

Cross-examined: In spite of what the surveyors had said witness was positive the

river had not changed its course at his boundary. The well would be within the ground bounded by the old course of the river.

Hermanus Stephanus Bosman, a retired farmer living at Beaufort West, said he was seventy-one years of age. He knew the river Gamka well. It had changed its course on the upper side. That had taken place gradually owing to the cuttings made by the Municipality, but witness was quite sure that it had not altered at Mr. Maddison's place, and he had known it since his eighteenth year.

Cross-examined: Witness came to reside in the village in 1855, and lived there ever since.

Johan Coenrad Hattingh said he was sixty-eight years old, and had lived in Beaufort West since the end of 1872. Witness often went to see Jacobs when he occupied Lot H. The river bed had not changed its course since then, and Jacobs had the same extent of land as Maddison now had.

Evidence taken on commission at Beaufort West, and supporting the defendant as to the river not having changed its course was read.

After hearing Sir Henry Juta,

De Villiers, C.J.: It is not necessary to hear Mr. Gardiner. The main question is what was really transferred by the Municipality to the original purchaser. To discover what was transferred the Court must refer to the title deeds and the deed of transfer. In the body of the deed of transfer the land said to be transferred to the then purchaser is described as bounded on the west side by the river Gamka. It refers to the diagram, and I confess that on the diagram, or the picture of the diagram, the river really does appear some little distance from the boundary line. Probably this was done to save surveyor's expenses, because in surveying the ramifications of this river, which does not run in a straight line, but in a zigzag direction, and in order to make an accurate survey it would be necessary to make several rectilinear figures according to the curves of the river. To save expense, therefore, he simply traced the straight line C B. If this picture had stood alone no doubt it would have considerably helped the plaintiffs' case, but on the face of the same sheet on which this figure appears it is said that the lot is bounded on the west by the river Gamka. Now, in some cases where a surveyor wishes to show that a river is

not to be the boundary he has used the words "towards the river," and when those words have been used the Court found on one or two occasions that it could do justice by holding that it was not intended that the particular river should be the boundary, but that it was intended to show the general direction of the boundary. But here the words used are "extending west to the river." Then we have had in point of fact the occupation, at all events shortly after the transfer, to the river, and the Municipality seem never to have disputed the right of these people to go there. Jacobs at all events seems to have gone to the river, and his occupation was never disputed. Now supposing there had been no change in the direction of the river, I think the Court would hold that the bank of the river must now under all the circumstances be taken to be the boundary. But then the plaintiffs go on to say that if the river is to be taken as the boundary it has in point of fact changed its course since the time of transfer. I think the onus of proving that lies upon the plaintiffs. The owner is entitled to say there is the river and there is my proof, and it lies upon the transferee to prove that the river as it stands is not the river as it was when the lot was purchased. No doubt there is some conflict of testimony, and one circumstance certainly appears in favour of the plaintiffs, and that is that there is a considerable discrepancy as to the boundary in the title deed and that given by the present course of the river, but as far as the evidence of the witnesses is concerned it seems to me that the great weight of the evidence is in favour of the river at that particular point being the same as it was at the time of transfer. However portions of the river may have changed, this, it is apparent from the evidence of very old, respectable witnesses, has not changed. The evidence given before the commissioner appears to bear this out, and certainly the evidence given before the Court is to that effect. As I said before, the onus of proving that there is this diversion lies upon the plaintiffs, and as they have not fully satisfied the Court upon that point, I think the only course will be to give absolution from the instance, also in the claim in reconvention.

Mr. Justice Laurence concurred, and said that the only difficulty he had was in understanding how Mr. Blore could have made such a mistake. His Lordship also thought there had been considerable diversion of

the river at certain points, and the present did not appear to be a really representative case.

[Plaintiffs' Attorneys, Messrs. Van Zyl and Buissinne; Defendant's Attorneys, Messrs. Scanlen and Syfret.]

MARAIS V. THE GENERAL OFFICER COMMANDING THE LINES OF COMMUNICATION AND THE ATTORNEY-GENERAL.

Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Petition in the Matter of David Francois Marais v. The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony, for Special Leave to Appeal from the Supreme Court of the Cape of Good Hope, delivered 18th December, 1901.

Present for the hearing:

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR HENRY DE VILLIERS.

This was a petition by D. F. Marais for special leave to appeal against a decision of the Courts in Cape Colony which had refused to release him from an arrest effected by the military forces of the Crown on 15th August last.

It appeared sufficiently from the petitioner's own petition, as well as from the documents accompanying it that the district in which he was arrested, and the district to which he was removed (and of which removal he also complained) was a district which had been proclaimed under martial law.

The petitioner applied to the Supreme Court complaining of his arrest and imprisonment, and on 12th September last the matter of the petitioner's arrest was brought before Mr. Justice Buchanan, and that learned judge, after hearing the matter, made the following order:

In the Supreme Court of the Colony of the Cape of Good Hope.

Cape Town, Thursday,
September 12, 1901.

In the Matter of the Petition of David Francois Marais.

Having heard Mr. Currey, with him Mr. S. Solomon, for petitioner, Mr. Searle, K.C., for the General Officer Commanding Lines of Communication, Cape Town, and the Hon. the Attorney-General (Sir James Rose-Innes, K.C.M.G.), with him Mr. Ward, for the Colonial Government, upon petitioner's application for his immediate liberation and discharge, and having read the order granted on the 6th inst., calling upon the gaoler at Beaufort West to return to this Court the authority on which he detains petitioner:

Having also read the further affidavits filed, and having heard the return, made by the Attorney-General verbally, that the gaoler who has the custody of the petitioner holds him as an officer acting under the authority and control of the military authorities in the district in which martial law prevails:

It is ordered that the said application be and the same is hereby refused.

By order of the Court,

J. H. GATELY,
Acting Registrar.

From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody.

All the persons arrested were as appeared by the warrant under which they were arrested charged with contravening what were called Martial Law Regulations which regulations are set out in the petitioner's affidavit as follows:

No. 14. Rebellion, dealings with enemy, etc.

Notice is hereby given that from and after the 22nd April, 1901, all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails:

(1) Be actively in arms against His Majesty, or

(2) Directly incite others to take up arms against His Majesty, or

(3) Actively aid or assist the enemy, or

(4) Commit any overt act by which the safety of His Majesty's forces or subjects are endangered, shall immediately on arrest be tried by a Military Court convened by authority of the General Commanding-in-Chief His Majesty's Forces in South Africa, and shall on conviction be liable to the severest penal-

ties. These penalties include death, penal servitude, imprisonment, and fine.

Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a Military Court.

Under these circumstances their lordships were appealed to to give special leave to appeal, and Mr. Haldane, on behalf of the petitioner, was fully heard on 5th November last.

The only ground susceptible of argument urged by the learned counsel was that whereas some of the Courts were open, it was impossible to apply the ordinary rule that where actual war is raging the Civil Courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.

The question was as fully argued before their lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

Martial law had been proclaimed over the district in which the petitioner was arrested, and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830.

In *Elphinstone v. Bedreechund* (1 Knapp, Privy Council Reports, page 316) the Supreme Court at Bombay had given a large sum as damages against the appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poonah, but the great battle of Kirkee had been fought and Poonah had been taken possession of by the British forces. The treasure was seized on 17th July, 1818. At Poonah some courts had been open from the previous February, and it was argued and held by the Bombay courts that it must be held to

be a time of peace, and that the military authorities were responsible in damages for seizure of the treasure.

To this the Attorney-General, Sir James Scarlett, replied that a military commander may allow the usual courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander, but this does not deprive the commander of his power or free the country from military government.

Lord Tenterden, in giving judgment, said: "We think the proper character of the transaction was that of hostile seizure made, if not *flagrant*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject," and the judgment was accordingly reversed.

The truth is, that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity and whether the intervention of the military force was necessary, but once let the fact of actual war be established and there is an universal consensus of opinion that the Civil Courts have no jurisdiction to call in question the propriety of the action of military authorities.

The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.

For these reasons their Lordships advised His Majesty to refuse leave to appeal.

THE EASTERN AND SOUTH
AFRICAN TELEGRAPH CO.,
LTD., V. THE CAPE TOWN
TRAMWAY COMPANIES, LTD. } 1902.
April 18th

*Judgment of the Lords of the
Judicial Committee of the Privy
Council on the Appeal of the Eastern
and South African Telegraph
Company, Limited v. The Cape
Town Tramway Companies,
Limited, from the Supreme Court*

of the Colony of the Cape of Good Hope; delivered the 18th April, 1902.

Present at the hearing :

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[Delivered by Lord Robertson.]

The question raised by this appeal is whether the respondents are liable in damages for certain disturbances in the working of the appellants' sub-marine telegraph cable at Cape Town. That such disturbances did take place; that they were caused by electricity which had been stored by the respondents and used in propelling their tramcars in Cape Town and its suburbs, but from time to time had left the tramway system and found its way to the appellants' cable in the sea near Cape Town; and that pecuniary losses resulted; are matters beyond dispute.

In order to the adequate understanding of the question thus raised it is not necessary to enter into minute or highly technical descriptions. It may conduce to clearness in the discussion of the legal questions which result if, leaving over in the meantime the mode in which the electricity left the respondents' system, it be in the first place stated how the electricity injured the appellants. At some point then in Table Bay this electricity, having escaped and being at large, was attracted by the appellants' cable, entered the sheathing of the cable, and by the sheathing, as a conductor, found its way back to the tramway central station, whence it had started, and thus completed its circuit. While travelling along the sheathing of the appellants' cable, the current varied very frequently, and at irregular intervals, in accordance with the starting and stopping of the tramway cars. It was this irregularity and jerking which did the mischief; and but for this, the current might have used the sheathing as a conductor without any injury. As things were, the current in the sheathing induced similar irregular currents in the conducting wire of the cable, with the result that the signals were interfered with, and as recorded, were confused and unreadable. None of the apparatus was damaged; but the working of the apparatus was so interfered with as to take away its utility for the time of the interruption.

In order to complete the description of the nature of the injury, it is necessary to add that the difficulty has now been completely got over by laying what is called a twin-core cable for several miles out, the two wires rectifying one another's action. Now that this has been done, the electricity from the tramways can pass along the sheathing without any harm being done. The cost of this remedial measure forms a large part of the claim in the suit, much of the rest representing experimental and tentative measures. Into this, however, it is unnecessary further to enter, as the *quantum* of damage is not raised in this appeal, but only the question of liability.

Turning now to the mode of escape of the electricity from the tramways, there is again no controversy; and for present purposes a succinct statement is sufficient. The respondents' tramway runs along the shore of the sea, and their tramcars are run by the tolerably familiar system of overhead trolley. All that is necessary to take note of is that the electricity which is used is generated at a power-station erected by the respondents for that purpose, and that the conductor which is provided for the return of the current, after driving the tramcars, consists of the tramway rails. Now, when uninsulated (and safety requires that this should be their condition), the rails are so far from being (even comparatively speaking) a perfect conductor, that necessarily, and as matter of course, a considerable proportion of the electricity, instead of going directly back to the station, leaves the rails; and some portion of the escaped current it was which reached the appellants' cable.

Upon these facts, the appellants' main contention is that, on the principle of *Fletcher v. Rylands* (L.R. 3, E. and L., App. 330), the respondents are liable for the interruption of the appellants' business, and must recoup them for the protective measures necessarily taken to prevent a recurrence of such interruption. To this, the respondents have a twofold answer: (1) They say that they are protected as regards all but a small portion of their tramway system by certain provisions which occur in each of the series of Colonial statutes incorporating their constituent companies; and (2) as regards the part of their line not so protected by statute, they maintain that *Fletcher v. Rylands* does not apply to the facts. Two other contentions have been advanced on the latter branch of the case (the first of which received more countenance in the Supreme Court than support at their lord-

ships' bar), viz.: (1) That the law of *Fletcher v. Rylands* has no place in the Roman-Dutch law; and (2) that it was not established that any escape of electricity injurious to the appellants took place from that section of the tramway to which none of the statutes apply.

Before proceeding to discuss the interesting and important questions thus raised, a few facts and dates may conveniently be noted. The appellants' cable had been in operation for years before the respondents' tramways were made. The tramcars began to be worked in August, 1896, and the disturbances on the appellants' apparatus were felt at once, and continuously thereafter during the days and hours when the tramcars were running. Communications took place between the parties, and both seem to have frankly co-operated in ascertaining the cause of injury and devising remedies. After this had been done, with the result already stated, the present suit was instituted, on April 15, 1899, in order to determine the question of liability. On March 13, 1900, the Supreme Court of the Colony gave judgment for the respondents, and the present appeal is against that judgment.

In considering the merits of the appeal, it is best first to take the question of common law. That the facts about the section of tramway line not constructed under statutory authority, viz., that from the city boundary to Mowbray, do raise this question is, in their lordships' judgment, sufficiently clear. It is true that the crucial test of this particular section being worked alone is wanting; although at one time during the disturbances of the cable this section and the short section home to the station house were worked alone. But no effective answer was made to the record of journeys which was commented on by Mr. Bousfield; and this record attests that the disturbances on this section were at least as great as on any other. Now Mr. Jacob, the respondents' principal witness, is very emphatic in stating (and, indeed, this is of the essence of the respondents' case), that the disturbances on the cable are not dependent on the quantity of the current escaping, but on the rate of alteration and the rate of variation, and Mr. Jacob's evidence, when directly applied to the separate influence of one section, entirely supports the appellants' case. The question of common law is thus raised directly (as well as indirectly, in relation to the just construction of the statutory provisions).

Now if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Fletcher v. Rylands* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their lordships that, given resulting injury such as is postulated in *Fletcher v. Rylands*, and the principle would apply.

But this is only one half of the question, and it remains to be seen if the injury postulated is present. Was there such resulting injury as to found a claim on the principle of *Fletcher v. Rylands*? Now in the present case neither person nor property was injured (unless the ingenious suggestion of Mr. Bousfield could be entertained, that physical injury was done to the paper, which was smudged by the eccentric action of the recording apparatus). Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property. Now the kind and degree of interference with the respondents' property is pretty well illustrated by the fact that it can only take place if the cable is constructed without certain precautions, for, given the cable as it now is, there is no injury. This is referred to, not because their lordships consider that the respondents have made out that the twin cable had the general use and recognition which they ascribed to it, but as showing that it cannot be predicated of the electric escape in question that it is destructive of telegraphic communication generally, but only that it affects instruments made in a certain way. Now if the instrument be taken as it was when the injury occurred, its nature is such that to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours. To describe this as a delicate instrument might be inaccurate, if the term were used in relation to other electrical instruments of extreme sensibility. But in the present discussion this is not the true comparison at all.

The true comparison is with things used in the ordinary enjoyment of property, and

his instrument differs from such things in peculiar liability to be affected by even minute currents of electricity. Now, having regard to the assumptions of the appellants' argument, it seems necessary to point out that the appellants, as licensees, to lay their cable in the sea, and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operations of their neighbours, they must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure. The principle of *Fletcher v. Rylands*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the non-natural uses of his neighbour's property. Nor need the law be regarded as showing any want of adaptability to modern circumstances if this be the true view, for the liability thus limited is of insurance and not for negligence, and all the remedies for negligence remain.

While agreeing in the result with the Supreme Court on the common law branch of this case, their lordships are not prepared to accede to some of the comments made on *Fletcher v. Rylands*.

The learned judges of the Supreme Court have indicated considerable reluctance to accept the doctrine of that case, and seem to regard it as more or less inconsistent with the principles of the Roman law, upon which the law of the Colony is based. Their lordships are unable to find adequate grounds for this view, and it was not maintained at the bar. It is not supported by the texts or decisions which illustrate the full recognition of the right of an owner freely to use his property for natural purposes, even although loss to his neighbour may result. Nor, on the other hand, does the prominence given to *culpa* in Roman law preclude the reception of the doctrine now under consideration into legal systems founded on

the civil law. The learned judges, and also Mr. Justice Kekewich, in the National Telephone Companies, seem to have been inaccurately informed on this point; for, as matter of fact, not only is the principle of *Fletcher v. Rylands* fully accepted in Scotland, but it had formed part of the law of Scotland before *Fletcher v. Rylands* was decided, and *Fletcher v. Rylands* has been treated by the Scotch Courts as an authoritative exposition of law common to both countries.

So far, then, as the respondents' liability is governed by the common law, their lordships, on the grounds already stated, do not consider the appellants' claim to be maintainable. It remains to consider the liabilities of the respondents for the escape of electricity on those sections of their line which have been constructed under statutes.

The provisions of the several statutes authorising the several sections are identical; and section 4, sub-section D, of Act 22 of 1895, has been taken as the text of the argument. The statutes have, of course, direct and express relation to electricity as the motive power. The company, under those statutes, have right to maintain and work all necessary power and stations, subject to the approval and in accordance with any resolution or standing order of the Council of the City of Cape Town: "Provided that . . . the company specially undertakes that, in the event of any electric leak taking place and damage being thereby caused at any time by electrolysis or otherwise, it will reimburse and make good to the Council, or other body or person, all costs, damages, and expenses to which the Council, or other body or person, may be put by reason thereof; and provided further, that nothing in this Act contained shall entitle the company to use the rails of any of the said lines of tramway as a part of its system of conductors for the return electrical current, without the consent of the Council first had and obtained" The consent of the Council to the use of the rails for the return current was had and obtained, under certain conditions, of which the 4th is as follows:

"4. If at any time and at any place a test be made by connecting a galvanometer or other current indicator to the insulated return and to any pipes in the vicinity, it shall always be possible to reverse the direction of any current indicated by interposing a battery of three Leclanche cells, connected in series, if the direction of the current is from the return to the pipe, and by interposing one Leclanche cell if the direction of

the current is from the pipe to the return. If at any time a greater leakage is discovered than would render it possible for the current to be reversed in the manner above indicated, the same shall be localised and removed as soon as practicable, and the running of the cars shall be stopped unless the leak is so localised and removed within twenty-four hours.”

The first question then is, was it a leak, either in the sense of the statutory undertaking or of this condition, that sent out this electricity which reached the cable? For if so, the stipulated liability has been incurred. Their Lordships are unable to think that it was. The language of both the statutory undertaking and of the condition seems to point to some defect in apparatus, not contemplated as a condition of the working of the system. But the *départure* of the electricity from the rails arose from no defect but from the necessary condition of things, if the tramcars were to run and the rails to be used

as a return. The evidence shows clearly that if uninsulated (as was the case here), the rails of necessity conduct home to the central station only some of the electricity, the rest leaving the rails and going afield. Giving to the word “leak” whatever expansion may be appropriate to its extension to electricity, their Lordships do not, consider the event which has occurred to fall within the undertaking and condition. The escape was, on the contrary, a natural incident of the operations legalised under the statutes.

The argument of the respondents on the words “or otherwise,” as limited by the preceding word “electrolysis,” did not command their Lordships’ assent; but it is superseded by the other grounds of judgment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the judgment of the Supreme Court affirmed. The Appellants will pay the costs of the appeal.



CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT.

(IN CHAMBERS.)

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

PETITION OF JAN DU PLESSIS. { 1901.
Oct. 2nd.

Civil imprisonment — Release — In-
solvency.

This was an application for the release of Jan du Plessis from civil imprisonment.

In his petition the applicant stated that he was on July 24 last, arrested at the suit of Elizabeth M. Brown, widow, Thomas West Edkins, and William Bridgman Brown, trading under the style or firm of Charles Brown and Co., and was lodged in gaol at Lady Frere, in the district of Glen Grey, where he still was, and which arrest still subsisted. On or about August 28 last, the surrender of petitioner's estate was duly accepted by the Eastern Districts Court. Wherefore the petitioner prayed that their lordships might be pleased to discharge him from the said arrest, and to release him from his imprisonment.

The affidavit of Thomas West Edkins, one of the partners of the firm of Charles Brown and Co., carrying on business in Queen's Town, stated that Du Plessis had been resident on the farm Glen Grey Reserve for upwards of ten years. There were on the said farm, which was about 1,500 morgen in extent, splendid agricultural lands, strong permanent water, and very good grazing for all kinds of stock. The said John du Plessis was now and had been for many years past occupying the said farm, and enjoying all the privileges attached thereto, without any burden of rent or otherwise, except as to the Government quitrent, which he had to pay annually, and which amounted to £37 10s. The

farm Glen Grey Reserve belonged to his father, Marthinus du Plessis, a rich farmer of that district. Some years back John du Plessis started dealing with deponent's firm, who gave him credit, and he always paid off his indebtedness by farm produce and in cash. About 1897 John du Plessis came, and proposed to deponent's firm that they should give him some goods on credit to open a shop on his farm, saying that as he was on the border of Kafirland, he could do very well in trade there, and work up a good business. Knowing that John du Plessis was farming the place free and practically without any burdens attached thereto, and knowing that it was a good farm, and for the reason that he had always led them to believe that he was doing well on the farm, and that he could do still better with a shop in conjunction with his farming operations, deponent's firm gave goods to the value of about £100 on credit, on the understanding that he had to pay them off in monthly instalments in farm produce and in cash. For the first few months subsequent to their giving him goods, he used to pay off as agreed, and in consequence, and at his request, they gave him further credit. Afterwards, within one year after the business was opened, John du Plessis failed to make any payments, and they did not give him further credit. In September, 1898, the said John du Plessis came to them and asked for an extension of time wherein to pay his indebtedness, and faithfully promised to bring them in all his farm produce in reduction of his indebtedness. They believed him, and accepted three promissory notes for the amount due to them, as follows: One for £155 15s. 2d., maturing on December 1, 1898, one for £158 16s., maturing on March 1, 1899, and one for £161 18s., maturing on June 1, 1899. In August, 1899, Du Plessis only brought them in twenty-five bags of mealies, valued at £20 17s. 7d., for which they gave him credit. He at the same time reaped seventy-five more bags, which he did not bring in to them, as faithfully promised, but sold some

elsewhere, and with part of the proceeds of the said sale he bought a buck wagon, which he had afterwards for some time in transport service at a good rental. As the said John du Plessis had made no further efforts, had failed to keep his promises as to paying them, and as he made no further efforts to discharge his liability, deponent's firm took proceedings in the Supreme Court against him, and finally obtained a decree of civil imprisonment against him, in terms whereof his person had been attached and lodged in gaol. While such proceedings were going on, he never made any offer of settlement to them, or tried in any way to meet them. When they, in the first instance, gave him credit for shop goods, it was distinctly agreed that he should pay his cash takings to them, as well as the farm produce, in reduction of his indebtedness; but they found from inquiries made afterwards that he speculated with the money in other things, instead of paying them. Du Plessis had now surrendered his estate as insolvent, and his liabilities so far exceeded his assets that his creditors would get very little out of it, something like 2s. in the £. This state of affairs was the result of sheer negligence and inattention to his business and farming operations on the part of Du Plessis. Deponent himself possessed a farm adjoining that of Du Plessis, and his people had all along been doing well. If Du Plessis had exercised ordinary care and diligence, he should, in view of the good place he farmed, and the easy terms on which he occupied the farm, and that the trade was good during the year he had the shop on the farm, not be indebted to them in any money. Deponent's firm had been wilfully misled by Du Plessis when they gave him credit, and having regard to the outward appearance of his financial position, they could not then reasonably suspect him of any inability to pay. They had always been willing to meet him in the discharge of his liabilities, if he had only showed willingness on his part to do so, but he never did. Du Plessis therefore obtained goods under wrong pretences from deponent's firm. Du Plessis had every opportunity of discharging his indebtedness, but did not keep his promises, and carelessly and negligently allowed his estate to dwindle away. Deponent's firm had lost heavily by the said Du Plessis, and such loss was not due to any carelessness on their part; but they were misled by what the said Du Plessis told them about his financial position, and by the fact that they knew

on what easy terms he was farming Glen Grey Reserve, and that his people were well-to-do. Deponent's firm would get nothing out of Du Plessis' estate. They had incurred a lot of expense in recovering the amount due to them and in obtaining a decree of civil imprisonment, and they had only resorted to such extreme steps after having tried everything else to obtain a settlement from Du Plessis and his release from imprisonment would only allow him to escape a just punishment, which was obtained as the only remedy open to deponent's firm.

A replying affidavit for the applicant was put in from the bar. In this, he stated that ~~was~~ losses were due to rinderpest and locusts. He admitted that, in years when plenty of rain fell, he got good crops off his farm, but stated that, owing to droughts, his farming operations had not been a success, and also in dry years wire-worm destroyed a lot of small stock, such as sheep and goats. The promissory notes were given in good faith, and he believed that, with fair seasons, he would have been able to meet them. He specifically denied that he had misled the respondents as to his financial position, or that his estate had dwindled away owing to any fault of his. He added that he had a wife and six children dependent upon him.

Mr. S. Solomon (for applicant): The affidavits of respondents show no sufficient ground for refusing the release in the last paragraph. They say that they wish to keep him in prison as a punishment. Our law does not recognise civil imprisonment as a punishment, but merely as a mode of compelling a man who has the means of doing so to satisfy his legal obligations to his creditors. Section 6 of Act 8 of 1879 leaves the matter in the discretion of the Court.

Mr. Searle, K.C. (for respondents): The Court has sometimes exercised its discretion by refusing to release from civil imprisonment. In the case of *De la Cornilliere* (1 Roscoe, 430) the applicant was released on giving security not to quit the Colony. In *Re Schenk* (Buch., 1876, p. 8) notice of the application had to be given to the creditor. As release is not granted, as a matter of course we certainly cannot be made to pay costs. Act 8 of 1879, section 6, does not abolish civil imprisonment. If a man swears he has nothing, of course he will be released, but here applicant has done next to nothing to satisfy his obligations. He has paid only £20 out of some £400 or £500.

Mr. Solomon did not press for costs.

The Acting Chief Justice, in giving judgment, said: The applicant in this case was indebted to the respondents in a considerable sum of money. They obtained judgment against him, and this judgment not being satisfied, they were granted a decree of civil imprisonment. On his arrest the applicant applied to the Eastern Districts Court for the sequestration of his estate as insolvent. This was accepted, and the applicant now applies under the 22nd section of the Insolvent Ordinance for his release from imprisonment. This 22nd section, in brief, assumes that a debtor who surrenders his estate shall be released from imprisonment by order of the Supreme Court or of any judge thereof, or of any Circuit Court, in case such judge or Court shall not see cause to refuse to make such order. The Insolvent Ordinance was enacted in 1843 at a time when there was a very different conception of the object of civil imprisonment than now prevails, because in 1879 the General Law Amendment Act was passed, which laid down that the Court should not grant writs of civil imprisonment if the debtor could satisfy the Court that he had no property or means sufficient to satisfy in whole or in part the judgment. If, therefore, after the passing of that Act the Court should not grant a writ of imprisonment where the debtor had no means, so the Court ought to release a debtor who is imprisoned and who can satisfy the Court that he has no means. In this case the debtor has surrendered his estate, and has been divested of the whole of his property for the benefit of his creditors, and cannot, as against his trustee, until after the confirmation of the liquidation account in the estate, possess or acquire any property. It is therefore perfectly clear that he has no means to satisfy the judgment in whole or in part. The respondents in the present case have endeavoured to show that the applicant improperly incurred these liabilities, and urge if he is released he will escape his just punishment. Such an idea of punishment, however, is no longer recognised by law. If a debtor has infringed the Insolvent Ordinance then he can be punished under that Ordinance, but punishment by means of civil imprisonment is no longer recognised by the law. The application will be granted, but no order will be made as to costs, because the applicant was wrong in the first instance in calling upon the creditors to show cause why the application should not be granted, and why they should not pay the costs of the

application. Under any circumstances the applicant had to come to the Court, and if it had not been for the latter part of that notice the respondents might probably not have come into court.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSION. } 1901.
 } Oct. 12th.

Mr. Gardiner moved for the admission of Arthur Edmund Robertson as an attorney.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate of King William's Town.

PROVISIONAL ROLL.

ZIETSMAN V. DE VRIES AND OTHERS.

Mr. C. de Villiers applied for provisional sentence upon a mortgage bond for £50, with 10 per cent. interest from July 1. The bond had become due by reason of three months' notice having been given, in accordance with the terms of the bond. It was also asked that the property specially hypothecated be declared executable.

Order granted, and the property declared executable.

MITCHELL V. STRUMPHER.

Mr. Currey appeared for the plaintiff, and asked that this matter be allowed to stand over, as it was in course of settlement.

The matter was ordered to stand over.

VISSEER V. MARCUS AND OTHERS.

Mr. De Waal moved for provisional sentence upon a mortgage bond for £100.

Order granted, and the property specially hypothecated declared executable.

DE WAAL V. FOURIE.

Mr. Gardiner moved for provisional sentence on a promissory note for £250, together with interest from July 1, 1897, and also for judgment, under Rule 329d, for the sum of £2 2s., goods sold and delivered by plaintiff to defendant.

Provisional sentence and judgment granted as prayed.

MORITZ V. GINN.

Mr. Gardiner moved for a writ of civil imprisonment against the defendant on an unsatisfied judgment of the Court for £33 1s. 7d., together with costs amounting to £9 12s. 4d.

Defendant appeared in person, and having gone into the witness-box, said he had no means, and at present was only earning 4s. 6d per day at the Docks. He had at one time been engaged in a confectionery business, but his partner had left four months ago, and all the money had disappeared with him. He did not know if any of the machinery was left, and at any rate, it did not belong to witness, but to his partner.

Mr. Justice Maasdorp said it was quite clear that the man had no property, and no order would be made.

LOUW V. RHODES AND RADZIWILL. } 1901.
Oct. 12th.

Mr. Searle, K.C., moved for provisional sentence on a promissory note purporting to have been signed by the Right Hon. C. J. Rhodes, and promising to pay to Catherine Radziwill the sum of £2,000 for value received. On this promissory note the plaintiff, Mr. T. A. J. Louw, had advanced to the defendant Radziwill the sum of £1,150, and provisional sentence for that amount, with costs, was now asked.

Sir Henry Juta, K.C., appeared for the defendant Rhodes, and applied for a postponement of the case as against him. Counsel read an affidavit made by Mr. L. L. Michell the general manager of the Standard Bank, in which Mr. Michell stated that he held a general power of attorney from Mr. Rhodes. On hearing of the existence of the document upon which summons had been issued, he wrote to Mr. Rhodes to inquire if the signature to the document was genuine, and had received a cable in reply stating that Mr. Rhodes repudiated having signed any such document and denied all knowledge of it. From a communication received, he (Mr. Michell) believed that Mr. Rhodes was not indebted to the endorser of the note in any sum whatever. Affidavits were being mailed from England confirming these statements. Continuing, Mr. Michell said Mr. Rhodes was in indifferent health, and his medical advisers insisted upon his remaining in Europe for the present, so that it was not anticipated that he would return to this country for some time to come. Proceeding, counsel said that the signature having

been denied, the ordinary procedure, if the parties had been present, would have been to call evidence at once. However, the parties were not all here, but the affidavits which were being mailed would give more particulars, and, therefore, it would be better to allow the part of the case as against Mr. Rhodes to stand over.

Mr. Searle said he had no objection to the postponement as against Mr. Rhodes, but, of course, provisional sentence would be given against the second defendant, Princess Radziwill, upon whom notice had been served, but for whom there was now no appearance.

The application as against the defendant Rhodes was allowed to stand over until November 1, but provisional sentence was granted as prayed against the defendant Radziwill.

BUDLER V. JOUBERT AND ANOTHER.

Mr. Benjamin moved for provisional sentence upon a mortgage bond for £800, with interest from July 1. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

CLARK V. PETER HOLZ.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £100, together with £16 9s., taxed costs, and £1 12s. 6d., Sheriff's costs.

Mr. Wilkinson appeared for the defendant, who went into the box and said that at present he was working on commission in a photographer's business, and expected to make about £10 or £12 a month. He made an offer to pay the debt by instalments of £1 per month. He had at one time offered to pay the debt by instalments of £5 per month, but at that time he expected to get an engagement at £18 per month. He had to support his wife and family and mother-in-law.

A decree of civil imprisonment was granted as prayed, but execution stayed pending payment of instalments of £1 per month, the first instalment to be paid on November 1.

BELLEVLIE PROPRIETORS V. JESSE COHEN.

Mr. De Waal moved for a decree of civil imprisonment against defendant, but said it

had been agreed that execution should be suspended upon payment of the debt, £32, by instalments of £2 10s. per month.

Decree of civil imprisonment granted, but execution stayed pending payment of instalments of £2 10s. per month.

SOUTH AFRICAN ELECTRIC PRINTING CO. V CATHERINE RADZIWILL.

Mr. Benjamin moved for confirmation of a writ of arrest against the defendant, Princess Radziwill. He also moved for judgment under Rule 329d, for the sum of £113 19s. 8d. for work and labour done, and costs. As to the writ of arrest, the defendant had given security, but had not entered an appearance, and therefore, in accordance with a previous decision of the Court, the proper course was to ask for confirmation of the writ.

The writ was confirmed, and provisional sentence granted as prayed.

PURCELL AND OTHERS V. WEINTROB AND ANOTHER.

Mr. Close moved for provisional sentence upon promissory notes for £100, less £50 paid on account, with interest and costs of suit.

Provisional sentence granted as prayed.

MABAIIS V. HENDRIKSZ.

Mr. Howel Jones moved for provisional sentence upon a mortgage bond for £1,200, with interest at the rate of 5 per cent. from July, 1899. The bond had become due by reason of the non-payment of interest.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

PEABODY V. BLACK AND LYON V. BLACK.

Mr. Benjamin appeared for the plaintiffs and Mr. Gardiner for the defendant in these two cases, and as certain affidavits had just been put in, the cases were postponed until November 1.

BACON V. A. BERLYN.

Mr. Close moved for provisional sentence upon a judgment of the Wynberg Resident Magistrate's Court, to which a return of *nulla bona* had been made, and he also applied for a decree of civil imprisonment against the defendant on that return. Counsel quoted the case of *Mostert v. Forde* (10 Sheil, p. 344), where similar orders had been granted. In the present case, an attempt

had been made to obtain a civil imprisonment decree in the Wynberg Magistrate's Court, but an exception taken by defendant to the effect that the Magistrate had no jurisdiction was upheld, the defendant having since the judgment removed from Wynberg to Cape Town.

Provisional sentence and a decree of civil imprisonment were granted as prayed.

ILLIQUID ROLL.

LOXTON BROS. V. HENRY DE KLERK.

Mr. Close moved for judgment, under Rule 329d, for £30 0s. 9d., being balance of purchase money of goods sold and delivered.

Judgment granted as prayed.

JOSLING V. HENRY DE KLERK.

Mr. Close moved for judgment, under Rule 329d, for £22 11s. 6d. for goods sold and delivered.

Judgment granted as prayed.

LATEGAN V. LATIGAN.

Mr. Gardiner moved for judgment, under Rule 329d, for the sum of £1,000, being the value of certain 1,000 sheep belonging to plaintiff. The sheep had come into defendant's possession under a certain verbal lease, and defendant had failed to deliver them up. Judgment was also asked for £150, being rent of farm, and for £100, cash advanced.

Judgment granted as prayed.

AREND V. J. MAKEIN.

Mr. Wilkinson moved for judgment, under Rule 319, for £23 in default of plea.

Judgment granted as prayed.

DRAPKIN V. H. DANEMAN.

Mr. Alexander moved for judgment, under Rule 329d, for £88 5s. 6d., goods sold and delivered.

Judgment granted as prayed.

OHLSSON'S CAPE BREWERIES V. WOBBE.

Mr. Solomon moved for judgment, under Rule 329d, for £76 6s., less £56 6s., paid on account.

Judgment granted as prayed.

VAN REENEN V. LANGE.

Mr. Solomon moved for judgment, under Rule 329d, for £30.

Judgment granted as prayed.

ANDERSON V. CATHERINE RADZIWILL.

Mr. Solomon moved for judgment, under Rule 329d, for £44, for rent.

Judgment granted as prayed.

ANDERSON V. F. W. SMITH

Mr. B. Uppington moved for judgment, under Rule 329d, for £36, for rent.

Judgment granted as prayed.

REHABILITATIONS.

Mr. Benjamin moved, under section 117 of the Insolvent Ordinance, for the rehabilitation of the insolvent estate of Jan Christoffel de Villiers. The certificate of the Master, certifying that the requisite number of creditors had agreed, was put in.

Order granted as prayed.

Mr. J. E. R. de Villiers moved, under section 117 of the Insolvent Ordinance, for the rehabilitation of the insolvent estate of Andrew Hewat. The usual certificate from the Master was put in.

Order granted as prayed.

Mr. Russel moved, under section 106 of the Insolvent Ordinance, for the discharge of the estate of Samuel Hyman Cramer from insolvency.

Order granted as prayed.

GENERAL MOTIONS.**IN THE ESTATE OF THE LATE JAN ISAAC LENNECKS.**

Mr. Benjamin moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

PETITION OF THE KERKERAAD OF THE DUTCH REFORMED CHURCH AT TULBAGH.

Mr. C. de Villiers moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

PETITION OF NYAKA MPAHLANA.

Mr. P. S. Jones moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

PETITION OF OKKEER JOHANNES OLIVIER.

Mr. De Waal moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

PETITION OF JACOB TOBIAS.

Mr. Close moved that a rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

**ANDERSON V. ANDERSON. { 1901.
Oct. 12th.**

Mr. Gardiner moved in this matter, which was for the revival of an order for the restitution of conjugal rights. A number of years ago the respondent deserted petitioner, and in November, 1894, the latter received information to the effect that his wife was in service at Rondebosch. In the beginning of 1895 petitioner instituted in the Supreme Court proceedings for the restitution of conjugal rights, failing which for divorce, and a rule *nisi* was obtained, personal service to be effected. However, it was found impossible to effect such service, the respondent having in the meantime left Rondebosch, and an extension of the return day was afterwards granted. It was again found impossible to effect service, and since the date of these proceedings in 1895, petitioner had been unable to obtain any information as to his wife's whereabouts. He therefore prayed for a revival of the order, and also asked for directions as to the mode of service.

Mr. Justice Maasdorp pointed out that in the affidavit it was only stated in the most casual way that the wife could not be found, and besides, something might have happened since the date of the order which would bar the order being revived. Therefore no order would be made on the present application. If further proceedings were taken an attempt must be made to effect service in the ordinary way.

INSOLVENT ESTATE OF ERASMUS V. ERASMUS.

Mr. Benjamin moved that a rule *nisi* authorising the transfer of certain property be made absolute. It appeared that a deed of separation had been drawn up between the respondent and his wife, the insolvent. Under this deed the respondent agreed that certain property, including an erf at Venterstad, should go to the wife. That erf, however, had never been trans-

ferred into the wife's name, so that it could be disposed of for the benefit of her creditors.

After hearing counsel,

Mr. Justice Maasdorp said that the Court could not on a motion give judgment on such a contract. The erf was still registered in the name of the husband, and the only right the trustee now had, if he had any, would depend upon what took place between the parties after the deed of separation. That deed of separation was the only right he would have to enforce such right as the wife might have under the contract. It was now asked that such right be enforced by granting on a motion a judgment for the transfer of the property, but his lordship did not think the Court had ever carried the rule so far as that. If there were any rights proceedings to enforce them must be taken in the ordinary way if desired. No order would be made.

IN THE MATTER OF THE MINOR JOHANNA CATHARINA SWART.

Mr. P. S. Jones moved for an order for authority to the guardian of the above minor to pay out of the estate certain moneys disbursed on her behalf. The Master had reported that it appeared to be a case in which the expenditure might be authorised.

An order was granted in terms of the Master's report.

SUPREME COURT

[Before the Hon. Mr. Justice JONES and the Hon. Mr. Justice MAASDORP.]

Ex parte DU TOIT. { 1901.
Oct. 14th.

Mr. Benjamin moved in the matter of the petition of Edward Wedel du Toit, who, in his capacity as the curator of the property of Maria Elizabeth Meintjes, asked for an amendment of an order of Court confirming the sale, for £850, of certain landed property in the estate. It appeared that by a clerical error £850 was given as the purchase price, instead of £855, and the extent of the land had been given as 1,172 morgen 100 square roods, instead of 1,672 morgen 100 square roods. It was therefore sought to

have the order amended, so as to set forth the correct purchase price and measurement. Counsel pointed out that the Master, when considering the matter for report, must have been aware of the correct extent of the land, as the title deeds, which he would have before him, gave that.

Order amended as prayed.

Ex parte GOOSEN.

Mr. Alexander moved for an order authorising the Registrar of Deeds to pass transfer of a certain piece of land situated in Queen's Town, and belonging to an estate of which the petitioner is executor testamentary. The Registrar reported that the price received for the land was fair and reasonable.

Order granted as prayed.

Ex parte OOSTHUIZEN. { 1901.
Oct. 14th.
Nov. 1st.

This was an application for an order authorising the Registrar of Deeds to register the transfer of certain property.

The petition of Ockert Almero Oosthuizen stated that

1. Under their joint will the parents of petitioner, viz., Jacobus Daniel Johannes Oosthuizen and Sophia Johanna Oosthuizen (the latter now deceased) made certain bequests of landed property to their sons on conditions set forth in the said will.

[The clauses of the will to which the present petition referred were as follows: (1) We bequeath the farm Middlewater, after the death of both of us, to our son, Ockert Almero Oosthuizen, together with the half of the sheep and goats, which after the death of both of us shall be in our estate, with the exception of the bequest mentioned in the third clause hereof. (3) We bequeath after the death of both of us, to our son, John Pieter Oosthuizen, the farms called . . . together with all the cattle and other things which shall be on them, or belong to them at that time.]

2. The testator is alive, but the testatrix died in June, 1883, leaving the following sons: (1) Ockert Almero, (2) Frederick Simon, (3) John Pieter, (4) Peter Marincowitz, who died on 24th January, 1896, leaving two minor children, viz., Daniel Johannes and Catharina Jane.

3. The testator has agreed to give immediate transfer to petitioner of Middlewater

in the division of Prince Albert, the said testator being willing to waive his rights thereto under the said joint will.

4. The Registrar of Deeds declines to register the deed of transfer of the said farm, on the ground that under the will the bequest of the said farm only vests in petitioner on the death of the survivor.

5. The other surviving sons, viz., Frederick Simon and John Pieter, are agreeable to the above transfer being passed.

Wherefore petitioner prays for an order directing the Registrar of Deeds to register the said transfer of the property mentioned in paragraph 3.

The matter had been before the Court on September 12, 1901, when it was ordered to stand over for further information, and notice to the guardian of the deceased son's children.

Mr. Searle, K.C., moved for the order, and the matter was further ordered to stand over for notice to petitioner's minor children.

Mr. Benjamin was appointed *curator ad litem* to the said minors.

Postea (November 1).

The Court granted an order as prayed.

[Applicant's Attorneys, Messrs. Reitz and Herold.]

MILLER V. MILLER.

Mr. C. de Villiers moved that the rule *nisi* granted on August 26, calling upon the respondent to restore to plaintiff her conjugal rights, failing which, to show cause why a decree of divorce should not be granted, be made absolute. Respondent had not restored to plaintiff her conjugal rights.

A decree of divorce was granted, the plaintiff to have custody of the minor children of the marriage.

Ex parte HUNTER.

Mr. Close moved for leave to the petitioner to sell certain property in which his minor son was interested, and of which property petitioner and his wife had the usufruct for life. The houses on the property, which is situated at Woodstock, had been condemned under the Public Health Act as unfit for human habitation. It was thought advisable that the property should be sold by public auction to the highest bidders, and the net proceeds invested in other landed property for the benefit, during their lives, of the said John Hunter and Eliza Hunter. It was suggested that the Colonial

Orphan Chamber invest such proceeds, and that Samuel Tonkin, of Rosebank, be appointed receiver in the matter. The Master's report was favourable to the course suggested being adopted.

An order was made in terms of the Master's report, and Samuel Tonkin, of Rosebank, was appointed receiver.

ABRAHAMSE V. ABRAHAMSE.

Mr. J. E. R. de Villiers moved that the rule *nisi*, calling upon the defendant to show cause why the applicant (his wife) should not sue him *in forma pauperis* for divorce, be made absolute. Counsel said that there had been some difficulty with regard to service, the assistant at defendant's last known place of residence having refused to receive the service there. An endeavour had been made to trace defendant's whereabouts, but without success. Recently the applicant met her husband on the Parade, and asked him to accept a copy of the notice, but he said they could leave it at his home. She then asked him where his home was, and he refused to tell her. She told him that the notice was one calling upon him to appear, and show cause why she should not sue him *in forma pauperis* for divorce, and he said in reply that he would not appear, as he was going away.

The rule *nisi* was made absolute, Mr. J. E. R. de Villiers being appointed counsel, and Messrs. Van Zyl and Buissinne attorneys for the plaintiff.

DILWORTH V. DILWORTH.

Mr. Close, for the petitioner, moved that the rule *nisi* granted on August 28 last, calling upon the respondent to restore to plaintiff his conjugal rights, failing which to show cause why a decree of divorce should not be granted, be made absolute. The defendant had not restored to him his conjugal rights.

A decree of divorce was granted, plaintiff to have custody of the minor son of the marriage.

KRISEMAN V. COLONIAL GOVERNMENT.

This was an application for judgment under Rule 330. The plaintiff not having filed his declaration within the time provided for by the rule, had been barred.

Mr. Sheil, K.C., appeared for the Government, and moved for judgment, which was granted as prayed.

HARMAN V. COLONIAL GOVERNMENT.

This was an application for judgment under Rule 330. The plaintiff not having filed his declaration within the time provided for by the rule, had been barred.

Mr. Sheil, K.C., appeared for the Government, and moved for judgment, which was granted as prayed.

Ex parte **THE PAARL SPIRIT CO.**

This was a motion for the appointment of an official liquidator. The petition set forth that the directors of the Paarl Spirit Company, which was formed at Paarl, with unlimited liability, in September, 1841, with a capital of £3,000, divided into 400 shares of £7 10s. each, were the petitioners. Clause 33 of the trust deed provided that the company should continue for seven years, but its duration might be renewed every seven years for a further period of seven years. The duration of the company was so extended from time to time, until in April last year the shareholders determined by a resolution that the company should cease by the effluxion of time on October 31 last year. The directors proceeded to liquidate the company, but last September a meeting of shareholders recommended that an official liquidator be appointed, and that Mr. J. I. de Villiers, in his capacity of secretary of the Paarl Board of Executors, be appointed official liquidator. So far, the liquidation had been very successful, £26 10s. having been returned on every £7 10s. share, and from the profit and loss account it would be seen that there was a sum of £293 5s. 2d. remaining. The liabilities, so far as known, were nil, but it was desirable that the company should be placed in official liquidation to facilitate final winding up, in terms of Act No. 25 of 1892, and the Court was asked also fix a date within which all claims against the company must be filed. It was also asked that Messrs. Walker and Jacobson be appointed the solicitors in the official liquidation.

Mr. Searle, K.C., moved.

The Court granted an order placing the company in official liquidation, Mr. De Villiers being appointed official liquidator, with the usual powers conferred by section 149 of the Act No. 25 of 1892; all claims against the company to be filed on or before January 31, 1902, and Messrs. Walker and Jacobson being appointed solicitors in the liquidation.

Ex parte **VAN WYK.**

Mr. Close applied for the appointment of a *curator ad litem*.

An order was granted, in terms of the Master's report.

GAY V. GAY.

Mr. Benjamin appeared in an application by Thomas Gay for leave to sue by edictal citation.

It was alleged that the wife (respondent) deserted her husband, and could not now be found. Petitioner wished to sue for restitution of conjugal rights. Counsel said that the wife's parents had been communicated with, but knew nothing of her whereabouts. He moved for an order for substituted service, as an alternative for personal service.

Mr. Justice Jones said that in these cases when the Court granted substituted service they should know something as to where the person was last heard of, and as to the attempts made to discover where the person was. This case would stand over *sine die* for explanation to the Court as to what efforts had been made to find respondent, and for information concerning where she was last heard of.

Ex parte **HAUMAN.** { 1901.
Oct. 14th.

Minor—Mortgage bond—Land—Bequest price.

The Court authorised a minor to pass a mortgage bond on landed property bequeathed to him by will to enable him to pay the bequest price.

This was an application for leave to mortgage a share of a certain bequest.

The petition of Gerard Wachtendonk Hauman, of Caledon, in his capacity as natural guardian of his minor son, Johannes Stephanus Hauman, set forth:

1. That the minor aforesaid was about 20 years of age.

2. That by the last will of petitioner and his deceased wife, dated 4th of May, 1897, the farms Tranendal and Diep Gat, situate in the division of Caledon, were bequeathed to petitioner's two sons, Stephanus J. D. Hauman and Johannes S. Hauman, for the sum of £1,500.

3. That petitioner is desirous of transferring the said farms to his said two sons in terms of the aforesaid will, but that the

one son, Johannes S. Hauman, is still a minor, and is therefore unable to pass a bond for his share of the bequest money to be paid by him into the said estate, he not being in a position to pay the said share.

4. That it is to the interest of the said legatees to take transfer of the property.

Wherefore petitioner prays for an order authorising the said minor, Johannes S. Hauman, to pass a bond over his shares of the aforesaid bequest properties for the sum of £750, being amount required by him to pay his shares of the bequest price.

The Master recommended that the prayer of petitioner be granted.

On the motion of Mr. De Waal, the Court granted an order as prayed.

[Applicant's Attorneys, Messrs. Dempers and Van Ryneveld.]

Ex parte BREDEVELD. (1901.
(Oct. 14th.

Mortgage—Land—Repairs.

The Court authorised the passing of a mortgage bond on landed property to raise money for the execution of necessary repairs, although in terms of the will which bequeathed the land, the raising of money by means of mortgage was forbidden.

This was an application for leave to mortgage certain property.

The petition of Jan Petrus Bredeveld, of Goodgift, Simon's Town, set forth:

1. That petitioner had been duly appointed executor testamentary of the estate of his late father, Hendrick N. Bredeveld (hereinafter styled the testator) by letters of administration dated August 13, 1901.

2. On or about September 17, 1873, the testator executed his last will and testament, and on May 14, 1887, he died without having revoked the same.

3. The testator, in his said will, bequeathed to his three children, viz., to petitioner, Jan P. Bredeveld, Hester M. Bredeveld, and Hendrik F. Bredeveld, all his property, whether movable or immovable, subject *inter alia* to the following condition:

(a) That the property or estate belonging to the testator shall be and remain the lawful property of his three abovementioned children, and of their grandchildren, even so long as one of the family of Brede-

veld may still be living, and that the abovementioned property shall not be sold, publicly or privately, and that not one of these heirs shall have the right to mortgage the place or raise money thereon, but that all descended from the testator, whether children, grandchildren, or after them, shall continue to reside undisturbed on the abovementioned property.

4. The said Hester Maria Bredeveld was married to one Christian Pietersen, and both she and her husband have died, leaving five children, of whom four are minors.

5. The estate of the said testator consisted of certain landed property, *inter alia* six erven situate at Swart River in the Cape Division.

6. On the said property there are four cottages. One of these cottages is occupied by the said Hendrik F. Bredeveld, and another by the children of the deceased Hester M. Bredeveld, free of rent. The other two cottages are let at a monthly rental of £1 each.

7. In or about the month of June last, petitioner received notice from the Municipal Council of Rondebosch that the Plague Medical Officer and Municipal Architect had condemned the said cottages as unfit for human habitation. Petitioner applied to the said Council to allow him time to obtain authority to raise money for executing the necessary repairs to the said cottages, and the said Council has agreed thereto.

8. According to specifications for the said alterations and repairs, the probable cost thereof will be £188 9s. 6d. Petitioner is a mason, and is prepared to execute the necessary repairs to the satisfaction of the builder and the municipal authorities for that amount.

9. Petitioner is desirous of taking up his residence on the said property so as to have the better control over it, and to improve it, and has had plans and specifications drawn for building a cottage suitable for such residence at a cost of £426 15s.

10. Petitioner is prepared to erect the said cottage, and will undertake to pay the estate a rental of £5 per month for the same.

11. Petitioner will have to raise a mortgage on the said property in order to effect the alterations required by the municipal authorities to the said cottages, and to erect the proposed cottage for his residence, and cannot do so without authority from this Honourable Court.

Wherefore petitioner prays for an order authorising him in his said capacity to raise a loan on and pass a bond specially hypothecating the abovementioned property for £675, for money to be lent and advanced for the purposes hereinbefore specified, and to pay the cost of this application, and of raising the loan and passing the bond. Or in the alternative, for the sum of £225 for money to be lent and advanced to effect the said repairs, and to pay costs of this application, and of raising the loan and passing the bond.

The Master recommended that the secretary of the General Estate and Orphan Chamber, or in the event of his refusal, some other fit and proper person, to be selected by the executor, be authorised to advance the amount actually required, not exceeding £225, and that the money so advanced be repaid by him out of the rents of the said property, and that the properties be handed over to the executor when the loan has been repaid.

On the motion of Mr. S. Solomon, the Court granted an order in terms of the Master's report.

[Applicant's Attorneys, Messrs. Van der Byl and Van der Horst.]

IN THE MATTER OF THE PETITION OF JAN PETRUS DANIEL KRIGE, ACTING RECTOR OF THE BOYS' HIGH SCHOOL, STELLENBOSCH, AND OTHERS.

Mr. Howel Jones moved for an order to attach certain moneys *ad fundandam jurisdictionem*. Counsel said that the petitioners wished to attach the moneys of one Van Coller, who was indebted to them to the extent of £260 altogether. It was believed that Van Coller had £200 deposited in the Standard Bank, and this sum was sought to be attached. Van Coller was now in Pretoria.

Leave was granted to attach *ad fundandam jurisdictionem*, the defendant to have leave to move to set aside the order. Leave was also given to sue by edictal citation, personal service to be effected. November 15 was fixed as the return day.

GREEN AND SEA POINT MUNICIPALITY V. DRAKE.

This was an application for an interdict restraining respondent from proceeding with certain buildings in Rochester-road until sanctioned by the Municipality.

Mr. Benjamin appeared for the Municipality.

A rule *nisi* was granted, with costs, to become absolute without further motion unless opposed on the first day of next term. The rule was ordered to operate as an interim interdict, defendant to have leave to anticipate if so advised.

THE COLONIAL GOVERNMENT V. MOWBRAY MUNICIPALITY AND OTHERS. } 1901. Oct. 14th.

Motion—Practice.

Where the affidavits of parties are contradictory, the Court will not decide the matter at issue on motion, but will order an action to be brought. The notice of motion may, however, be allowed to stand for the summons.

This was an application on notice to the Municipality of Mowbray and to eighteen householders residing within that Municipality that an interdict would be applied for restraining the respondents from allowing dirty water and offensive matter to flow down Trill-road on to the railway line at the Observatory-road Railway-station, and thereby creating a public nuisance. The costs of the application were claimed against the first-named respondents. In support of the application it was alleged that for a long time past complaints had been made about the offensive smell from dirty water which flowed on to the railway line from Trill-road, near the Observatory-road Station.

A railway detective stated on affidavit that on the 22nd January last, at 1.15 p.m., he was proceeding from Observatory-road Station up Trill-road, when he found a quantity of filthy liquid flowing down the road, which he traced as having come from the back of Disa Villas; that there was a Municipal slop-cart standing in Trill-road, and two coloured men were carrying slops in buckets from the tubs at the back of the houses to the cart; that it appeared that a portion of the contents of the tubs had been emptied into the drain; that he challenged one of the men, and he admitted having emptied the sediments of a tub into the drain, giving as a reason for doing so that he was afraid of blocking the outlet if he put it into the cart; that on the 26th February last he saw a quantity of soapy water

flowing from the back yard of house No. 20, Trill-road, and on the same day he saw a quantity of soapy water flowing from the back yard of house No. 7, Wyburd-road, where he found a quantity of linen which had evidently been washed on the premises hanging in the yard of No. 3 Disa Villas; that in Herman-road there are two blocks of houses abutting on Trill-road without any street drainage. He found dirty water from the houses becoming stagnant and spreading across Herman-road. With any flow of water from either of the blocks of houses the stagnant water would be bound to flow into Trill-road, and go down to the railway. In April and May he made further investigations, and found dirty water flowing from a number of houses in and off Trill-road. He annexed a schedule giving the houses from which the dirty water came with the names of the occupiers, the owners, the date, and the hour of inspection.

The affidavit of Louis Henry Cochrane, District Railway Engineer, alleged that the railway at Observatory-road Station and for some distance at either side runs through a cutting about 3 feet below the surrounding ground; that there is a ditch running along the southern side of the Observatory-road, which crosses the railway at right angles to the station, by means of which stormwater has for many years past been carried from the railway, and from the surrounding land to the servitude ditch leading into the Liesbeek River; that there has been a large increase in the number of houses at Observatory-road, especially above the railway, during the last few years. The drainage from a number of these houses has been either directed or allowed by the Mowbray Council to flow on to the railway, and from thence it flows into the ditch above referred to along the Observatory-road, which below the railway is the property of the Admiralty. The Mowbray Council has been frequently requested to abate the nuisance, but has failed to do so.

The Astronomer-Royal at the Royal Observatory has not only threatened to block but did recently actually partially block the ditch immediately below the railway, and it remains partially blocked.

The drainage water, which is discharged on to the railway line, is not only an intolerable nuisance, but is injurious to the health of the railway employees and others residing in the neighbourhood.

The drainage in question consists of urine, kitchen slops, and other dirty water.

It is absolutely necessary that this nuisance should, for the convenience and health of the railway officials and the travelling public, be abated.

The Medical Officer of Health for the Colony deposed that he inspected the drain on the 7th September last, and that he found that a considerable amount of sewage was conveyed down from the gutter on each side of Trill-road, and that the brick drain along the station contained a considerable amount of deposit. He expressed his opinion that the drain was a danger to health, and during hot weather might prove a nuisance. That at the time of his visit it was not particularly offensive to the nose, but this was no criterion of its danger. He satisfied himself that the material flowing down was undoubtedly sewage. In the first place, no rain had fallen for some time previous to his inspection, and therefore no stormwater could have been coming down. The water he found came from stable discharges, from sinks, dirty bath water, and washings of back yards and the like. It was almost certain that chamber slops had also been thrown into it, this being the most convenient way of getting rid of such matter, and one sure to be adopted by the occupants of the class of houses in this road.

Mr. Power, one of the assistants of the Astronomer Royal, also filed an affidavit, in which he dwelt upon the very serious nuisance which was occasioned, and pointed out that it was dangerous to the health and prejudicial to the comfort of the residents at and visitors to the Royal Observatory, and of persons passing therefrom to the Observatory-road Station.

For the respondents, it was alleged by the Mayor and by the Chief Sanitary Inspector that all the houses referred to in the applicants' affidavits are supplied with tubs, in which all kitchen and bedroom waterslops are placed, the tubs being regularly emptied every day into the Municipal carts, and removed.

That the gutters in Trill-road are swept and cleaned daily, and the work of removing sewage matter is well and properly carried out by a very efficient staff.

That there are no stables in Trill-road, and consequently no discharge from stables, as alleged, can possibly flow into the gutters of the said road.

That there is no overflow from the sanitary pails, as these are emptied regularly every week, which prevents the possibility of such an occurrence.

That the sanitary condition of Mowbray

is as perfect as it can be, in the absence of an underground system of drainage.

It was further alleged that there was no Municipal regulation in force whereby inhabitants can be prosecuted for washing their own clothes on their premises, and that one prosecution for doing so had failed.

The respondents, other than the Council, alleged that they were supplied with slop-tubs, into which all kitchen and bedroom slops were deposited.

That these tubs were emptied daily, and that the contents were taken away daily by the Municipal carts.

There was a further affidavit from the railway detective, in which he stated that, since the above affidavits were filed, he had again inspected the drain, and found no abatement of the nuisance.

Mr. Searle, K.C., and Mr. Sheil, K.C., appeared for the Government, and Sir Henry Juta, K.C., represented the defendant Municipality.

[Jones, J., asked how, in the face of the contradictory evidence, the Court could grant an interdict upon affidavits?

Mr. Searle submitted that there was sufficient evidence in the statements of the persons who saw the drains.

[Jones, J. : There may be abundant evidence on your side, but it is flatly contradicted on the other.]

Mr. Searle submitted that the evidence for the applicants was not flatly contradicted, and said that there must be offensive matter in the drain, because the sanitary inspector himself said that he cleaned it out every day, which he would not do if it was not offensive. In the course of his argument, counsel submitted that the Municipality must either take up the position that there was no water running down the drain or the position that no slop water ran into it, but only dirty water from the yards where clothes were washed, and that they were entitled to allow that water to run into the drain. By their regulation, the Municipality recognised their obligation to prevent people putting such water into the drain. He contended that the Mayor's affidavit was one of the strongest grounds for granting the interdict, as he practically admitted that the drain was used for the purpose of allowing such water to run into it.

Sir H. Juta was not called upon.

Jones, J., in giving judgment, said: This is a case in which it is not necessary to hear Sir Henry Juta. The Colonial Government makes an application for an interdict against the respondents, including

the Mowbray Municipality. On the one side we have the affidavits of the railway detective and Mr. Cochrane and Dr. Gregory, and they swear positively to a nuisance having been committed by certain water being allowed to run down this drain. On the other side we have the affidavits of Mr. Smith, Mr. S. Tonkin, and a number of people who are actually resident there, and they contradict the statements which are made by the other side. Well, in these circumstances, the constant practice of the Court has been not to roughly decide on the affidavits which of the parties are telling the truth, but simply to direct that an action should be brought, so that the Court may then have an opportunity of hearing the witnesses and seeing them cross-examined before the eyes of the Court itself. Now, in spite of what Mr. Searle has said, there are in this case very strong statements by the Mayor (Mr. Tonkin), who says that tubs are supplied by the Municipality for the very purpose of collecting this water, which is said to cause the nuisance, and that such water is carefully removed each day and carried away; that infinite precautions are taken by the Municipality to prevent sewage being discharged into the streets, and that, in fact, nearly one-fifth of the Council's whole receipts are expended on the removal of sewage from the houses in the Municipality; that special instructions have been issued to the Municipal inspectors to secure evidence of contraventions of the Municipal regulations framed to prevent nuisances, but that, up to the present, notwithstanding the strictest vigilance, no evidence of any violation of the regulations has been obtained, whereon to found a prosecution. The affidavit then deals with cases where individual offenders have been prosecuted, and where in one case they failed to obtain a conviction. To this affidavit is appended an additional regulation, which was apparently published in 1899, and in which it is distinctly provided that the occupiers of houses within the Municipality shall be required, on the order of the Council, to receive a tub for the reception of bedroom and kitchen slopwater, and any occupier, when so required, refusing or neglecting to use such tub, or allowing such bedroom and kitchen slopwater, or other offensive matter, to run into any drain or street, etc., shall be subject to a penalty not exceeding 40s., or one month's imprisonment. In the face of these allegations made by Mr. Tonkin and Mr. Smith, the Court is not now in a position to

definitely decide whether there has been a nuisance committed as against the Colonial Government. The Court will therefore simply make these directions: the application for an interdict will be refused at present, but the proceedings already taken will be allowed to stand for summons; costs of this application to be costs in the cause.

Maasdorp, J., concurred.

[Government Attorneys, Messrs. Reid and Nephew; Respondents' Attorneys, Mr. Gus. Trollip].

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

Re S.S. "ROUSSILLON." { 1091.
{ Oct. 18th.

Damage to cargo—Unseaworthiness of ship—Lay days.

Where certain cargo had sustained damage after the expiry of the lay days, owing to the unseaworthy condition of the vessel in which it had been conveyed,

Held, that the ship is responsible for such damage if it can be shown that she put to sea in an unseaworthy condition.

Semle: If the consignees pay demurrage after the expiry of the lay days, the owners are bound to maintain their vessel in a seaworthy condition, and must be held responsible for damage to cargo arising from their not having done so.

This was an application for the release from attachment of the steamship Roussillon. An order to attach the ship had been granted on the petition of De Beers Consolidated Mines, who were now called upon to show cause why the ship should not be released.

The petition of the respondents, upon which an order for attachment was made, stated that on or about the 3rd September the ship Roussillon was

chartered by J. O. Smith and Co., of Port Elizabeth, to convey a quantity of explosives to Table Bay for De Beers. The vessel reached Table Bay on the 9th September. It was not possible to discharge her immediately, and demurrage at the rate of £20 a day was paid by the petitioners. Subsequently it was reported that the vessel was in a sinking condition, and the petitioners despatched Mr. G. R. Burnham, superintendent engineer of the Union-Castle Company, to survey it. He stated that some of the cases of dynamite showed signs of having been submerged in water, but there was no danger to the ship owing to the leak. When the matter came to the notice of the Government, the Inspector of Explosives made an inspection, and recommended that the damaged cases should be taken out to sea and thrown overboard, and 483 cases were thrown into the sea by the captain and crew. The ship was afterwards surveyed, and the surveyors reported that the leak was due to corrosion, which had probably been going on for two or three years, and expressed the opinion that the ship was not in a "tight, staunch, and strong" condition when she left Port Elizabeth, as was represented by the owners. The petitioners, therefore, contended that the damage done to the cargo was caused by the action of the respondents. The Court attached the ship to found jurisdiction, and the master and owner of the ship now applied to set aside the attachment.

In support of the present application affidavits were filed by the owner (Mr. C. Rogers), the master, and chief mate of the vessel to the effect that the ship was quite seaworthy. Before she took on board the dynamite she had brought a cargo of sugar from Durban to Port Elizabeth.

Mr. Searle, K.C., for applicant, and Sir H. Juta, K.C., for respondents.

In argument, Mr. Searle said that the ship was chartered on the 3rd September, and arrived in Table Bay on the 9th. The lay days expired on the 13th, and from that date the charterers were in default. They had specially undertaken by the charter party to relieve the ship before the 13th September. There was default; the ship had to be relieved, and the charterers undertook to release the ship after the 13th. It was true that they paid demurrage, but that did not prevent the owners of the ship from saying that after a reasonable time they would not be detained further. On the question of the ship's seaworthiness, Mr. Searle quoted *Scrutton* (page 68, 3rd Edition),

and *Carrer* (page 22, Library Edition). He submitted that the evidence of the master and mate showed the ship to have been dry and seaworthy. The leak was not sprung until the 18th, five days after the lay days had expired.

Maasdorp, J., referred to the statement of the mate to the effect that the leak was due to corrosion.

Mr. Searle submitted that after the lay days the charterers were in default, and the owners of the ship were not liable for what happened thereafter unless it could be shown that in the conduct of some operations there had been some negligence on the part of the master, and this was not alleged.

Sir Henry Juta said that De Beers were not the charterers, but the consignees. As owners of the goods, they paid demurrage, and they held the ship responsible. De Beers were claiming for the damage to the goods, and it was only fair and reasonable that the ship should give security. If they gave other security the ship would be released.

In giving judgment, Maasdorp, J., said: It appears that respondents in this case obtained an order for the attachment of the ship *Roussillon*, in order to found the jurisdiction of this Court in an action which they intend bringing against the master or the owners of this ship, and they obtained an order under circumstances set forth in their petition and affidavits annexed. It appeared from the documents that a charter party was entered into between J. O. Smith and Co. and the owners of this ship, and one of the conditions of that charter party is that the ship shall be tight, staunch, and strong, and in every way fit for the service undertaken. That service was to carry to respondents in this case, applicants in the former petition, a certain quantity of dynamite. The ship arrived here with the dynamite on board, and in consequence of a leak being sprung, inquiries were made and surveys were taken. The petitioners stated that the result of the surveys was that evidence appeared that the ship at the time when it took these things on board was not tight, staunch, and strong, and was not in a seaworthy condition. It was stated in the petition that surveyors reported that the leak was due to corrosion, which had probably been going on for two or three years; and petitioners said they had reason to believe that the damages were due to the ship not being in the condition it was represented to be in. If it appeared that the condition that the ship should be in a sea-

worthy condition had not been observed, and that the damages were caused through non-compliance with this condition, the owners were liable, unless there were circumstances which exempted them. Under these circumstances, the Court granted an order for attachment, pending an action to be instituted by the consignees or charterers, whoever they may be, for any damage suffered by them. Now the present applicant moves that this order be discharged, and the application is chiefly made on the ground that, if the goods had been discharged within the lay days mentioned in the charter party, no damage would have been suffered, and that, therefore, any damage so suffered was suffered through the neglect of the respondents in this case. The charter party contains a condition that the charterers undertake to effect discharge within four days of the arrival of the steamer in Table Bay, and that, for each day over and above these four days, the charterers would pay demurrage at the rate of £20 a day. It is contended that the contract really came to an end when the lay days expired, and that after that the ship was at the disposal of the owners. I do not wish to decide the point now, but it seems to me rather that it is contemplated by the parties that there should be such delay, and that while such delay takes place demurrage should be paid, and that while such demurrage is paid, the obligation shall continue which attached to the ship that it shall be in a seaworthy condition at the time it left the port. If damage can be traced to such unseaworthiness at the time the ship left Port Elizabeth, such obligation will continue to attach after the lay days have expired. It is not admitted that the ship was in an unseaworthy condition when it left, but I do not find any evidence which is sufficient to contradict the statements made in the petition. A statement is made in the affidavit of one of the present applicants' witnesses that the leak must have been caused by corrosion. I think that rather goes to support the evidence of the witnesses for the petitioners that this corrosion must have been going on for some time, and that supports the contention that the ship was not in a seaworthy condition when it left. Under these circumstances, I think this application should be refused; but I do not now decide the point as to what the responsibilities of the parties were after the expiration of the lay days. I will only say that no authorities have been cited which satisfy me that after the expiration of the lay days the obligation on the owners or

master cease. Even if De Beers were charterers, they were also consignees. They were consignees in any case, and they had the right to come to the Court for redress. Under the circumstances, the present application must be refused, with costs.

Ex parte GARNER. (1901.
(Oct. 15th.

Articled clerk—Service.

The Court will not allow service to count which has not been rendered by virtue of some agreement of articles, but where there has been an interruption in the service, will under special circumstances, sometimes allow such interrupted service to count as continuous.

This was an application by an articled clerk to be allowed to count various periods of service with certain attorneys to whom his articles had not been ceded, as if the said articles had been so ceded and his service had been continuous.

The petition of applicant set forth that he was articled as a clerk to the late Mr. Marais P. Leroux, attorney and notary, of Kokstad, Griqualand East, on the 20th August, 1898, and continued to serve under the articles until the 26th October, 1899, when Mr. Leroux died. Applicant continued to serve in the office, which was carried on under the name of Zietsman and Leroux. After Mr. Leroux's death on October 26, 1899, Mr. Geo. Walker took over full and entire control of the office, and remained in control until July 31, 1900. Mr. Phillip Jacobson arrived to take over control on the 14th September, 1900, and remained until the 17th December, from which date until the present Mr. Berning had had charge. Petitioner had not had his articles with Mr. Leroux ceded, nor had he entered into fresh articles, although he had served continuously in the office. He petitioned the Court to allow him to count the whole period of service as though the articles had been duly ceded to the attorneys named.

The Law Society consented to the service during Mr. Leroux's life counting in any future service, but objected to the period after Mr. Leroux's death being allowed to be counted.

Sir H. Juta, K.C., for petitioner.

Mr. Searle, K.C., appeared on behalf of the Law Society.

Sir Henry Juta said that strictly speaking the Law Society was right in saying that when the late Mr. Leroux died, fresh articles should have been entered into. When he entered into the articles petitioner was a minor with no one looking after him, and he was only learning the law, a knowledge of which would have prevented him getting into his present unfortunate position. There had been continuous service in the same office. The essence of the thing was that this young man had performed continuous service, because that was the object of the indenture.

Mr. Searle referred to Rules 149 and 150.

Maasdorp, J.: It appears that the petitioner in this case was articled to the late Mr. Attorney Leroux on the 20th August, 1898, and under his articles of service continued to serve until the death of Mr. Leroux on the 26th October, 1899. After that he remained in the same office in which business was carried on from time to time by several different attorneys in succession, and he continued in their employment. But he was never articled to any of them, nor were the articles entered into with Mr. Leroux ceded to them. The application he now makes is that the service he so rendered to these other attorneys should be allowed to count as if the original articles had been ceded, and as if he had served continuously under articles for the whole of that period. Now no case has been cited in which the Court has allowed service to count which has not been rendered by virtue of some agreement of articles. The Law Society opposes this application, but is willing to make a concession, and even that concession the Court does not always readily grant, though it has been granted in many cases. Where time has been allowed to elapse after articles have expired before new articles are entered into, the Court has allowed such disconnected service to count as continuous service. That is the only indulgence the Court allows in such cases. The rules are very strict. I am not prepared to say they are very clear in every respect, because they have given rise to a good many applications and a good deal of argument, but the rule is very simple in respect to the present application, and if this young man had looked after his own interests he would have found no difficulty in discovering the rule that no service with any attorney can count unless

it is a service by virtue of articles of apprenticeship to such attorney. Through some neglect or indifference he has lost valuable time. It is impossible to grant the application in the terms in which it is made. The Court will allow the period of service between the 20th August, 1898, and the 20th October, 1899, when he was under articles with Mr. Leroux to be taken in connection with any future services he may render to fulfil the complete term of three years.

On the application of Mr. Searle, the costs of the Law Society were granted.

[Applicant's Attorneys, Messrs. Walker and Jacobsohn.]

MCCALONEY V. SPILHAUS AND CO.

This was an application by defendants for leave to appeal to the Privy Council.

Mr. Benjamin (with whom was Mr. Gardner) moved; Sir Henry Juta, K.C. (with him Mr. Searle, K.C.), represented the respondents.

Leave was granted, on condition that judgment be carried into execution, subject to security.

JORRE V. JORRE AND ANOTHER. } 1901.
Oct 15th.

This was an application to have a certain rule *nisi* set aside.

The petition of the applicant, Betsy Jorre, stated that a rule *nisi* had been granted, to operate as a temporary interdict, restraining the first-named respondent, Woolf Jorre, from withdrawing certain money standing to his credit in the African Banking Corporation, and restraining the second respondent, the manager of the bank, from parting with the same. The parties were husband and wife, and it was alleged in the petition, and supported by affidavit, that the husband was addicted to intemperance, visited gambling dens, had deserted his wife, and had misconducted himself. It was further alleged that his wife's father had given him £100 in trust for his wife, and that the latter had intrusted him with a similar sum to keep for her. Part of this money was now deposited with the Banking Corporation, and in the petition it was asked that he be restrained from withdrawing this. She intended to bring an action for divorce. An order was granted in Chambers by the Hon. the Acting Chief Justice in terms of this prayer.

K 4

In support of the motion to set aside the order, the husband, in an affidavit, denied the charges of intemperance, etc., and that he had been given money in trust for his wife. He stated that his wife left her home, and although he had requested her to return, she had not done so. He alleged that his wife's father and himself carried on business as harness-makers, and that the only money he received from him was the proceeds of the partnership, and he denied that his father-in-law gave him £100 for his wife. He had had frequent disagreements with his wife with regard to the way in which she managed the home, as she spent most of her time at her parents' house. He alleged that in August last his father-in-law removed everything he (applicant) possessed from his house, leaving him nothing but the clothes he wore. He was at present without means, as he could not obtain work. In an answering affidavit, the father-in-law denied that he was ever in partnership with the applicant, or ever paid him any money as proceeds of the alleged partnership. He also denied having removed the applicant's furniture and effects.

Mr. B. Upington for applicant.

Mr. Benjamin for respondent.

The Court, by consent, ordered the interdict to be discharged, and directed that the money, which was stated now to amount to £80, should be paid to the applicant's attorneys, who were to pay half the amount to the respondent's attorneys.

ARISTO EGYPTIAN CIGARETTE } 1901.
CO. V. GASHARATOS AND CO. } Oct. 15th.

Trade mark—Infringement.

A man's trade mark can be infringed only by an imitation so close as to lead an ordinary sensible purchaser to buy the goods bearing the spurious trade mark by mistake for those which bear the genuine trade mark.

This was an application for an order restraining respondent from making use of certain labels.

The affidavit of Aristo Yaxaglou, the applicant, stated that respondent, T. Gasharatos, was formerly in his employ, and was discharged for trying to render other employees dissatisfied with their wages. He then threatened to imitate applicant's cigarettes. Applicant complained

that the label used by respondent, which bore the title "Aristokratik," was a close and colourable imitation of his (the applicant's) registered trade mark in a label used in connection with a brand of cigarettes made by him called "Aristo."

The respondent denied the threat and that he was discharged for the reason stated, and contended that his labels were not an imitation of the applicant's trade mark.

Mr. Benjamin for applicant.

Mr. McGregor for respondent.

After hearing argument, the Court refused the application, with costs.

Maasdorp, J.: In this case applicant claims to be the owner of a registered trade mark, of which a copy is attached to his affidavit, and he complains that the respondent has infringed this right of his, which he has obtained under registration, by making an imitation of this trade mark. He says the imitation is of such a character that an ordinary member of the public is likely to be deceived by it, and is likely to buy goods of the respondent as though they were goods of the applicant. It is unnecessary to go into all the authorities referred to in this case, because they all amount to this: that if upon examination of the trade mark, and upon comparing such trade mark with the imitation complained of, it should appear that the imitation is of such a character that it is likely to lead an ordinary and unwary purchaser, who intends to buy an article, to buy another. Such imitation would be an infringement of the trade mark. The only thing to be done in this case is to discover whether any purchaser wanting to buy goods of the applicant is likely to be deceived into buying respondent's by the alleged imitation of packets and labels. The first thing that strikes me in looking at these labels is not so much the resemblances as the differences. Here you find on one box a lady smoking a cigarette, and having on each side of her a war chariot. On the other hand, we have a military gentleman surrounded by very peaceful machinery, with a crescent and star and the moon shining above him. These are very natural differences. In one case, a man; in the other, a woman. In one, landscape scenery; in the other, war chariots. Taking the boxes as a whole, there seem to me to be very material differences. But it is said that, notwithstanding such differences, there is one characteristic feature which would deceive the public, and that is the use of the word "Aristokratik," which has a strong re-

semblance to "Aristo." But in the one we have the name of the sellers, "Gasharatos and Co.," added, and in the other we have the name of the persons who deal with these cigarettes. The question is whether an ordinary purchaser, a sensible man, unwary at the time, is likely to buy one instead of the other. Applicant says his cigarettes have obtained a very good name in the market, and that there is a run after them. Well, anyone who was determined to have applicant's goods would go to buy these celebrated cigarettes made by Aristo Yaxoglo and an ordinary unwary purchaser, who found a box given to him containing the names of "Gasharatos" and "Aristokratik," is not likely to purchase these, to my mind, as containing the goods of the applicant. The differences being so great, in my opinion, the resemblance is not calculated to deceive the public into buying one packet for another. The application in this case must be refused, with costs.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS

THE LOYAL SOUTH AFRICAN BUD
OF HOPE LODGE, NO 4305
OF THE INDEPENDENT OR-
DER OF ODD-FELLOWS (MAN-
CHESTER UNION) FRIENDLY
SOCIETY V. MORRIS D. WAX-
MAN, LALL WOLLERSTEIN,
HARRY PAYMAN, AND THE
OTHER MEMBERS OF THE HE-
BREW DRAMATIC AND OPER-
ATIC COMPANY.

1901.
Oct. 16th.

Sir Henry Juta, K.C., moved for an order for the attachment of certain goods, the property of the respondents, in order to render effective the landlord's hypothec, and also that the respondents be ordered forthwith to disclose the full names and addresses of the members of the Hebrew Dramatic and Operatic Company, in order to effect service upon them in an action for rent and damages.

The affidavit of A. Raphael set forth that the respondents hired the Odd-Fellows' Hall, Plein-street, during March and June, and gave various performances in it, and that the rent for two weeks, amounting to £25, was now owing. In addition, the iron

rails of the gallery had been destroyed and a number of chairs broken, and for the damages sustained, as well as the cost of taking down certain staging left in the hall by the respondents, a further sum of £9 was claimed. Deponent had been informed that an endeavour had been made to obtain from the manager the names of the other members of the company, but without success.

The Court granted an order for the attachment of the property mentioned in order to render effective the landlord's hypothec, and also calling upon the respondents to disclose the names of the joint contractors in the hire of the premises; the question of costs to stand over.

VAN ONSELEN AND OTHERS V. { 1901.
LANDMAN AND ANOTHER. { Oct. 16th.

Mr. C. de Villiers moved that a certain award of arbitrators be made a rule of Court.

Mr. Close, for the respondents, consented to this, and said the only question was as to costs of the application.

Mr. De Villiers read an affidavit on behalf of the applicants, and submitted that it showed that it was through the respondents' non-compliance with the award that they had come to court, and therefore the respondents should pay the costs of the application.

Mr. Close pointed out that in the notice of the motion there was no mention of costs being claimed.

The Court granted an order making the award a rule of Court, but made no order as to costs.

PHOENIX MASONIC LODGE V. { 1901.
WILLIAM FROST. { Oct. 16th.

Lease—Assignment—Breach of condition.

Where lessors had consented to the assignment of a lease on condition that the assignee should carry on the business of a law agent and auctioneer and the lessee, in breach of the condition, was carrying on the business of a butcher, the Court restrained him by interdict from continuing such last-mentioned business.

Mr. McGregor, for the applicants, moved for an order restraining the respondent from utilising for the sale of butcher's meat a

portion of the applicant's premises situated in St. George's-street, Simon's Town, whereof the respondent is the lessee. The affidavit of the secretary of the Phoenix Masonic Lodge stated that the portion of the premises in question had originally been leased to the firm of Messrs. Kapelowitz and the sixth clause of the lease set forth that the lessees were not to assign the lease or sub-let the said premises except with the consent in writing of the trustees of the lodge, which consent was not to be unreasonably withheld. Messrs. Kapelowitz carried on a general business. The applicants in June received a communication from respondent asking their consent to the lease being assigned to him for the purpose of his carrying on his business as law and general agent and auctioneer in them. In his letter the respondent said he was sure they would appreciate the fact that no forage or anything of an inflammable nature would be kept on the premises in future. The applicants consented to the assignment of the lease on the condition that the respondent carried on in the premises the business of law agent and auctioneer. This agreement was made on June 29 last. The respondent was now utilising the premises for the sale of butcher's meat, and on September 3 a letter was sent to him by the applicants objecting to such use of the premises. No reply being received notice was served upon him on September 24, calling upon him to show cause to the Supreme Court, on October 12, why the order now asked for should not be granted.

Mr. De Villiers appeared for the respondent and read an answering affidavit, in which respondent admitted the correctness of the lease between himself and the applicants, but said he had conducted the business in a respectable and cleanly fashion, and there was no killing done on the premises; in fact he restricted himself almost entirely to the sale of frozen meat. When he received notice that the respondents objected to the premises being used for that purpose he set about disposing of his stock as quickly as possible, but as he had about £60 worth of stock in hand and had orders to fulfil until the end of the month to the value of another £200, he would suffer very considerable loss if he had to leave before the end of October. He had written a letter agreeing to leave the premises at the end of October and pay the costs incurred up to date, and also to pay a reasonable sum, to be mutually agreed upon for the right to continue the business until the end of the month.

Mr. McGregor said the affidavit had only been filed on the morning of the 12th October, when the case was down for hearing. The letter mentioned, he was instructed, had only been received on October 11. His instructions were to ask that only forty-eight hours' notice be given to the respondent.

Maasdorp, J.: It is quite possible that under the original lease that was entered into by the original lessees and the lessors such lessees might have been entitled to sell meat upon these premises, and that consequently the inconvenience which the lessors now complain of might be one which they would have had to submit to. It appears, however, that this lease was taken over under certain conditions by the assignee of the lease, and it is quite possible that under this assignment or this consent to the sub-letting, the present lessee has no right to put meat into the premises or to sell meat from the premises. However, it is not necessary, in view of the proposition made by the respondent, to decide that point, but it does appear that it is one which might fairly be considered doubtful, and the respondent seems at one time to have thoughtlessly come to the conclusion that he had a right to put meat there, but he now admits that he has no such right. Under these circumstances, respondent does not seem to have been guilty of a wilful infringement of the terms of this lease, and he has made an offer to leave by the end of the month, and this is the form the order will take. As to the question of costs, it seems that it was brought to respondent's notice on September 3 that the business was objected to, and notice of application was served on September 24, but yet respondent did not, until October 11, make the offer he has now placed before the Court, and by that time these costs had already been incurred. In the face of this delay, I think that the applicants, if they thought they had a right, and it is now admitted by respondent that they had, were entitled to come into Court and ask that this business be stopped at some fixed period, and the respondent will therefore have to pay the costs of the application. An order will therefore be granted restraining the respondent from utilising for the sale of butcher's meat the portion of the applicant's premises situated in St. George's-street, Simon's Town; the interdict to take effect on the first day of November; respondent to pay the costs of this application.

INSOLVENT ESTATE OF JACOB STEPHANUS NAUDE

This was an application for an order authorising the Master to call a special meeting of creditors in the above estate for the proof of debts and the appointment of a trustee.

The petition stated that the firm of W. A. Hall, trading at Worcester under the style of Hall and Co., were creditors in Naude's estate to the extent of £85, due on a promissory note. The estate was placed under sequestration on December 14, 1883, and the schedules showed assets amounting to the value of £137. These assets were said to consist of movable property, but the goods attached by the messenger of the Court and sold only realised 18s, which did not cover the costs incurred by him. Other assets mentioned in the schedule could not be found. The Master gave notice of two public meetings for proof of debts and election of trustee, the first meeting being held on January 3, 1884, but neither at that meeting nor at the second meeting did any creditors appear, and no trustee was elected. The said Naude died in March, 1884, and F. Lindenberg was appointed executor dative in the estate. The petitioners had become aware that there was certain landed property in the estate which insolvent had possessed at the time of his sequestration, although the property had not been brought up in the schedules. On October 12, 1900, the executor dative applied for the rehabilitation of Naude's estate. This application the Court refused, but granted an order authorising the Master to join the executor in passing transfer of this property. Petitioner had then endeavoured to get the proceeds of the sale distributed *pro rata* among the creditors in the insolvent estate so far as necessary to liquidate their claims, but the executor had replied that he did not recognise any of these claims. The landed property had realised £863, of which £653 were available for distribution, and the other assets amounted to £439. The petitioner submitted that the landed property, which was registered in the name of the insolvent, became vested in the Master for the benefit of the creditors in the estate.

The affidavit of F. Lindenberg, the executor dative in the estate, admitted that the landed property in question was registered in the name of Naude on both the Municipal Council and Divisional Council assessment rolls. It ad-

mitted that the property was not brought up in insolvent's schedules, but this omission apparently was not wilful, but because Naude seemed to think that he had parted with his interest in the land, which in 1883 was only valued at £67. Proceeding, deponent detailed how the ownership of the land by Naude's estate had become known about four years ago, when there was a proposal that an application should be made under the Derelict Lands Act, so as to secure payment of arrear rates. The position taken up by the executor was based upon a report by the Master to the effect that all debts at the date of sequestration had been proscribed by the lapse of time.

Sir H. Juta, K.C., for applicant; Mr. Searle, K.C., for the executor dative in the estate of the late J. C. Naude.

Sir Henry Juta, in argument, contended that the debts in an insolvent estate could not be proscribed.

Maasdorp, J.: It seems to me upon the form in which the application now comes before the Court, that a large number of questions have been raised at the Bar and also by the Master in his report which do not call for decision at present. The application is now for an order upon the Master to call a special meeting of creditors for the purpose of proving debts and for the election of a trustee. The application is made on the ground that there is certain property still vested in the Master on behalf of the estate which is to be administered, and the question will arise hereafter whether there is any such property in existence. But however that may ultimately be decided, it does appear that the creditors who appear now, allege that they have a claim on certain property, and it is quite possible that that claim may be made good, in which case there will be certain property in the estate which will have to be distributed for their benefit. What the effect is of neglecting to prove debts in the estate for so many years will have to be decided when an action arises upon that question. It need not be decided now. The further question as to whether the property, which was at one time vested in the Master for the benefit of the creditors, became divested because of any neglect on the part of the creditors, will also have to be decided then. Then there may be other questions, among them the question as to whether this property, having been sold in the manner it was sold by order of the Court, does not affect the position of the creditors who may have

failed to prove, but all these questions will have to be decided when the action is brought. For the present the Court will grant the order authorising the Master to call a special meeting for the purpose of having debts proved and electing a trustee. The question of costs will stand over until these further proceedings. If no further proceedings are taken, then either party can come before the Court on the question of costs.

Ex parte RICHARD LEA. 1 1901.
1 Oct. 16th.

Mr. Benjamin moved as an urgent motion for an interdict restraining the removal of an alleged lunatic, Richard Lea, from beyond the jurisdiction of the Court. Counsel read the petition, which was signed by Messrs. Walker and Jacobson, attorneys, stating that Lea was lately a sergeant in Kitchener's Horse, and in that capacity he well and truly served her late Majesty Queen Victoria. He was invalided from the front, having been injured by a fall from his horse at Krugersdorp, and was sent to Wynberg Hospital. His mind was temporarily affected, and he was sent to Valkenberg Asylum. Subsequently he was sent to Robben Island, and it was alleged that the authorities were about to remove him to some place outside the jurisdiction of the Court. In the petition a number of allegations made by Lea as to his being improperly treated were detailed. In conclusion it stated that Lea alleged that he was now of sound mind, and was desirous of returning to his wife and family in India.

Maasdorp, J., said he was afraid it would appear upon inquiry that there was a great deal of delusion about this. It was just as well that people who took an interest in lunatics should see the man before coming to court. Had the attorneys in this case seen the petitioner?

Mr. Benjamin said they had not seen him, but they had had communications from him. In reply to a further question, Mr. Benjamin said he did not know who it was alleged was going to remove the man, but as he was confined under authority from the Colonial Secretary, he could not be removed from Robben Island without the authority of the Colonial Secretary.

Maasdorp, J., said a rule *nisi* would be granted, returnable on November 1, calling upon the Superintendent of the Robben Island Asylum to show cause why

the removal of Lea from the jurisdiction of the Court should not be interdicted, the rule to operate as an interdict in the meantime; the rule to be served upon the Attorney-General also as curator of lunatics. His lordship also advised those who took up the case to put themselves in communication and ascertain whether they should take any steps upon such information as they might obtain. It was perfectly right that they should take up a case of that kind put in their hands, but coming from an alleged lunatic they should make inquiries themselves and not merely take the documents put into their hands by an alleged lunatic.

[Applicant's Attorneys, Messrs. Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice JONES in Chambers.]

LESTER V. MARTIN. { 1901.
 { Oct. 23rd.

Arbitration—Witness.

A witness in arbitration proceedings ordered to attend before the arbitrator.

This was an application upon notice of motion calling upon Alfred G. Martin to show cause why an order for personal attachment should not be granted against him for contempt of court committed by his failing to obey a subpoena issued by the Resident Magistrate of Cape Town calling upon him to attend an arbitration court to be held before Mr. George Moore Bethel in connection with disputes between the partners John Brown Lester and Samuel Patton Impey, and to produce before the arbitrator the books and papers of the partnership, and by his failing to obey an order made by the Supreme Court for his attendance before the arbitrator. Respondent was further called upon to show cause why he should not be ordered to attend before the arbitrator upon due notice being given by him.

Affidavits were read on behalf of the applicant stating that respondent had failed to attend before the arbitrator when ordered

to do so. The applicant, owing to certain disputes had claimed arbitration in terms of a clause in the partnership deed between himself and Dr. Impey, and had given notice of the appointment by him of Mr. G. M. Bethel as his arbitrator. He had called upon Dr. Impey to nominate an arbitrator in terms of the Arbitrations Act of 1898. Dr. Impey had failed to make such nomination, and in terms of the Act, applicant had appointed Mr. Bethel sole arbitrator. Messrs. Martin Bros. were the bookkeepers of the partnership, and respondent had been ordered to give evidence before the arbitrator and to produce the papers and accounts. This he had not done.

The affidavits for the respondent were to the effect that Dr. Impey never consented to arbitration or to the appointment of Mr. Bethel, and that he had been advised and believed that the matters in respect of which Dr. Lester required arbitration were not of such a character or class as fell within the meaning and intent of the arbitration clause. Respondent was not given notice when the application was made to the Supreme Court for an order for his attendance, and it was alleged that the full facts were not then before the Court. Dr. Impey said it was his intention to cause summons to be issued for the bringing to a conclusion of the issue between Dr. Lester and himself. He further stated that one of the matters Dr. Lester demanded should be submitted to arbitration was in respect to the payment of the sum of £1,400 paid by him to join deponent as a partner, the payment of which sum led to the partnership, and was consequently a consideration antecedent to the partnership and deed of partnership.

Mr. Schreiner, K.C., for the applicant, and Mr. McGregor for the respondent.

Jones, J., said that there seemed to be two points, first, whether the arbitrator had been duly appointed, and, secondly, whether Martin ought to attend.

Mr. Schreiner referred to the 10th clause of the partnership agreement, which provided for the settlement by arbitration of matters in dispute between the partners. He alluded to section 9 of the Arbitration Act in respect of the appointment of arbitrators. He said that the respondent had blankly disobeyed the order of Court.

Mr. McGregor said that section A of the schedule provided that if no other mode of reference was provided, reference should be to a single arbitrator. Then section 8 said that where a submission provided that re-

ference should be to a single arbitrator, and the parties did not agree to the appointment of an arbitrator, they should go to the Supreme Court. The clause in the agreement did not provide for the mode of arbitration. Dr. Impey had never undertaken to do anything in the matter of nominating an arbitrator. Mr. McGregor further argued that the matters in dispute were not arbitrable matters. In the course of argument, Mr. McGregor cited *Re Hammond and Waterton* (62 Law Times' Reports, p. 808), *Peirce v. Young* (14 Chancery Division, p. 200), and *Turnock v. Satoris* (43 Chancery Division, p. 150).

Without calling upon Mr. Schreiner, the Court ordered respondent to attend before the arbitrator as prayed.

Jones, J., said that in this case an application was made under the ordinary common law of the country for an order to attach the respondent Martin, who was bookkeeper to two partners, Doctors Impey and Lester. It appeared that these doctors entered into partnership, and under the terms of the partnership they had specially agreed: "That should any dispute arise between the parties hereto, either as to the true intent and meaning of these presents, or with regard to any matters having reference to the partnership hereby entered into, every such dispute shall be submitted to arbitration for settlement, and the award of the arbitrator or arbitrators or of the umpire, should any be appointed, as the case may be, shall be final and binding on the parties hereto." Under these provisions it appeared that notice was given that an arbitrator would be appointed. Then the question at once arose whether the fact of giving the notice under the provisions of the 10th section of the Arbitration Act (29 of 1898) was a good and full notice. That would entirely depend upon the reading given to section 9 of the Act. That section provided: "When a submission provides that the reference shall be to two or more arbitrators, one or more of whom may be appointed by each party, then, unless the submission expresses a contrary intention: (a) If any of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; (b) if, on such reference, one party fails to appoint an arbitrator, either originally or by way of substitution, as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that

arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent of both parties: Provided that the Court or a judge may set aside any appointment made in pursuance of this section." Here was an anticipation that they would have to refer differences to an umpire.

It was stated the course taken here was not a right one. I do not agree with that. There had been a failure to appoint an arbitrator, more than seven days elapsed, and consequently an arbitrator had been appointed. No application had been made to set aside that. I am of opinion that the matter of the outstanding accounts supposed not to have been paid into the joint account for the benefit of both partners was a *bona fide* matter of dispute, and a matter for arbitration. As to the £1,400, the Court could not now say whether that matter could be dealt with by arbitration. The parties were not before the Court. The question was whether the arbitrator was properly appointed under the provisions of the Act. I hold that he was. It being sworn that the respondent Martin was a material witness, an order was made that he should appear before Mr. Bethel, to produce all books and papers of accounts of the partnership of Impey and Lester, and to give evidence on such facts as were within his knowledge. Applicant did not wish that there should be any punishment for the non-observance of the order by Martin, but simply wished that he should be ordered to attend before Mr. Bethel. An order would be given as prayed, and Martin would be ordered to pay costs.

Mr. Schreiner asked that respondent should be ordered to pay the costs of the two applications, and of the two attendances of the arbitrator.

The Court made an order upon respondent to attend before the arbitrator, and to pay the costs of this application, of the application on October 16 last, and of the two meetings of the arbitrator.

REID AND CO. V. THE CORPORATION OF THE CITY OF CAPE TOWN. { 1901
Oct 24th.
Nov. 1st.

Plans for alteration of building—
Sanction of Town Council—
Discretionary powers.

The Court will not interfere with a Town Council which in the

exercise of its discretionary powers refuses to sanction building plans submitted, unless it is shown that the Council is acting from dishonest, fraudulent, or other improper motives.

This was an application by Andrew Burnett Reid and John Cran, trading as A. B. Reid and Co., for an order compelling the Corporation of the city of Cape Town to approve of certain building plans lodged by the applicants with the City Engineer on October 2, on the grounds that the approval thereof was being illegally withheld. Costs of the application were also applied for.

The affidavit of Andrew Burnett Reid stated:

1. That I am a partner in the firm of A. B. Reid and Co., the applicants in this matter.

2. That my firm are the registered owners of certain premises situate in Cape Town, at the corner of Strand and Rose-streets, the recent destruction of which by fire necessitated the rebuilding thereof.

3. That in accordance with the Corporation's regulations, my firm caused plans and specifications to be prepared, and these were duly lodged with the Corporation on October 2, 1901, through the architects employed by the firm.

4. That on the 10th inst., the letter marked "A" was received by the architects who were acting for my firm, and on the following day the letter marked "B" was addressed to the City Engineer.

5. That the City Engineer acted illegally in refusing to approve of the said plans, for the reasons stated in his letter returning the same.

6. The stoep in question belongs to my firm by prescriptive right, which the Corporation admits, but that body is endeavouring, by a side issue, to force my firm to remove the said stoep without compensation, and the question of its removal has nothing whatever to do with the plans, which are in accordance with the requirements of the Corporation's regulations.

7. That the said stoep is absolutely necessary for the proper carrying on of our business, and it is of the greatest importance to my firm, for the reasons set forth in the letter "B," that the rebuilding of the premises should be undertaken with the least possible delay, otherwise serious loss will result to my firm.

8. That on the 16th inst., at the Mayor's request, my partner and I interviewed him; he tried to induce us to give up our right to the stoep, but it was pointed out to him the utter impossibility of that being done, as well as the enormous cost, loss, and inconvenience that would result to my firm.

9. I say that the plans are admitted by the Corporation to be in order, but an attempt is being made to deprive my firm of its rights, without following the legal course of expropriation, and this can still be done after the premises have been restored to their condition prior to the fire.

10. The necessity for the removal of the stoep does not exist, hence the Corporation's anxiety to have it effected without wasting the ratepayers' money, which would be the case if expropriation were resorted to. Strand-street is 90 feet in width at this point, and between the stoep and the kerb there exists at present a sidewalk of 9 feet in width; if to this be added the space occupied by the stoep, a sidewalk of about 18 feet will be provided on the outskirts of the city, where traffic must for all time be very limited, owing to the immediate proximity of Lion's Rump, which bars any extension of the city in that direction.

11. That an exactly similar case occurred recently in connection with the plans submitted by Messrs. D. M. Murray and Co. for the rebuilding of their premises in Green-market-square; these plans were passed without the removal of the stoep.

12. The Corporation should expropriate the said stoep if they wish it removed; this they are not disposed to do, well knowing that the cost of so doing would be more than the improvement thereby to be effected is worth; my firm has received no notice of expropriation from the respondents.

The letter, marked "A," referred to above, was written by the City Engineer, Mr. R. O. Wynne-Roberts, to Messrs. Tully and Waters, applicants' architects. The letter was as follows: "I have had these plans examined, and regret that I am unable to approve of them, for reasons given below. The existing stoep, which is an encroachment on the street, is not indicated on the plans to be removed, in spite of the fact that the plan proposes what is virtually an entire rebuilding. The plans are returned to you in order that this point may be made clear.

To this applicants' attorneys replied, in the letter marked "B," referred to above, as follows: In reply to your letter of the 9th instant, addressed to Messrs. Tully and

Waters, and according to which you have not approved of the plans in consequence of the stoep being retained, my clients instruct me to point out that the plans, etc., submitted, are in accordance with the Corporation's regulations 110 and 111, while the grounds of your refusal are not in keeping with regulation 112, and I learn from the interview I had with you on the site yesterday that you are attempting to deprive my clients of their rights to the stoep by a side issue, which course is not only illegal, but I feel sure, one that the Public Works Committee would not recommend to the Council for its adoption. Your suggestion that if my clients agree to register a servitude against their property, agreeing to remove the stoep, without compensation, at such time as the general street improvement scheme is carried out in that locality, cannot be considered. You, in effect, say if my clients give up their undoubted right to the stoep, without compensation, then you are prepared to recommend the approval of the plans, which is an admission that the plans are in order, but you are illegally withholding approval as a fulcrum whereon to work the lever to remove the stoep. I wish you clearly to understand that my clients are not wishing to be unreasonable in the matter, but they are in a very desperate condition as regards accommodation for the carrying on of their business, and while not wishing to have recourse to litigation, they only require fair and reasonable treatment, and they request that the facts above and below stated, be placed before your committee with the least possible delay. (1) The existing foundations and walls on the stoep side of the building, with a slight pulling down in connection with the latter in some places, are to be used in rebuilding operations. (2) That to remove the stoep would mean an additional expenditure of at least £2,000, such a course involving the lowering of the floor level, removing engine, boiler, and machine beds, existing foundations, and walls, all of which would have to be rebuilt from the street level. (3) That the temporary premises in which their business is now carried on have to be vacated within four months, leaving them barely sufficient time wherein to complete their building. (4) That even with the stoep in its present position an ample sidepath (nine feet wide) exists between the kerbing and the stoep, besides which, Strand-street is 90 feet wide at this point, and consequently there is no necessity for the removal of the stoep. (5) The plans are in accordance with

the Corporation's regulations, and the approval is being illegally withheld. (6) Very serious damage will result unless the building operations are sanctioned without delay, and for which the Corporation must be held liable. (7) The present case in no way differs from that of Messrs. D. Murray and Co.'s building near the Town-house. (8) It is absolutely necessary that my client's building operations should proceed without delay. Plans are returned herewith. Trusting the matter will receive early and favourable considerations,—I am, etc.,

For the respondent the affidavit of Josiah Robert Finch, Town Clerk of the City of Cape Town, was read, and was as follows:

1. I have perused the notice of motion and the affidavit of the applicants filed on behalf of the applicants in this application.

2. The building in respect of which the applicants submitted plans to the City Engineer is one of those buildings in the older and upper portion of Cape Town which has in front of it a stoep which prevents the construction of a continuous sidewalk all along the street.

3. The Town Council has removed many of these stoeps from time to time, and has incurred considerable expense in so doing.

4. When a stoep can be removed at less cost and inconvenience than usual, owing to the fact that premises are being rebuilt, the Council frequently takes the opportunity of such rebuilding to remove the stoep under the powers given to it under Regulation 205 of the old regulations, and Regulation 161 of the Building Regulations.

5. In the present instance the attention of the Public Works and Improvements Committee of the Town Council was drawn to the fact that the applicant's premises in question were being rebuilt. The committee was of opinion that it was desirable that the opportunity should be taken to remove the stoep in front thereof in Strand and Rose streets, and the committee has made a recommendation to this effect to the Council.

6. The said committee has not power to deal with and to dispose of the matter itself, which will have to be brought up before the whole Council and dealt with. The recommendation of the committee will be laid before the Council at its next meeting to be held on Thursday, October 24.

7. In the meantime, pending the decision of the Council, it is not considered advisable to allow the work of reconstruction to be begun, as it was thought that work might be done which would increase the expense of removing the stoep. No undue time,

however, has been taken by the Council in dealing with the matter, as the meeting on Thursday will be the first opportunity which the Council has had of deliberating on the matter.

8. I annex hereto copy of letter dated the 19th inst., addressed by the solicitors of the Council to the solicitors for the applicants, marked C.

9. I have ascertained that the applicants have not delayed proceeding with the work in question, but that without the permission of the Council they have begun the work of reconstruction, which works are not shown on the plans deposited.

10. The procedure that will be taken if the Council adopts the recommendations of the committee will be to expropriate the stoep in question and to pay to the owners such compensation as they may be entitled to.

The letter marked C referred to above was addressed by the Council's solicitors to the applicants' solicitor, and pointed out that the Council did not wish nor require the owners to lower their floors to the level of the street, and that the boiler and machine beds could remain at the level at which they were at the present time. A slight alteration would be required so as to give access by steps inside the line of the walls, but probably no other interference with the plans would be necessary. After pointing out that the matter had to be finally settled by the Council at its next meeting, the letter went on to say as follows: "We have moreover to direct your attention to the fact that a considerable portion of the stoep in Rose-street has been removed, and that under No. 208 of the regulations of the Council promulgated on the 29th May, 1899, when the whole or any portion of a stoep shall have been removed for any purpose whatever, the same shall not be rebuilt except to form a low pavement or footway. We direct your attention to this fact, as it may be necessary for your clients to modify their plans on this account."

Edward John Dampier, building surveyor to the Town Council, stated that on the 12th October he inspected the premises in question, and again inspected them on October 21, when he found that portion of the wall in Rose-street had been taken down to the extent of about two-thirds of its length. Proceeding, he detailed certain work being carried out, which he said was not shown upon the plans submitted, which were simply for a partial repairing of the ground floor walls. Under Building Regulation 113 any

deviation from the plans submitted had to be sanctioned by the Council in the same manner as the original plans, but no application had been made in respect of this new or additional work. This fact had only been discovered by deponent owing to his making a personal inspection, the applicants having omitted to send in notice of their intention to begin work, which was required by Regulation 115. In referring to the foundations, deponent said that, in the case of the stoep in Strand-street, if this was acting as a support to the wall, that fact would show that the wall was in an unsafe condition. He could not see how considerable expense could be occasioned to the owners by the removal of the stoeps in question, and as far as he could observe, the work being carried out by the applicants was precisely the same work that they would have done had the stoeps not been there.

Edward William Pugh, a building inspector, employed by the Town Council of Cape Town, in an affidavit, corroborated the statements made by Mr. Dampier.

An affidavit by R. O. Wynne-Roberts, City Engineer, was also read, in which, after detailing all the facts in connection with the plans not being approved of, he concluded by saying that he had made a personal inspection of the premises in question, and had ascertained that the statements made in the affidavits of Messrs. Dampier and Pugh were correct.

A replying affidavit by John Cran, one of the partners of the applicant firm, was read, in which he stated that Dampier's allegations as to the plans being varied, and as to work having already been commenced, were merely side-issues that did not affect the main question. He further said that if the stoep were removed, it would be absolutely necessary to lower the floor levels to that of the street, otherwise it would be impossible for the building to be used for their business. As to the Town Clerk's affidavit, deponent said that the stoep in question was erected many years prior to the passing of Regulation 205, which regulation, as well as Regulation 161, are *ultra vires*, and, moreover, no steps have been taken by the Corporation, under the provisions of these regulations, even if they were *intra vires*. He further said that, if the City Engineer had not illegally rejected the plans, no delay would have occurred, and the Corporation could have decided the question of expropriation at their last meeting; the passing of the plans had nothing to do whatever with the subject of expropriation.

The removal of the stoep would entail a very heavy expense and delay to his firm, which could have been avoided had the Corporation taken the legal course open to them immediately after the fire occurred.

Mr. Searle, K.C., for applicants; Sir H. Juta, K.C., for respondents.

Mr. Justice Jones asked if the Council was willing now to give notice of expropriation?

Mr. Searle said that the Council met that day.

Mr. Justice Jones thought that, under the circumstances, it would be better to wait the decision of the Council as to the expropriation before deciding the matter.

The matter was accordingly ordered to stand over until 1st November.

Postea (November 1).

The affidavits read when the case was heard in Chambers on the 24th ult., were again read, as was an affidavit since made by Mr. J. R. Finch, Town Clerk, stating the action taken in regard to the matter at a meeting of the Town Council, held on October 24, when it was resolved that the stoep of the premises be acquired by the Council either by expropriation, mutual arrangement, or arbitration.

Mr. Searle, K.C. (for the applicants), argued that according to their own regulation, the Town Council were bound to pass plans within fourteen days, or, in the event of disapproval to state within this period the particulars in which they required alterations. He submitted that the Council had not complied with this regulation. The only way in which the Council could cause applicants to remove the stoep was to take proceedings provided under section 175 of their Act of Parliament (No. 26 of 1893). The regulation under which they originally proceeded treated the stoep as an encroachment. If they required to expropriate the stoep, let them do so, but they could not refuse to pass the plans on that account. He contended that the Council were bound to act within fourteen days. They had not even now stated the alterations which they required to have made. Applicants could get nothing definite out of the Town Council. Counsel referred to the case of *Clark v. Town Council* (4 Sheil, page 42), and urged that the Council could not use a lever to get the stoep taken up without compensation.

Buchanan, A.C.J., said that the plans depended upon whether the stoep remained or not.

Mr. Searle contended that the Council were bound to state the alterations required within fourteen days. The question of the passing of the plans was quite distinct from any other questions raised, and the Council should comply with their regulation, which provided either for the passing of the plans, or, in the event of the refusal, for a statement to applicants of the particulars of alterations required. If the Council could not pass the plans in their present form, he submitted that applicants were justified in coming to court, and were entitled to costs.

Without calling upon Sir Henry Juta (for the respondents), the Court refused the application, with costs.

Buchanan, A.C.J.,: This is an application for an order compelling the Town Council of Cape Town to approve of certain building plans lodged by the applicants on October 2 last, on the ground that the approval is being illegally withheld. In the case of *Clark v. The Town Council* (4 Sheil, 42), certain principles have been laid down, which have been followed by this Court in other cases. The learned Chief Justice in that case said that if a Town Council, in refusing to sanction plans submitted, exercised its functions *bona fide*, the Court would not interfere, and the Court indicated that it would only interfere with the actions of a Town Council where a Council acts from dishonest, fraudulent, or otherwise wholly improper motives. In the present case, what took place is this. On October 2 the plans were lodged. According to the rules of the Town Council, the City Engineer shall intimate whether the plans are approved or not, and within fourteen days. The City Engineer wrote to the applicants telling them that he could not approve of these plans. In the letter he points out that the stoep, which he says is an encroachment on the street, is not indicated as to be removed, and the plans are returned to applicants in order that this point may be made clear. There is a distinct intimation as to the ground upon which the plans were not passed. Applicants replied stating that the stoep was not an encroachment, and that they were entitled to the stoep. Thereupon the matter came before the committee of the Town Council, and they inquired into it, and recommended to the Town Council that the stoep should be expropriated. On October 24 the Council resolved to expropriate the stoep. Now, the engineer, knowing that the stoep had to be removed, and

knowing that, as soon as the stoep was gone, the plans would have to be altered, refused to grant consent to the plans, because, as he pointed out, the alterations would increase the expense to the builders, and might also increase the amount of compensation. Applicants were in a great hurry to push things through, but there has been no unnecessary delay by the Council. Immediately the Council resolved on expropriation, the plans had to be altered, and the very first step, if the Court ordered these plans to be passed, would be to alter them. The Council is not using this as a lever to obtain other benefits; it is a *bona fide* exercise of their authority. This application is altogether unnecessary, and the applicants have altogether failed in showing the Court that the consent of the Council has been illegally withheld. Unless they show that consent has illegally been withheld, they cannot succeed in this application. There is nothing in the affidavits to show any dishonest, fraudulent, or otherwise wholly improper motive on the part of the Council in refusing to pass these plans, and on the principles laid down in *Clarke's* case I think the application should be refused with costs.

Maasdorp, J., concurred.

[Applicant's Attorney, G. Trollip; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

ADMISSIONS. { 1901. Nov. 1st.

Mr. Buchanan moved for the admission of Edmund Colpoys Lardner Burke as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Registrar of the High Court of Griqualand West.

Mr. Buchanan moved for the admission of Emmanuel Charles Fortescue Hutton as an attorney, notary, and conveyancer.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate of East London.

Mr. Benjamin moved for the admission of Christopher Brady as a conveyancer.

Order granted, and the oath administered.

Mr. Howel Jones moved for the admission of Cuthbert William Whiteside as an attorney and notary.

Order granted, and leave given for the oaths to be taken before the Resident Magistrate of Port Elizabeth.

PROVISIONAL ROLL.

PEABODY V. BLACK AND LYON { 1901.
V. BLACK. { Nov. 1st.

Mr. Benjamin appeared for the plaintiffs in these cases, and asked that these cases be allowed to stand over *sine die*. He read an affidavit showing that it was necessary that affidavits should be obtained from America.

Mr. Gardiner, who appeared for the defendant, objected to the postponement, and said that the promissory notes upon which summons had been issued were for some machinery which had been delivered broken. He submitted that if affidavits were required from America, it would be better, to save expense, to go into the principal case.

The Acting Chief Justice said that he thought it would save time if the principal case were gone into.

Ultimately the Court said that the postponement would have to be granted, but the Acting Chief Justice at the same time suggested that the parties should consider whether the principal case should not be gone into at once, so as to save time. He did not wish to express any opinion on the affidavits, but there seemed to be some serious matters in dispute.

BESTER V. URBASCH.

Mr. Close moved for provisional judgment on a cheque for £23.

Provisional sentence granted as prayed.

WARD V. NAESS.

Mr. Benjamin moved for the confirmation of a writ of arrest.

Granted.

HAYTON V. RAUTENBACH

Mr. Buchanan moved for provisional sentence for £400 due on a mortgage bond.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

NOTCUTT V. RADZIWILL.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant upon an judgment for £87 6s. 4d., with £9 1s. 6d. costs, on which a return of *nulla bona* had been made.

There was no appearance for the defendant.

Decree was granted as prayed.

MILLS V. VAN DER WALT.

Mr. Russell moved that the return day of the summons in the above case be extended to November 30, there being some difficulty as to service, owing to the defendant residing at Griquatown.

Extension granted as prayed.

ARDERNE V. SALESIAN INSTITUTE.

Mr. Buchanan asked that this matter be postponed until February 28, 1902, an offer of compromise having been made, and all the creditors having accepted, save a few in foreign parts.

Postponement granted as prayed.

LEWIS V. WHEELER. { 1901.
Nov. 1st.

Arrest—Soldier on Active Service.

Persons on active military service cannot be arrested for a civil debt.

This was an application for a decree of civil imprisonment upon an unsatisfied judgment for £87 6s. 4d., with £9 1. 6d. costs. A return of *nulla bona* had been made.

The defendant's affidavit stated that he had made an offer to pay off the debt by instalments of £5 per month. He also stated that he had no business or means of support, except £9 per month, which he was drawing whilst on active service in the District Mounted Troops, Worcester. He had made over all his effects to his creditors, but there were some outstanding debts which he was unable to collect, owing to the disturbed state of the country and to martial law prevailing in the district. Out of the £9 per month, he had his mother to support, and save for the £5 out of this £9, which, as stated above, he earned whilst serving his King and country whilst employed in the District Mounted Troops, he had no means.

The applicant's affidavit set forth that the debt was a very old one, and while he had no wish to be hard on the defendant, and was quite prepared to accept a reasonable offer, he considered that £5 per month was not sufficient, and asked for £10 per month.

Mr. Buchanan appeared for applicant, and Mr. McGregor for respondent.

Mr. McGregor (for respondent): Respondent is on active military service, and such persons cannot be arrested. *Voet* (2, 4, 39); *Dunlevie v. Harrington and Another* (1, Menz., 292); *Van der Linden*

(Book 3, Part 1, Chap. 4, section 2, No. 6) says that military officers going on active service are free from arrest, *a fortiori*, those are actually on active service. See also head note to *Casson v. Conolly* (1 Juta, 68). It is true that certain books draw a distinction between arrest and civil imprisonment. I hold this distinction to be unfounded, and hence that the present application is unwarranted.

Mr. Buchanan (for applicants): These district mounted troops are being disbanded daily, so that we do not know whether defendant is still serving with them or not. Some proof of the fact should have been produced.

[Maasdorp, J.: Then where does defendant get his £9 a month?]

From the mounted troops; that is all he has. This debt was contracted in 1894, and he has made no effort to pay it.

Mr. McGregor admitted that in *Marriott v. Haigh* (9 Juta, 501) judgment was given against a soldier on active service.

Buchanan, A.C.J.: This is an application for a writ of civil imprisonment. Since the passing of the Act of 1879, civil imprisonment has been abolished in cases where the defendant has no property or means sufficient to satisfy in whole or in part any judgment. The defendant in this case has had a writ of execution taken out against his goods, to which a return of *nulla bona* has been made. He carried on business, but he distributed his effects among his creditors, and now swears positively that he has no means whatever, except certain outstanding debts due by persons residing in a disturbed district, which he has no means of collecting. He therefore has no means to satisfy in whole or in part this judgment. But in addition, the defendant is on active service, and on going into the authorities, it is clear that a person who is on active service cannot be arrested for a civil debt. On these two grounds, viz., that the defendant is on active service, and that he has at the present time no available means to satisfy in whole or in part the judgment, the application will be refused, but as Mr. McGregor does not press for costs, no order will be made as to costs.

PURCELL V. WEBSTER. { 1901.
Nov. 1st.

Mr. B. Uppington moved for provisional sentence for £82 10s., being interest due upon a mortgage bond for £3,250.

Provisional sentence granted as prayed.

DU PLESSIS V. ESTATE HERHOLDT.

Mr. Searle, K.C., moved for provisional sentence upon a promissory note for £500.

Mr. B. Upington, for the defendant, appeared to oppose, and read an affidavit in which it was alleged that the note formed part and parcel of an action which was set down for hearing on the 18th inst., and which alleged that the transaction had been a fraudulent one, and therefore that if that were proved the note now sued upon would be of no effect.

Mr. Searle said that the issue really was whether or not certain farms had been sold out and out, or only leased for the sum agreed (£1,000) during the lifetime of the late A. J. Herhold. In any case he contended the sum of £500, which the promissory note represented, would be due. He also pointed out that the case had been set down for trial during the two last terms, but had not been heard, and it was doubtful whether it could be heard this term, as the parties resided in the Hanover district.

The matter was allowed to stand over until after November 18 to see whether or not the principal cases would come on on that date.

LOUW V. RHODES. { 1901.
Nov. 1st.

This matter first came before the Court on October 12, when Mr. Searle, K.C., moved for provisional sentence on a promissory note purporting to have been signed by the Right Hon. C. J. Rhodes, and promising to pay to Catharine Radziwill the sum of £2,000 for value received. On this promissory note the plaintiff, T. A. J. Louw, had advanced to the defendant Radziwill the sum of £1,150, and provisional sentence for that amount, with costs, was asked. Sir Henry Juta, K.C., then appeared for the defendant Rhodes, and applied for a postponement of the case as against him. Counsel read an affidavit made by Mr. L. L. Michell, the general manager of the Standard Bank, in which Mr. Michell stated that he held a general power of attorney from Mr. Rhodes. He proceeded to state that on hearing of the existence of the document, he had written to Mr. Rhodes, who had replied by cable repudiating ever having signed any such document, and denying all knowledge thereof. It was stated that an affidavit from Mr. Rhodes had been mailed, and the case against him was allowed to stand over until

November 1, but provisional sentence was granted against the defendant Radziwill.

Mr. Searle, K.C., now again appeared for the plaintiff, and said that the affidavit repudiating the signature had now been filed, and he had been instructed to ask the Court to fix a date for proof of signature. He suggested that the first day of next term be fixed as the date.

Sir Henry Juta, K.C., for the defendant, said he had no objection to that. He did not know whether defendant, owing to his ill-health, would be able to be here then, but if not they would have to apply for a commission to take his evidence in England.

The following was Mr. Rhodes's affidavit:

I, the Right Hon. Cecil John Rhodes, of Groot Schuur, Cape Town, South Africa, M.L.A., make oath and say as follows:

1. I have not either in the year one thousand nine hundred or in the present year accepted, drawn, endorsed, or signed or been in any way party to any promissory note, bill of exchange, or other negotiable instrument, save and except ordinary cheques drawn by me upon my bankers, the Standard Bank of South Africa (Limited), Cape Town, and Messrs. Hoare, of 31, Fleet-street, London.

2. In particular I have not been party to and know nothing of certain documents which I am told purport to bear my signature in some form or shape, and short particulars of which documents are set out at the foot hereof:

1. The promissory note for £435 drawn by Princess Catharine Radziwill in favour of Mr. C. J. Rhodes, and purporting to be endorsed by him.

2. Promissory note for £3,000 drawn by the said Princess in favour of F. J. Lovegrove, and purporting to be endorsed by Mr. C. J. Rhodes.

3. Promissory note for £1,000 purporting to be drawn by Mr. C. J. Rhodes in favour of the said Princess, and endorsed by Dr. Scholtz.

4. Promissory note for £2,000 purporting to be drawn by Mr. C. J. Rhodes in favour of the said Princess, due September 23, 1901, discounted by T. J. Louw.

5. Promissory note for £6,300 drawn by Princess Radziwill in favour of Mr. C. J. Rhodes, and purporting to be endorsed by him.

6. Promissory note for £6,000, purporting to be endorsed by Mr. C. J. Rhodes.

7. Bill for £4,500, purporting to be signed or endorsed by Mr. C. J. Rhodes.

Sworn by the deponent, Cecil John Rhodes, at No. 15, St. Swithin's-lane, in the City of London, this 10th day of October, 1901. Before me, (signed) Frederick Hickson, a Commissioner for Oaths.

The Court fixed the first day of next term for the hearing of the matter.

MARAIS V. BOSMAN.

Mr. Howel Jones applied for provisional sentence on a sum which had become payable by non-payment of interest, together with interest at the rate of 6 per cent from March 1, 1899. He also moved that the property specially hypothecated be declared executable.

The application was granted.

HALL V. HAYWARD.

Mr. Upington applied that this case should stand over until next Thursday.

Granted.

PHILPOTT V. VORSTER.

Mr. Percy Jones moved that the return day fixed in the case be extended until the last day of term.

Granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. } 1901.
FOUCHE. { Nov. 1st.

Forfeiture—Acts 15 of 1887 and 40 of 1895.

Where forfeiture and nullity of sale are claimed under Act 15 of 1887, section 2, as amended by Act 40 of 1895, section 4, the summons should contain a prayer for a declarati on of such forfeiture.

This was a motion for judgment under Rule 329d.

The defendant, Hendrik Johannes Jacobus Fouche, late of Douglas, but now on commando with the Boer forces, was sued by edict, and was in default.

The summons claimed: (a) The sum of £236, being balance of the purchase price of lot 9,164 Herbert, agricultural lot 92 at Douglas, purchased by defendant under Act 15 of 1887, as amended by Act 40 of 1895, for

the sum of £295 on September 18, 1897; (b) interest at the rate of 4 per cent., reckoned from September, 1897; (c) the sum of £7 11s., being the fine of 1s. *per diem* from October 18, 1898, to March 18, 1899, as provided in terms of section 4 of Act 40 of 1895; (d) costs of suit.

Mr. Sheil, K.C., appeared for the Government, and moved for judgment in terms of the summons, and also in terms of Act 40 of 1895, section 4, for a decree declaring the sale null and void in the event of the judgment not being complied with within one month from date.

The Court granted judgment in terms of the prayers of the summons, with costs, and decreed that, upon failure for one month after the date of judgment to pay the amounts claimed, the sale should become null and void, and the payments already made in respect thereof should be forfeited to the Government, but intimated, as a point of practice, that in future cases the summons should contain a prayer for a declaration of forfeiture, and that the sale should be null and void in terms of the section.

[Government Solicitors, J. and H. Reid and Nephew.]

KANNEMEYER V. HAVINGA AND OTHERS.

Mr. Searle, K.C., applied for judgment against five defendants in terms of a summons calling upon them to show cause why they should not be ordered to join in having a partition of a certain farm made. He did not ask for costs against one defendant, Conrad Adolph Havinga, but he applied for costs against the others.

The application was granted, four of the respondents being ordered to pay costs.

FRIEDMAN AND CO. V. BENNETT.

On the motion of Mr. Benjamin, judgment was given under Rule 329d for £12 16s. 6d., for goods sold and delivered.

KATZ AND LURIE V. BENNETT.

Mr. Benjamin moved for judgment under Rule 329d for the sum of £10 10s. 2d., for goods sold and delivered.

Granted.

MATHEWS V. VEINER.

Mr. Alexander applied under Rule 329d for judgment for the sum of £40 10s., for rent, with interest and costs.

Granted.

MANSFIELD V. GERICK.

Mr. C. de Villiers moved under Rule 329d. for judgment for the sum of £23 16s. 9d., for goods sold and delivered.

Granted.

FALCONER V. CARBARN.

Mr. Solomon applied for judgment under Rule 329d. for £267 7s. 3d., for money lent, work done, and goods supplied, with interest and costs.

Granted.

WALKER V. CHILIE.

Mr. Benjamin moved for judgment under Rule 329d. for £14, being balance of account for goods sold and delivered.

Granted.

SPILHAUS V. MAHOMED.

Mr. Russell applied for judgment under Rule 329d. for £248 2s. 10d., for goods sold and delivered.

Granted.

COLONIAL GOVERNMENT V. RAUTENBACH'S EXECUTOR TESTAMENTARY.

This was an application under Rule 329d. for judgment for the sum of £194 16s. 8d., being quitrent and stamp duty due on the farms Springbokvlei and Witkop, in the division of Gordonia, from January 1, 1895, to December 31, 1901, at the rate of £13 10s. 10d., and 7s. 6d. per annum, interest and costs.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

COLONIAL GOVERNMENT V. W. AND A. MC-ARTHUR (LIMITED).

This was an application for judgment under Rule 329d. for costs, the claim for £288 15s., licence money, having been paid since issue of summons.

Mr. Sheil, K.C., moved for judgment.

The Court granted judgment as prayed, with costs.

REHABILITATION.

Mr. Close applied for an order for the rehabilitation of Adam Weimer, whose estate was voluntarily surrendered on February 12, 1895.

Granted.

GENERAL MOTIONS.*Ex parte* **BOTHA.**

This was a motion for the making absolute of a rule *nisi* granted under the Derelict Lands Act.

Mr. Upington applied that the matter should stand over *sine die*.

Granted.

Ex parte **EXECUTORS OF THE ESTATE OF THE LATE JOHN GABRIEL DOVETON**

On the motion of Mr. Russell, the rule *nisi* granted in this case under the Derelict Lands Act was made absolute.

Ex parte **GELDENHUYS.**

Mr. Upington moved that a rule *nisi* under the Derelict Lands Act be made absolute.

Granted.

BULT V. BULT.

Mr. Searle, K.C., applied to make absolute an order upon Amy Louise Bult for the restitution of conjugal rights, failing which a decree of divorce. The respondent had said, according to an affidavit filed, that she absolutely refused to return to live with her husband.

The rule was made absolute.

CORNISH V. CORNISH.

Mr. Close applied for a decree of divorce. An order had been granted calling upon the husband to return to the petitioner on or before the 12th October, and this had not been complied with.

The Court granted a decree as prayed.

WILSON V. WILSON.

Mr. Close applied for a decree of divorce. An order had been made calling upon the respondent—the husband—to return or to receive applicant, which order he had not obeyed.

A decree of divorce was granted, with costs.

ROGERS V. ROGERS.

This was the return day of a rule *nisi* granted by the Circuit Court at East London, calling upon respondent to show cause why the applicant—the wife—should not be given leave to sue *in forma pauperis* for a decree of nullity of marriage.

The rule was made absolute. The Court assigned Mr. Upington, who moved in the matter, as counsel, and Messrs. Walker and Jacobson as attorneys.

NDUNA V. NDUNA.

Mr. Wilkinson moved that a rule for leave to sue *in forma pauperis* be made absolute.

The application was granted. Mr. Wilkinson being appointed counsel and Mr. Michau attorney.

Ex parte SMIT AND KRUGER. } 1901.
Nov. 1st.

Judgment debt—Attachment of money in hands of High Sheriff.
Attachment of money in hands of sheriff ordered to satisfy Magistrate's Court judgments.

This was a motion for authority to attach certain moneys in satisfaction of a judgment obtained in the Magistrate's Court for the district of Albert in favour of the second petitioner, and to satisfy a writ of execution issued at the instance of the first-named petitioner.

The petition stated:

1. That on April 23, 1900, the first petitioner obtained judgment in the Court of the Resident Magistrate for the district of Albert against Jacobus P. Coetzee, of Burghersdorp, for £20 and costs.

2. On the following day petitioner issued a writ of execution for (1) the sum of £20, and (2) the sum of £1 18s. 3d., taxed costs and charges, in obtaining the said judgment.

3. The movable property of the said Coetzee, when attached and sold in execution, realised £13 3s. 9d., which sum was paid to the first petitioner.

4. That hence the said Coetzee is still indebted to the first petitioner in the sum of £8 14s. 6d.

5. That the said Coetzee is lawfully indebted to Louw A. M. Kruger, of Burghersdorp, in the sum of £10 12s. capital, £1 3s. 9d. interest, and £1 5s. 3d. costs of suit under a judgment of the Resident Magistrate's Court for the district of Albert, dated October 18, 1900.

6. On December 11, 1900, the said L. A. M. Kruger sued out a writ of execution out of the said Court.

7. The messenger entrusted with the execution of the said writ could not find any goods or chattels of the said J. P. Coetzee wherewith to satisfy the exigency thereof.

8. Jacobus P. Coetzee aforesaid is entitled to £33 8s. 11d., balance due to him from the proceeds of a certain erf which was sold by the Deputy Sheriff at Burghersdorp in execution of a judgment of the Supreme Court bearing date 10th of May, 1900, in the suit of Engela H. Paul v. the said J. P. Coetzee, and which said sum of £33 8s. 11d. is now in the hands of the High Sheriff at Cape Town, after satisfying the judgment and costs in favour of the said Engela H. Paul as aforesaid.

Petitioners prayed for an order authorising the Messenger of the Court, in terms of section 13 of Act 20 of 1856, to attach the said sum of money due to the said Jacobus P. Coetzee, or so much of it as may be necessary to satisfy the exigency of the said writ.

Mr. Close moved, and a rule *nisi* was granted, returnable on the last day of term.

On the return day the rule was made absolute.

DES FORGES AND CO. V. S.A. } 1901.
BUD OF HOPE LODGE. } Nov. 1st.

This was a motion for the release from attachment of certain property. An order had been granted on the present respondents' application giving them authority to attach certain furniture in the Odd-Fellows' Hall, Plein-street, in connection with a claim for rent against the Hebrew Operatic Society, who were formerly tenants of the hall. The present applicants alleged that part of the furniture attached belonged to them, they having hired it to the society. They applied for an order on respondents to deliver up this furniture to them, and to pay £5 for hire during the time the furniture had been detained.

The affidavit of Joseph W. J. Bentley stated that:

1. He was general manager of the retail department of the firm of P. des Forges, and as such had the hiring of the furniture hereinafter referred to in his control.

2. That in the month of March last, and periodically thenceforward, his firm let out on hire to Morris Waxman, the manager of the Hebrew Dramatic and Operatic Company, certain furniture for use in their dramatic representations, in the Odd-Fellows' Hall, Plein-street, such furniture was

duly delivered to the said Waxman after he had been occupying the hall for about three days. Certain articles of furniture were from time to time changed, and taken possession of by deponent's firm, and other furniture supplied as the exigencies and necessities of the scenic arrangements required. Such furniture was hired to the said Waxman at a rental of £5 per week, and exceeded £100 in value.

3. That the list of furniture annexed to the affidavit of P. Raphael sworn to by him in support of the notice of motion which came before this Hon. Court on 16th October, 1901, comprised (with a few trifling exceptions) property of the said Des Forges and Co.

4. On June 17 his firm received verbal notice from a member of Waxman's Company to terminate the hire; this man informed deponent that the firm of said deponent could either take the goods away or leave them in the hall, "as they would be quite safe." The company resumed their performances at the hall aforesaid, and again used the furniture, which had not been removed. On July 3 they again gave verbal notice that they no longer required the goods.

5. Plaintiff thereupon went with men to fetch the goods, but was refused admittance to the hall.

6. On the same day deponent's firm wrote to the caretaker of the said hall, threatening that they would charge him with hire of the furniture unless they were allowed to remove it the day following.

7. After various attempts at an amicable settlement had been made, the attorneys of deponent's firm wrote to the chairman of the Bud of Hope Lodge threatening legal proceedings unless the said lodge should consent to deliver the goods in question on or before September 24. In reply a letter was received from defendants' attorneys refusing delivery of the said goods, and claiming a lien on them for rent due to defendants by the Operatic Company aforesaid.

8. Owing to a misunderstanding deponent did not sufficiently instruct his firm's attorneys so as to enable them to prepare a notice of motion and affidavit in time for October 12, and they were unable to bring their claim before the Court on that day.

9. That respondents, knowing that certain goods were claimed by deponent's firm, nevertheless, without notice to the said firm, obtained an order of Court on the 16th October, 1901, attaching *inter alia* the

property of the aforesaid firm in the Odd-Fellows' Hall.

10. That deponent has been repeatedly told by Waxman that Raphael, the caretaker, well knew that the furniture used by the Operatic Company and now detained by the respondents, was the property of deponent's firm.

The affidavit of Philip Raphael was as follows:

1. I am caretaker at the Odd-Fellows' Hall, Plein-street, which is the property of the Loyal South African Bud of Hope Lodge.

2. The said hall was let to the Hebrew Dramatic and Operatic Company for £12 10s. per week.

3. The tenants from time to time brought on to the premises a piano and certain articles of furniture, which I understood was the property of the tenants, and belonged to the company.

4. I deny that Waxman ever informed me that the said furniture was on lease.

5. The first intimation I had to that effect was from one Sacks. This was after I had refused admission to applicants' representative.

6. I have no knowledge of the allegations in paragraphs 2, 3, and 4 of Bentley's affidavit, but I am aware that whilst the Operatic Company were playing in the Good Hope Hall they were also paying rent for the Odd-Fellows' Hall, and I believe they left their furniture in our premises.

7. With reference to the allegations in paragraphs 5, 6, and 7 of Bentley's affidavit, I say that in declining to deliver up possession of the articles claimed on behalf of applicants, I was acting on instructions received from the Board, and had no knowledge of the alleged leasing of the furniture.

8. There is nothing on the piano or any of the articles brought on the premises to show that they belong to any individual or firm, and from all appearances they were the property of the Hebrew Dramatic Company, and were treated as such by the Board as the lessors.

9. When the Operatic Company were two weeks in arrear with their rent, it was observed that they were removing some of their scenic effects, and thereupon, upon instructions from the Board, I locked the door and declined to allow them to move any of their property until the company paid its liabilities. At that time we had no intimation that any of the furniture aforesaid was claimed by applicants. This claim

was not put forward till a later date, and was immediately repudiated by the Board.

10. Applicants were called upon by a representative from the Board, and asked if they could produce any writing in support of the hire arrangement set up by them, but they only produced an ordinary delivery note used by them in connection with their business when delivering articles sold to customers.

Mr. Searle, K.C. (for applicant): The principle on which goods are attachable was laid down in *Lazarus v. Dose* (3 Juta, 42). Assuming we have established the fact that we let this hall to the Dramatic Company, we can attach their property for non-payment of rent. See *Lazarus v. Dose*, and also *Ulrich v. Ulrich's Trustee* (2 Juta, 319), where *Voet* (20, 2, 5) is referred to. The main principle laid down in both cases is that the landlord can attach whatever has been brought on the premises to remain there permanently. In this case the furniture was ours, and we let it to the Dramatic Company at a weekly rental of £5. The order attaching these things, I submit, should be set aside.

Sir H. Juta, K.C. (for respondents): We deny that these things are the property of applicants. They have let the matter lie by ever since July, and have let the chairs remain in the hall ever since as a part of its permanent furniture. As to *bona inrecta*, if the owner wishes to protect them he has only to give notice to the landlord that they belong to him (the said owner), and not to the tenant. If no such notice is given, very little evidence will suffice to establish the landlord's lien on such goods. In this case no such notice was given, no definite term of hiring was agreed upon; we do not know how long this company was to stay, or whether it was a professional or an amateur dramatic company, or in short, anything about it. If the owners of these chairs had not intended them to remain permanently in the hall, they would not have left them there since June.

Mr. Searle: The balance of evidence is certainly in favour of the contention that the goods are ours. If they have not been purchased—and there is no proof that they have—they still belong to us. We are, however, quite willing to go to trial if your lordship considers it desirable.

[Buchanan, A.C.J.: The case had better go to trial. The notice of motion may stand as a summons. Costs will be costs in the cause.]

Ex parte LEA. { 1901.
Nov. 1st.

The Attorney-General mentioned the matter of the petition of Richard Lea, upon which the Court had on October 16 granted a rule *nisi*, returnable on November 1, calling upon the Superintendent of the Robben Island Asylum to show cause why the removal of Lee from the jurisdiction of the Court should not be interdicted, the rule to operate as an interdict in the meantime; the rule to be served upon the Attorney-General also as curator of lunatics. The petition in question had followed upon a letter appearing in the "Owl" newspaper on October 4, which stated that petitioner was being illegally detained at Robben Island, and also alleged that he had been harshly treated. This letter was signed by three persons—J. Frolic, P. A. A. C. de Villiers, and Edward Mabile. These persons were supposed to be attendants in Robben Island Lunatic Asylum, but, as a matter of fact, there were no attendants with those names there. Upon the very day the rule *nisi* was granted, the authorities had made arrangements for sending the man to India, the medical authorities having the very best reason to think that he would ultimately recover his reason if sent there, where he had friends; but in consequence of that interdict, the authorities had been prevented from sending him home. The application had been withdrawn the previous day, and the Attorney-General now formally asked for costs, the rule having been served upon him. The affidavits he had clearly showed that there was nothing whatever in the serious allegations made against various officers in the employ of the Lunacy Department. The Government did not intend to avail itself of any order for costs against this unfortunate man, but as a great deal of public notice had been excited by the allegations, he wished to read some of the replying affidavits.

The original petition on which the rule *nisi* was granted was as follows:

1. That your petitioner was for some time a member of the Colonial Force, being a sergeant in the Volunteer Regiment known as Kitchener's Horse; that your petitioner did in that capacity well and truly serve her late Majesty, Queen Victoria.

2. That your petitioner was invalided from the front, having been injured by a fall from his horse at Krugersdorp, in the Transvaal Colony, and was sent down to the Wynberg Military Hospital.

3. That your petitioner's mind thereafter became temporarily affected, the effect, as your petitioner doth believe, of the aforesaid fall, and your petitioner was accordingly sent to the Valkenberg Lunatic Asylum, under a summary order made by the A.R.M. of Wynberg, on 15th January, 1901, and a subsequent order of this Hon. Court, for his further detention, dated 28th January, 1901.

4. That on or about the 12th day of March, 1901, Dr. Dodds, the medical officer in charge of the said Valkenberg Asylum, received instructions from the Embarkation Officer that your petitioner had been granted an indulgence passage in the transport Roslin Castle to his home and family in India.

5. That your petitioner was at that time perfectly sane, and he believes that the said Dr. Dodds did then certify to his sanity.

6. That through some cause unknown to your petitioner, and over which he had no control, your petitioner lost his passage in the said transport, that at the time your petitioner thought and verily believed that this was due to the fault or negligence of the said Dr. Dodds, and being naturally annoyed in consequence, he unadvisedly used some threatening language towards the said Dr. Dodds.

7. That your petitioner was thereupon, presumably in consequence of the threatening language mentioned in the immediately preceding paragraph, removed to the Robben Island Lunatic Asylum, where he has been detained ever since.

8. That on his arrival at the Robben Island Asylum your petitioner was placed in a ward reserved for violent criminal patients, where he was kept for a period of about four months.

9. That thereafter, on making complaint, your petitioner was placed in a Kafir ward, 60 feet by 40 feet in size, along with about 150 Kafirs, and was kept in said ward for a period of three months, when your petitioner was unable to longer endure the strain of so horrible an experience, but became ill, and was confined to his bed for some time.

10. That your petitioner was thereupon removed from the Kafir ward, and placed among the ordinary white patients.

11. That during his confinement in the Kafir ward your petitioner suffered terribly from his horrible position and neighbours, but nevertheless retained his sanity.

12. That certain of the warders and attendants at the said asylum are perfectly assured of your petitioner's sanity, that three

of them have actually deposed to same in a letter addressed to the newspaper called the "Owl," which appeared in the issue of said paper of October 4, 1901, copy of which letter in its original and unaltered form is hereto annexed, and to which your petitioner craves leave to refer your lordships; that since the publication of the said letter the various warders and attendants have been warned, under threat of penalty, not to sign any document whatsoever concerning your petitioner; that the said warders and attendants are therefore afraid to depose to anything further concerning your petitioner, who is thus unable to obtain any affidavits in support of his present application.

13. That your petitioner believes that since the publication of the said letter the authorities have decided to remove him from the Robben Island Asylum to some place out of the jurisdiction of this honourable Court, where he will still be kept in confinement.

14. That your petitioner has entirely recovered, and is of sound mind, and is desirous of regaining his freedom so that he may return to India to his wife and family, from whom he has now been long separated, and who stand in need of your petitioner's services to gain their livelihood.

Whereupon your petitioner prays that your lordships may be pleased to grant an order restraining the authorities from removing or suffering your petitioner to be removed outside the jurisdiction of your lordships pending the holding of an inquiry into the cause and grounds of your petitioner's detention, with a view to his obtaining his release from further confinement, and other relief: also an order directing the holding of such inquiry and empowering your petitioner to have himself examined by independent medical men of his own selection, in view of such inquiry, and extending to him such further relief as to your lordships shall seem proper.

Cape Town, October 16, 1901.

The replying affidavit of William John Dodds, M.D., medical superintendent of Valkenberg Asylum, was as follows:

1. That I have no personal knowledge of the facts alleged in paragraphs 1 and 2 of the petition.

2. As to paragraph 3, the petitioner was admitted to be detained in the Valkenberg Lunatic Asylum on the orders therein referred to, the originals of which I crave leave to annex hereto, the nature of the disease

from which the petitioner was suffering will sufficiently appear from these documents.

3. As to paragraphs 4 and 7 of the petition, I have to state that by February the petitioner had shown some signs of improvement, and as he was continually pressing me to do what I could to get him back to India, I wrote to the military authorities with the view of securing an indulgence passage for him on board a transport vessel. I thought that in a transport, under the care of a doctor, and with the knowledge that he was returning home, he could safely travel, and there was reason to hope for further improvement. I understood he would land at Bombay, where his sister lived.

4. Some little time after I had written to the military authorities about the petitioner's passage he became irritable, apparently at the delay, and began to express fears about his safety on board the transport, giving as his reasons that it was no uncommon thing on such ships to quietly put men overboard. At times he was unable to control himself, and again he began to utter threats against the officers under whom he had served.

5. I pointed out to him that the want of control over himself which he was displaying rendered it very difficult for me to assist him. He agreed to this and said that he did not know what had come over him; he used not to be like this. I told him I would still do for him what I could if he would show me that he could control himself. He pressed me to mention a time, and I said, "Show me during the next fortnight that you can control yourself." This was about March 7.

6. On March 9 I received an intimation from the military authorities that Lea had been granted a passage to India by the *Dwaka*, sailing on March 25. On March 14, or evening of March 13, I received information that a passage was provided for Lea in the *Roslin Castle*, and that he was to be held in readiness to embark on Thursday next. By this I understood Thursday, March 21, whereas the *Roslin* sailed on March 15. But had I known that the *Roslin* was to sail on that date I could not, after Lea's recent excitement, have taken the responsibility of sending him without an escort, and the military refused to give him a passage if an escort was needed.

7. On March 27 I ascertained that the *Dwaka* would not sail until the end of April.

8. On the 28th, my colleague, Dr. Cowper, informed me that Lea had become very excited on learning about the *Dwaka* not sailing until the end of April, and had

threatened to put four bullets through him if he had a revolver.

9. I sent for Lea to endeavour to calm him, but he became still more excited, until it culminated in an outburst of maniacal frenzy. He suddenly seized the wooden stationery case, which was on my table, and made as if to hurl it at me. The attendant took hold of him, and he went away uttering threats against me. After this outburst it was impossible to send him to India by transport, as had been contemplated.

10. Robben Island Lunatic Asylum is not a criminal lunatic asylum. Government pleasure, and insane criminals are sent there, but the great majority of the patients are ordinary patients. Lea was transferred to Robben Island by authority of the Colonial Secretary on my application because of his threatening language and violent conduct, and because at the time our staff were very short-handed.

11. Since his removal to Robben Island I have only seen him once (on September 24). On that occasion he was calm, and did not display any excitement. While at the asylum every indulgence consistent with his own safety and that of others was granted to him; on several occasions he was allowed to come into Cape Town accompanied by an attendant. On one of these occasions (on March 18) it was reported to me that he thought some soldiers he saw were going to shoot him, and also that he shouted "Murder," thinking that the attendant was going to kill him. I have always been most anxious for the prisoner's removal to India, but the delay in removing him has been occasioned by circumstances over which I have no control.

The affidavit of Robert Sinclair Black, medical superintendent, Robben Island Asylum, was as follows:

1. Richard Lea was admitted to this asylum on 12th April, 1961. He was transferred at the request of the medical superintendent of Valkenberg Asylum from Valkenberg, with the approval of the Colonial Secretary, under the provisions of the Lunacy Act. His transfer papers show that during his stay at Valkenberg he had outbursts of great violence, and had used the most threatening language to Doctors Dodds and Cowper.

2. On his admission here he was a little excited, and spoke of the unfortunate position he was placed in, and his ill-treatment at Valkenberg. As he was otherwise quiet and amenable to the discipline of the asylum, I chose, till I had him for a reason-

able period under observation, to consider that he was a man recovering rapidly from an attack of acute mania, and on the eve of regaining his mental stability. I therefore reported on the usual form that I was as yet unable to certify him as of unsound mind. I granted him full parole, and between meal times he had full liberty to walk over the island and amuse himself as he deemed fit. I did my best in showing my trust of him, in this way to encourage him to feel that, with circumspect and quiet behaviour on his part, he would be set at liberty in a reasonable time. Every one on the island who came in contact with him sympathised with the unfortunate man, and he was treated by all officers and others with uniform kindness. On May the 9th he was granted partial parole; on May 20, full parole.

3. Soon after he was granted full parole, i.e., he was allowed to leave the asylum without an attendant, and behave as a free man between meals, it was evident his mental condition was not improving. He said that there was a conspiracy to illegally detain him, that Dr. Dodds was responsible for the whole thing, and that he would have his revenge; that he would murder Dr. Dodds if he had his opportunity, and also his child. As I was most anxious to take the most favourable view of Lea's case, which now began to give me much anxiety, I chose at first to treat this as mere wild talk, but other delusions were expressed. He made allegations of gross immorality against perfectly blameless people on the island, which gave much pain, and he reported drunkenness against officials who are teetotallers and other equally absurd statements. He became very excited and suspicious, and I could see that he entertained suspicions against me. It was reported to me by the head attendant on June 9 that I must be careful, as he had told several people that he would murder me if he got the opportunity.

4. I felt it now necessary for safety to stop his parole. I informed him of this next day, when he made a most furious attempt to attack me, which was frustrated by the attendants present, the head attendant being injured in the struggle. Lea was so furiously excited, and used such threatening language, that I had no alternative than to place him in the most secure yard in the asylum—that building used by coloured and native patients. The staff of attendants was at that time much below strength, and

I have a very large number of trying cases under my charge, so that I could not, for the sake of safety of the other patients, the attendants, and Lea himself, allow him to remain in the condition of maniacal fury on the European side, where he might have access to knives and other articles, which, in his condition, he might use as weapons. I have no hesitation in saying that in the same circumstances I would act in the same way again. Lea slept in his single room, and could get up and retire when he liked, and take his meals in it, but I kept him for safety and for exercise in charge of a special attendant in the strongest yard of the asylum, which, as the responsible medical officer, was the proper course for me in my opinion to adopt in the circumstances. For some little time he remained quiet, but was constantly writing letters which were not sane, and harping on his illegal detention. At the beginning of July I asked him whether he would like to take exercise in the European yard, but he said he feared that he would murder certain patients there, and refused to go. Towards the third week of July his condition became worse; he was in a condition of acute mania, saying that he was to be poisoned, murdered, or hanged. I had to place a second special attendant with him during the day, and one at night. He became actively suicidal, tried to strangle himself, tried to bite into the arteries of the wrist, and beat his face with his fists, causing bleeding and discolouration. At this time I had to have two special attendants with him at night. At the end of July he became more composed, and I placed him in the European observation dormitory, with a special attendant in addition to the usual night attendant. He was now much less actively excited, but still retained his delusions. He informed me on August 6 that the head attendant intended to murder him. The improvement gradually continued, and as I had not my attendant staff up to strength, I placed him again for exercise and meals in the European court on August 24. For a few days afterwards he was excited; on August 28 he used very threatening language, and threatened to stab me had he the opportunity. He has since, on the whole, continually improved, though he has fits of excitement. On October 11 he told us that he was now convinced that Mr. Shaw, Acting Under Colonial Secretary, was at the bottom of the conspiracy to illegally

detain him, and that he would have him dismissed. He frequently tells me that he will have his case brought before the Viceroy of India. On October 12 he, in my presence, threatened to murder Attendant Currie with a stone if he interfered with him. On October 18 he informed me that the Chief Justice was coming over in a special boat next day to see him. I have merely mentioned a few of the delusions to which he has given expression. His condition has greatly improved since August, and I have recommended that he now get an opportunity of change by being sent to his relations in India in charge of an escort. The change will, I hope, divert his mind from the delusions which now unhinge it, by complete alteration of scenes and surroundings. I am of opinion that he is still of unsound mind, and I could not take the responsibility of recommending his discharge even conditionally at present except as above recommended. For his treatment here when under my charge I take the entire responsibility in every particular. His has been one of the most trying cases which, in my long experience, I have had to treat, and had I not had the assistance of a most experienced head attendant and excellent staff, I would have felt much difficulty in treating Lea's case, as he gave great anxiety to my attendants. His case has been fully gone into by Dr. Dodds, Dr. Murray, and the other official visitors, and has been fully under the close inspection of Mr. Piers, Commissioner of Robben Island and Mr. Jackson, Acting Commissioner, who have been informed of every particular as regards his treatment, and have frequently seen him. Detailed reports have frequently been sent by me to the Colonial Office, and in no respect has the slightest hesitation been shown by me to grant the fullest inquiry into Lea's treatment when under my charge, for which, as I have already said, I take sole responsibility.

5. In connection with the letter to the "Owl" newspaper, Lea informed me that he had himself written the letter. No such attendants exist here as purport to sign the letter, and all the attendants who have had any connection with Lea's treatment have spontaneously come forward to state—as I am glad they have done—that the patient has never been treated except in the kindest way. At present Lea is on the same footing as the ordinary patient. He is allowed to walk out with the walking parties; he remains up till 9 p.m. On occasions I grant

him parole to take walks with an old comrade of Kitchener's Horse, who is an employee on the island, and who on those occasions is made responsible for him; in fact, everything is done to help his recovery. So long as he remains in a Colonial asylum I don't think that he will get entirely rid of his delusions, and it is for this reason that since his condition has become ameliorated that I have been pressing that he should have a complete change, so that fresh surroundings should contribute to the restoration of his mental stability.

6. I would only like to add that though Lea was for security placed on the coloured side, he was in no sense herded with Kafirs. He had always one or two special attendants in charge of him; he took his meals in his single room, which he had occupied since his admission to the asylum; he rose and retired to rest when he felt disposed. About a fortnight after being placed in the coloured yard he was given permission to take exercise with a special attendant in the large open coloured airing court. I gave him the option of several weeks before I again placed him in the European airing court. I gave him the option of returning there if he wished to do so; but he refused, saying that his antipathy to certain of the patients there was so great that he feared that he would commit murder. I therefore thought it more advisable to leave him until he was more composed.

European patients have complained to me and to the official visitors of the terror inspired by Lea's threats towards them.

Lea is an exceptionally powerful man, and most serious results would be incurred if he tried to put his threats into execution.

Dr. Black made a further affidavit as follows: I, Robert Sinclair Black, Medical Superintendent, Robben Island Asylum, make oath and say:

1. That Richard Lea never slept in the Kafir dormitory. He was simply put into the coloured airing court during part of the day for exercise, but he slept and had his meals in his own room, a room which he had occupied ever since his admission to the asylum.

George Piers, Civil Commissioner of the Paarl, also made an affidavit as follows: In June, 1901, I was Commissioner at Robben Island, and I still hold that position. I recollect hearing that Richard Lea, the abovenamed petitioner, had made an attack on Dr. Black, the medical superintendent, on the 11th of June. On the following day I visited Lea, who expressed his great re-

gret at what had happened, saying he knew full well that had he been in the Army he would have got at least two years hard labour for his conduct. He informed me at the same time that he bore no ill-will towards the doctor, Mr. Nutt, or the attendants generally, all of whom had treated him with the greatest kindness and consideration, and he added that, if what had happened had occurred at Valkenberg, he would have been very differently handled by Dr. Dodds's dogs, as he called the attendants. He then implored me to allow him to remain where he was, saying that he would prefer staying there for twenty years than go back to the white section, for he went on to say that if he did, he would certainly kill three patients there—Scott, Tupper, and Grant—who, he said, were the cause of all the trouble in the asylum.

Gerard Vrolik, in an affidavit, said: I neither signed nor caused to be signed and inserted in the "Owl" newspaper of the 4th October, 1900, nor had I anything to do with the letter purporting to be signed by three attendants of the Male Lunatic Asylum, and containing charges of ill-treatment of patient Richard Lea, an inmate of the asylum, by certain officers of this institution.

There was also an affidavit signed by all the attendants at Robben Island as follows: None of us either signed or caused to be inserted in the "Owl" newspaper of the 4th October, 1901, or had anything whatever to do with the letter purporting to be signed by three attendants of the Male Lunatic Asylum, Robben Island, and containing charges of ill-treatment of patient Richard Lea, an inmate of the asylum, by certain officers of this institution.

In an affidavit, Noel Janish, Under Colonial Secretary, said:

1. That on the 23rd May last, in consequence of a report made to the Colonial Secretary by the Medical Superintendent at Robben Island, the military authorities were approached with a view of obtaining a free passage for Richard Lea to India. On the 18th June a reply was received stating that Lea's name had been booked for a free passage to India on the first opportunity. Since that date further communications took place, but the military authorities were unable to provide a passage until this month, when they intimated that a passage would be given in a steamer which was to leave on the 16th of October, but before the vessel left an interdict was obtained.

2. That there was no intention to remove the petitioner out of the jurisdiction of the

Court in order to avoid inquiry as is insinuated in the petition. The idea was to comply with his own wish and to hand petitioner over to his wife and family, or if on arrival in India his condition was such as to require confinement, then hand him over to the proper authorities. That up to the 12th inst. Messrs. Van Zyl and Buissinne were acting as attorneys for the petitioner, and they were not only aware of the intention to send petitioner to India, but approved of it.

The following affidavit was also put in:

We, David Mudie and William Edward Moore, of Cape Town, make oath and say:

1. That we have been two of the official visitors of the Robben Island and Valkenberg Lunatic Asylums for about fourteen years. The official visitors inspect the asylums at least once every quarter.

2. On the 19th of September we went over to Robben Island for the purpose of examining the patient Richard Lea, and inquiring into his complaints.

3. We examined Lea in the dining-hall, and invited him to call any witnesses that he might have. None of the officials were present. Lea complained of all the officials generally, said that he was roughly handled, but he could give no particulars. Lea complained specially that he had been confined in a seclusion ward, where he had slept with two other patients, one of whom was a Kafir murderer. He also said that for three months he had been confined in a yard with Kafir and other natives. In accordance with our usual custom, we did not make inquiries of the Medical Superintendent or attendants, but sent our report to the Colonial Secretary, leaving it to him to make such inquiries as he might think proper of the Medical Superintendent.

4. Lea called several witnesses in support of his allegations of ill-usage, but not one of them had seen any. We allowed Lea to put his own questions, and then we questioned the witnesses ourselves.

5. We came to the conclusion from the evidence that the complaints of ill-usage, except as mentioned in paragraph 3, were not substantiated.

6. In our opinion Richard Lea is of unsound mind, and being a powerful man, would be very dangerous when excited or labouring under the conviction of bad treatment, which idea is firmly fixed in his mind (so impressed was the said David Mudie of his dangerous look that after we had been closeted with him for a few minutes he went outside and arranged for

two warders to stand at the door and come in if any noise was heard). A man such as Lea, who, according to his own acknowledgement, is subject to violent outbursts of temper, should and must be restrained. We are not prepared to say to what extent and in what manner restraint should be applied. The treatment in the asylum, as far as we as visitors can judge, is good. The food is good, the beds and rooms are clean, and the patients are made as comfortable as possible.

7. In our report on Lea's case to the Government, we concluded as follows: It appears to us that in fairness to the man himself and to all concerned, it is incumbent upon the military to provide a passage for him (Lea) to join or be near his family, and we would strongly urge that this should be done without further delay.

Reports of other official visitors of the Robben Island and Valkenberg Asylums were also put in testifying to the insanity of the petitioner Lea.

After reading the affidavits, etc., the Attorney-General said that the case having been withdrawn, the only way they could bring the facts to their lordships' notice was to formally make an application for costs, but of course no order as to costs would be taken advantage of. They were only anxious to do the best they could for this unfortunate man.

Buchanan, A.C.J., said that he himself had had numerous letters from this unfortunate man, and what the man had most at heart was being able to get away to India, where his wife and family were. He (the Acting Chief Justice) might say that before the interdict a respectable firm in Cape Town were making the best arrangements they could to get the man away to India. His lordship believed that the intentions of those who had moved in the matter were good, but they were certainly very unfortunate for the man himself.

The Attorney-General said that they hoped to send the man away to India as soon as an opportunity arose.

Maasdorp, J., said that at the time the application was made he pointed out to counsel that it would have been advisable if the persons who took an interest in this unfortunate man had communicated with the Attorney-General. The matter, however, was so urgent, as the vessel was about to leave, that he gave the order. At the same time he urged that it would be advisable to make further inquiries before moving further

in the matter, seeing they had a lunatic to deal with.

Buchanan, A.C.J.: The rule *nisi* returnable to-day will be discharged with costs.

Ex parte STEYN.

Mr. Close moved for leave to sell certain property.

Granted.

NATHAN V. NATHAN.

On the motion of Mr. McGregor, leave was granted to Ada Nathan to sue Max Nathan for divorce by edictal citation, returnable on the 13th January, in the Eastern Districts Court. Leave was granted to serve intendit and notice of trial at the same time.

Ex parte GREYLING.

Mr. Solomon applied for an order authorising the Registrar of Deeds to pass transfer of certain property.

Granted.

Ex parte DE VILLIERS { 1901.
Nov. 1st.

This was an application on behalf of Petrus Jacobus de Villiers for an order authorising the Master to pay to petitioner as father and natural guardian of the minor Elizabeth de Villiers the sum of £60 annually for the next two years out of funds devolving upon her from the estate of her late grandmother. Petitioner stated that he was desirous of having his daughter educated at the Musical College, Stellenbosch, for the musical profession, but that owing to bad harvests and other misfortunes it was not in his power to provide the funds necessary for this purpose. The Master recommended that the application be granted.

Mr. De Waal moved, and the Court granted an order in terms of the Master's report.

Ex parte STEER, N.O.—*Re* { 1901.
BATES V. ZACKS. { Nov. 1st.

This was an application for leave to attach certain property to found jurisdiction, and to sue by edictal citation.

The petition of Frederick Beecher Steer, in his capacity as the general agent of John Francis Bates, of Cape Town, showed:

1. That on June 12, 1900, one Ben. Zacks passed a mortgage bond in favour of petitioner's principal, for £800 on first mort-

gage of the remaining extent of a certain piece of land situate in the Cape Division at Plumstead, being Lot 3 and part 2, Block F, portion M of the freehold land granted to C. Preyzer on the 12th August, 1837, and transferred to the said Ben Zacks on June 12, 1900.

2. That it is provided in the said mortgage bond that the said Ben. Zacks shall pay interest on the said capital sum of £800 half-yearly, on June 30 and December 31, in each year, at the rate of 6 per cent. per annum, to be reckoned from June 1, 1900, and that in the event of the said half-yearly interest not being paid on the day it falls due the principal and arrears of interest shall be considered as legally claimed and due without notice.

3. That the said Ben. Zacks failed to pay the interest which became due on June 30, 1901.

4. That letters addressed to him on the subject at his former residence at Plumstead have been returned, through the dead-letter office, undelivered, and from inquiries which petitioner has caused to be made it appears that he has left his said residence, and that in spite of all efforts to ascertain his present whereabouts no trace of him can be found.

5. That there is a shop situated on the said land, but it has been vacant for some considerable time.

6. That petitioner is desirous of suing the said Ben. Zacks by edictal citation for the recovery of the capital amount on the said mortgage bond, together with the interest due thereon.

Wherefore the petitioner prays for an order for the attachment of the said landed property *ad fundandam jurisdictionem*, and that upon the return of the writ of attachment, petitioner may be allowed to issue a summons by edictal citation against the said Ben. Zacks for the recovery of the said sum of £800, with interest thereon at 6 per cent. per annum from the 1st January, 1901, and costs of suit. Petitioner also prays that your lordships will give such directions as to the mode of serving the summons and as to the time for the appearance of the defendant, as to your lordships may seem meet.

Mr. C. W. de Villiers moved, and the Court granted a rule *nisi* in terms of the petition, returnable on January 12, 1902.

On the return day (12th January) provisional sentence was granted on the bond, and the property was declared executable.

[Plaintiff's Solicitor, F. B. Steer.]

POTGIETER AND OTHERS V. DE JAGER AND OTHERS.

This was a motion for removal of trial from Oudtshoorn Circuit Court to the Supreme Court.

Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for applicants.

Mr. Schreiner, K.C. (with him Mr. McGregor), for respondents.

This case was ordered by the Supreme Court to be removed for trial to the Circuit Court, to have been held at Oudtshoorn on the 21st October. Applicants now asked that it be removed back again to the Supreme Court, as applicants did not know whether there was to be any Circuit Court—this year, at any rate.

Affidavits were read in support of and in opposition to the motion.

Mr. Schreiner said that, should anything occur to prevent the Court being held on the 9th November, the same circumstances would prevent the Oudtshoorn witnesses from coming down here.

Sir Henry Juta said the Supreme Court term was on, and there would be no bar on circuit.

Buchanan, A.C.J., said that the circumstances under which the case was removed to Oudtshoorn still existed, and there was difficulty, as stated on affidavit, in getting the military's permission for witnesses to come down here. The Circuit Court would probably sit in a short time. Under the present circumstances, the Court would not make an order for the removal of the case.

Costs of the application were ordered to be costs in the cause.

Ex parte ROBERTS AND ANOTHER. (1901. Nov. 1st.)

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain immovable property situate in Ward N, Table Valley. Petitioners were the executors testamentary under the will of the late C. J. Roberts, and had bought the said property, being part of the said estate, at a public sale for £3,450.

Mr. S. Solomon moved. The Court ordered the matter to stand over until further information could be obtained regarding the value of the property and as to the sale.

Ex parte FICK AND OTHERS.

Mr. De Waal moved for the cancellation of the appointment of Josias S. de Kock as executor of the estate of the late Gabriel S. de Kock.

A rule *nisi* was granted, calling on the executor to show cause. The rule was made returnable on the 12th January, and was ordered to be published once in the "Gazette" and once in a Pretoria newspaper.

[Before the Hon. Mr. Justice MAASDORP.]

DREYER V. VAN DER WALT.

This was an application for a process in aid to enable applicant to attach certain moneys in the hands of the High Sheriff in satisfaction of a balance due on a judgment debt. Applicant had obtained judgment against respondent in the Eastern Districts Court for £934 16s., and costs amounting to £116 0s. 11d. A writ had been issued out of the Eastern Districts Court, and the Sheriff had made a return of *nulla bona*. From time to time certain levies had been made on respondent, but a balance of £661 14s. 9d. was still due to applicant. Certain property belonging to respondent having been sold in execution, and there being a balance from the proceeds in the hands of the High Sheriff, applicant now asked for process in aid to enable him to attach this balance, in part satisfaction of the balance of the debt still due to him.

Mr. Buchanan moved, and the Court granted an order as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

BOSMAN, POWIS AND CO. V. { 1901.
VAN NIEKERK'S EXECUTOR. { Nov. 4th.

This was an action for a declaration of rights, and for an order compelling the defendant, as executor of the estate of the late Marthinus Johannes van Niekerk, to transfer a certain licence for the sale of liquor. The plaintiffs carried on business

together as wine merchants in Cape Town. In 1899 the late Mr. Van Niekerk was the holder of a certain bottle-store licence at the corner of Sea and Waterkant streets, where he carried on business. In November, 1899, Van Niekerk sold the licence and business to the plaintiffs for a valuable consideration, part of which was the payment by plaintiffs of a sum of £3 a month until December 31, 1902. The monthly payments had been made as they had fallen due, and the plaintiffs intended to make the future payments as they also fell due. From the date of the sale until April 11, 1901, when Van Niekerk died, he carried on the business as manager for the plaintiffs, and the plaintiffs paid for the licence. On June 4 the plaintiffs notified the defendant of their rights under the sale, and demanded transfer of the licence. The defendant refused to transfer, and was still carrying on business for the benefit of the estate of Van Niekerk, and the plaintiffs accordingly alleged that they had sustained damages in the sum of £100. The defendant, in his plea said that he had no knowledge of the sale or of the payment of £3 a month, and denied that the late Mr. Van Niekerk had carried on business for the plaintiffs. He declared, further, that when Van Niekerk died, the licence was in his name, and on June 1, 1901, he gave one month's notice to terminate the tenancy, and carried on the business for the benefit of the estate of the late Mr. M. J. van Niekerk.

Mr. B. Upington for plaintiffs, and Sir H. Juta, K.C. (with him Mr. De Waal), for defendant.

Daniel Ferdinand Bosman, partner in the firm of Bosman, Powis and Co., stated that he knew the defendant in the case, and had known him for many years. He was the executor in the estate of the late Marthinus Johannes van Niekerk. The latter had owned two bottle-stores, one in Wale-street and one in Waterkant-street, the latter of which, he informed witness, did not pay. He had a conversation with Mr. Van Niekerk as to the sale of the bottle-store, and eventually an arrangement was come to. Van Niekerk wanted witness to pay £100 or £150 as goodwill, and an arrangement was ultimately come to, by which witness should pay £3 a month for the duration of the lease. Witness took over the stock, and had to pay the current licence. The licence remained in Van Niekerk's name, and was not transferred, owing to objections on the part of the Inspector of Licences. On April 11,

1901, Van Niekerk died, after witness had paid the licence. Witness continued the monthly payments to the executor, who was also in his employ, but eventually he received a notice from the executor to vacate the premises.

By the Court: He went out of the premises because the defendant gave him a month's notice.

Cross-examined by Sir Henry Juta: He did not get a lease from Van Niekerk because Van Niekerk had not got a lease himself, and was therefore not able to give a lease. He went out of the place because the defendant denied the whole agreement between Van Niekerk and witness. He did not remain in the place because he was advised by his counsel to go out.

George Tregance Powis, a partner in the plaintiff firm, said that Van Niekerk spoke to him about the Waterkant-street bottle-store, and said that the business was not paying. Van Niekerk, who was a general manager for the firm, had not the time to get out to attend to the business, and he suggested that the plaintiffs should take the business over. An arrangement was come to which was that plaintiffs were to pay Van Niekerk during the unexpired portion of the lease under which he was a sub-tenant the sum of £3 a month in lieu of any goodwill, £7 for rent, and, until the expiration of the current licence £2 10s. a month. They were, in addition, to pay for the stock at wholesale market value, and on the 30th November they took stock, which was valued at £46 16s. That amount was settled in account with Van Niekerk, and after the latter's death the business was carried on for the account of the firm. From the date when they took over the store up to the 31st March, the branch exactly paid its way. When they started business, the sales at the branch were about £18 a week, and during the year ending 31st March, 1901, the books showed that they made a profit of £250 13s. 4d. After Van Niekerk's death the monthly payment was made to his executor; witness saw the latter after Van Niekerk's death, and he never took up the position that the bottle-store belonged to the deceased.

Cross-examined: The firm's books certainly did not show that the store was paying well.

By the Court: When they took over the business from Van Niekerk, the latter had no further interest in it.

Lambertus Petrus van der Poel, manager of the Bree-street branch of Messrs. Ohlsson, said he was at one time the manager for Van Niekerk in Wale-street. Some time

last year witness had a conversation with Van Niekerk about the Waterkant-street store.

Sir Henry Juta objected to evidence being given as to conversations with a party now deceased.

The Court ruled that the evidence was admissible.

Witness said that Van Niekerk told him that he had sold the Waterkant-street store to Bosman, Powis and Co. He said he sold it because it did not pay, and that it would pay plaintiffs better, owing to their having their own wine.

Cross-examined: Witness thought this conversation occurred in about June or July last year. Witness commenced the conversation by asking Van Niekerk why he did not then go to the Waterkant-street store. Then Van Niekerk said he had sold the place. Witness did not know if Van Niekerk stopped going to the Waterkant-street store.

Sub-Inspector Osberg was called, but said he did not know of the fact that Bosman, Powis and Co. had bought the store from Van Niekerk.

This concluded the evidence for plaintiffs.

Charles Horwood Kinsley, law agent, said he knew the late Mr. Van Niekerk for many years, and had applied for the renewal of the licenses of his Waterkant-street and Wale-street stores from 1894 up to 1901. Witness was always paid by Mr. Van Niekerk.

Petrus Johannes Louw, wine merchant and bottle-store keeper, said he had been in the business for many years, and sold the Waterkant-street store to Van Niekerk about 14 or 15 years ago. He paid witness about £210. About £30 of this was for stock. Witness had considerable experience of the liquor trade. The profit, buying from the merchant, on £100 per month, was about 33 per cent. In 1899 the value of the goodwill of a store where the takings were £100 per month would be about £300. If a man could not afford to pay for a licence at once the practice was for the wine merchant to pay and charge.

Cross-examined: The 33 per cent. would be the difference between wholesale and retail prices, and deductions would have to be made for working expenses. Witness owed Van Niekerk about £100 when he sold the store, and this was part of the purchase price.

Edward Mitchell George said he was for about ten years in Van Niekerk's employ, and had managed the Waterkant-street business. He left in 1899 owing to ill-health.

Witness's salary was £7 per month, and the rent £7. Excepting this and the licence, there were no expenses. The takings per week were about £25 or £30.

Andries Van Niekerk, executor dative in the estate of his late brother, said there were no documents left by deceased respecting this transaction. Under the Act witness called for proof of the claim made by plaintiffs. Witness told Bosman that he was not aware that the store was plaintiffs'. Witness never agreed to transfer the licence. Witness, his brother, Bosman, and Powis had a conversation in plaintiffs' office. Bosman said he had bought the store for £600, and was paying interest at 6 per cent. Witness said he must prove he had bought the store.

By the Court: Witness understood from Bosman's conversation that the £600 was to be paid into the estate.

Examination continued: Witness was agreeable to take £600. Witness arranged to buy the stock, to take possession of the business, and to take wines from the plaintiffs.

Cross-examined: Witness's brother—Michael—was barman in the store, and was paid by plaintiffs. Witness did not know, before his brother's death, that he had sold the store. The conversation with Mr. Bosman took place about a month after Martinus van Niekerk's death.

Re-examined: Witness found no papers about either of the bottle-stores on his brother's estate.

By the Court: Since the 1st July witness had been carrying on the Waterkant-street store. The net profits were about £30 a month.

Michael van Niekerk said that he had been managing the Waterkant-street store for plaintiffs. His late brother did not manage it; he only occasionally looked in to see how witness was getting on. Witness corroborated the last witness's statements as to the conversation with Bosman. He heard Bosman say that he had bought the store for £600, and was paying 6 per cent. on the purchase amount.

This concluded the evidence, and Mr. Upington then read the correspondence in the case.

Mr. B. Upington (for plaintiffs): The main issue is whether the agreement mentioned in the declaration was entered into in the manner therein stated. We say that the business was not paying Van Niekerk, and he was anxious to dispose thereof. The manager has deposed that the takings were £25 to £30 per week. The evidence

shows that the profit is 25 per cent. to 30 per cent. It would not pay a firm like Bosman and Powis, who would have to pay a manager, to take over a business like this. The evidence of Bosman and Powis shows that the goodwill was taken over at £3 a month. The licence was paid for by Bosman and Powis. Soon after the death of Van Niekerk the state of matters was put before the defendant. His only defence is that Bosman, Powis and Co. agreed to pay a lump sum of £600, instead of £3 a month. Again, it is strange that deceased left no books or papers. Bosman took over the business, not because he was anxious to do so, but to oblige Van Niekerk he agreed to give £3 a month so long as the lease should last. Then there is the difficulty that the licence was not transferred into the names of the plaintiffs. Inspector Osberg gave them to understand that the licence could not be made out in their name, and hence they took it out in the name of their manager. Now, the executor claims the licence, but is estopped from doing so by having received £7 per month as rent and £3 for the goodwill. Then there is the evidence of the manager of the Waterkant-street store, who alleges deceased said that he had disposed of the business at £3 a month. The accuracy of plaintiff's books was not disputed, and these books show that the business barely paid. Bosman and Powis are a wealthy firm, and they were not likely to falsify their books or to pay £3 a month because they could not afford to give a lump sum of £600 for the business. That disposes of the first part of the defence, viz., the absence of any proof of agreement. Then as to the second point, viz., that the licence is personal, and is a licence of the holder, and not of the property. No doubt this is so, but if a contract to transfer a licence has been entered into and proved, the parties so contracting are bound by their contract. Again, it has been said that Bosman, Powis and Co. quitted the premises on receipt of notice from defendant. But they did this without prejudice, and if J. M. van Niekerk had been now alive he would have been very glad to get rid of the business on the terms offered by Bosman, Powis and Co. As to the terms of the declaration, they fully entitle us to claim specific performance.

Sir H. Juta, K.C. (for defendants): The Court is asked to give a decree of specific performance, and to order the transfer of this licence. This claim is bad in law. This case is not on all fours with *Ohlsson v. Parsons* (11 Sheil, 233). One man cannot get

a licence for another. That would be against the whole spirit of the liquor laws. A man may not set up a dummy applicant to take out a licence for him. This is not a case of a current licence under section 56 of Act 28 of 1883, which allows a Licensing Court to transfer to a purchaser. But even then it is in the discretion of the Licensing Court to grant the transfer or not. In this case the licence bought was that for 1899, and the Court is now asked to transfer, not this 1899 licence, but a wholly new one, taken out in Van Niekerk's name in 1901. To do this would be absolutely illegal. It was not competent for Van Niekerk to give his name to Bosman and to take out a licence for him. The Court will not enforce specific performance of an illegal contract. Sections 56 to 63 of Act 28 of 1883 deal with what may be done with a current licence. In *Parsons'* case, section 11 of the Act of 1885 was relied upon. But that was a case of a manager. A manager is as liable for any infringement of the liquor Acts as the holder; but that is not so with the manager of a wholesale business, and there is nothing in any Act to show that a wholesale firm may have all licences taken out in their manager's name. Save in the case of a current licence no man may take out a licence for another. Then is plaintiff's story true? The alleged agreement took place in 1899, and since then plaintiffs have had ample time to get the licence in their own name. If parties to a sale of land have a chance of putting that contract into writing and fail to do so, the Court will demand very rigid proof of the existence of such contract, and *a pari* in this case. There is not a single scrap of writing to prove the contract of sale. Then again Mr. Bosman could give no explanation of the date 1902. He was to pay £3 a month for the goodwill; but for how long? Was he to go on paying it as long as the lease lasted? There is no evidence as to how long this lease was to last; how then could there have been a definite agreement of sale and purchase if plaintiff did not know what he was buying, i.e., how long the lease was to last, nor what he had to pay?

[Buchanan, A.C.J.: The longer the business is carried on, the more the goodwill is worth.]

No; all these hotel tenancies are only monthly, although they fetch from one to five thousand pounds. "Goodwill" is the business made by a predecessor, and hence in buying a "goodwill" you do not buy a lease. Bosman said he would not have thought of giving £60 for the goodwill of

such a business, but if the lease had, say, five years to run, he would, on his own showing, have had to pay £180 for it. In his sworn declaration Bosman said that the arrangement as to the £3 monthly payments was to terminate in December, 1902, and yet in the box he said he knew nothing about 1902. Then we have his letter of May 20, 1901, in which he says that if Van Niekerk's rent were raised he (Bosman) was not to pay more than £10 a month for both rent and goodwill. Was that reasonable? Then it is very noticeable that in that letter nothing was said about 1902, nor about the licence. Again, the books of Bosman, Powis and Co. show no record of having taken over a business save that from January to March they paid £12 10s. for rent. In short no two affidavits or declarations of plaintiffs are consistent. My explanation of the £12 10s. (which they cannot account for) is that plaintiffs paid £12 10s. a month to defendant until they paid the £30 for the licence, and then they deducted £2 10s., and paid only £10. If plaintiffs did make the agreement they allege, they did so illegally, and they cannot take advantage of their own illegal acts. *In pari delicto melior est conditio possidentis*, and here we are *possidentes* because we have the licence. Then again, defendant acquired the business 14 years ago for £210, it is true, but it must be remembered that a business like this was bound to have very much increased in value since then. If plaintiffs could tell us what stock Van Niekerk purchased from them we should know whether the business paid or not. However, we do know that between October 8 and December 1 they disposed of from £500 to £600 worth of goods at from 25 per cent. to 30 per cent. profit. As their books show, they received on an average about £377 a month, and paid £19 for expenses. How then were they losing money?

[Maasdorp, J.: Then you argue that the business was carried on at a profit, and that the deceased gave up that profit?]

He wanted to be freed from the trouble and responsibility of carrying on the business. After he had given it up he only looked in once or twice a month in his capacity of Bosman and Co.'s manager. If Van Niekerk knew (as he must have known) that this was a paying business, he surely would not have agreed to transfer the licence to plaintiffs and remain saddled with the lease of a house, which was almost valueless, save for the licence. In short the Court are asked to decree specific performance of a contract which was illegal

(if it ever existed at all), the existence of such contract being supported only by a tissue of the most palpable contradictions and improbabilities. A small, but very important, piece of evidence was that Van Niekerk had the licence renewed at his own expense, and that this outlay was not refunded to him. It must further be remembered that no evidence has been given as to damages, and that no proof was given to the executor of the claims made against him.

Mr. B. Uppington was not called upon in reply.

Buchanan, J.: The plaintiffs in this case, who are a firm of wine merchants carrying on business in Cape Town, sue the defendant, who is the executor of the estate of the late Marthinus Johannes van Niekerk, to compel the executor to transfer the licence for certain premises in Waterkant-street, Cape Town, which was formerly the property of the deceased, Van Niekerk, and which plaintiffs allege was purchased by them from Van Niekerk. In an action against a deceased person the Court, no doubt, requires strict proof of an agreement having taken place. In this case there is no written document to support the agreement, but there has been what is absent in many other cases—there has been a performance of all the essentials of the contract during the lifetime of the person who entered into the contract. It is not, therefore, a question in dispute whether there was or was not a contract; the only dispute is as to the actual terms of that contract. Plaintiffs allege that they took over this licence from Van Niekerk, who was in their employ, agreeing to pay Van Niekerk £3 per month in addition to the rent which Van Niekerk would have to pay. Van Niekerk had taken over this bottle-store some 13 or 14 years before, and he was anxious to dispose of it. He represented to the plaintiffs that it was not a paying business, and that he wished to have a lump sum down to repay him apparently for his original outlay. It was said he gave £210 originally for the business. Some small portion of this was for stock. But it came out in cross-examination of the person who sold Van Niekerk the store that this person was indebted to Van Niekerk, and it may be that Van Niekerk was taking over a bad debt. At any rate, Van Niekerk disposed of these premises to the plaintiffs. He put plaintiffs into possession, and before his death Van Niekerk's own brother managed these premises

for the plaintiffs, and not for the deceased. There is no doubt therefore that there was a contract, that it was performed in its essential parts, and that during the whole time of the life of Van Niekerk he received this £3 per month from the plaintiffs in consideration of the contract. The plaintiffs plead that they are bound to pay this £3 per month from the date of the sale until the 31st December, 1902, but Mr. Bosman says the real contract was that they should continue to pay this £3 as long as the existing lease under which Van Niekerk held was to run. Van Niekerk was not the original lessee, but held under a sub-lease. This sub-lease was not in writing, and plaintiff Bosman said he took Van Niekerk's word as to the period of the lease. At the time the contract was entered into, the licence was also disposed of; of that there can be no doubt whatever. Plaintiffs themselves have deposed to it; Van Niekerk did not continue to carry on the business, and a witness connected with the Licensing Court stated that Bosman spoke to him then about the transfer to the plaintiffs, that he told Bosman that the Magistrate held the view that more than one licence should not be in the name of a person, but rather in the name of the manager of the business, and that when Bosman pointed out to him that Green and others had more than one licence, he said he was then going to point out to these very persons that in future more than one licence would not be granted to one person. This idea of the Magistrate's has not been carried into practice, but Van Niekerk, the seller, remaining in the employ of the plaintiffs, the plaintiffs continued the licence in his name, Van Niekerk exercising a general supervision over all the plaintiffs' bottle-stores. When the licence expired it was renewed; it was a licence for the same premises, but the date of the licence expiring, it was renewed. It was said that it was renewed by Van Niekerk for his own benefit, but, as a matter of fact, it was no such thing. The plaintiffs paid for the renewals. Van Niekerk did not pay anything at all for renewing the licence. Van Niekerk had another licence, and he may possibly have paid the agent whom he instructed to obtain the renewal of both licences. The defendant, who is the executor, denies any knowledge of the contract, but notwithstanding he pleads that the terms of the contract, were not those in the declaration, but that the premises were let at a monthly rental of £10, terminable at a month's notice. In respect of this allegation we have no evidence what-

ever. When he first had an interview with the plaintiffs, the defendant says that he and his brother were told by Bosman, in the presence of Powis, that the £3 was the interest on the purchase price of £600 which Bosman said he had agreed to pay for the premises. Both Powis and Bosman are positive in their denial of this statement, and taking their denial, supported as it is by their books, and the contract of the parties, I cannot hold that there was any such statement made that the business was bought for £600. But this is not a condition set up in the pleadings. In my opinion, on the evidence, I am bound to say that the business, including the licence, was sold by Van Niekerk and bought by the plaintiffs out and out, and that the consideration was the sum of £3 a month, as long as the lease of the premises continued. This contract was faithfully carried out by the plaintiffs during the lifetime of the deceased Van Niekerk. It went on for nearly two years, and it is only after his death, when the transfer of the licence became necessary, that the defendant sets up this claim. As executor, the defendant is no doubt justified in making inquiries, and putting the parties to the proof; but by an inspection of the plaintiffs' books, and from their statements all the facts could have been ascertained by the executor, and he was not justified in defending this action. There was a contract of sale which was actually carried out, and the only thing that remained to be done was the transfer of the licence. The declaration prayed for is a declaration that the plaintiffs are entitled to all the right and title in the business, including the licence to carry on the bottle-store. It is proved that they are so entitled. The following words will, however, be added to prayer (a) of the declaration, viz., "subject to the payment of £3 a month, as long as the existing sublease to the late Marthinus Johannes van Niekerk shall continue." On our finding of facts the plaintiffs are also entitled to an order compelling the defendant to transfer the licence to them. As to the damages, it is a question of how much profit has been made out of this business, but we think that £25 will cover the justice of the case. Judgment will be given in terms of the prayer (a), with the addition of the words stated, and of prayer (b), the judgment to carry costs. Maasdorp, J., concurred.

SUPREME COURT.

[Before the Hon. Sir JOHN BUCHANAN.
(Acting Chief Justice) and the Hon.
Mr. Justice MAASDORP.]

LOUW V. LOUW. { 1901.
Nov. 5th.

This was an action for divorce brought by Mrs. Martha Maria Louw, against her husband, Wynand Jacobus Louw. The parties, it appeared, were married in community of property in February, 1874, and there were five children of the marriage, of whom three were minors. The action was brought on account of the alleged adultery of the defendant with a Mrs. Theron, a widow, at Zeerust, in the Transvaal.

Mr. De Villiers appeared for the plaintiff; the defendant was in default.

Francis Henry le Sueur, clerk in the Colonial Office, produced the certificate of the marriage of the parties.

Martha Maria Louw, the plaintiff in the action, said that the signatures in the register were those of herself and her husband. She was married in February, 1874, and lived with her husband for fifteen years at the Paarl, after which they went to the Free State. Her husband then went away to Zeerust in the Transvaal, and she had never seen him since. It was thirteen years in April since she had last seen him. She remained at the Paarl with her children.

Maria Catherina Elizabeth Roussouw, residing at the Paarl, said she formerly lived at Zeerust, in the Transvaal. In 1892 the defendant was at Zeerust, and was living with a Mrs. Theron, a widow with eight children. While they were so living together a child was born. They went to church together, and lived openly as man and wife. Before the Jameson raid they went away.

Counsel proceeded to read extracts from a number of letters which had been written by the defendant to his mother and sister, and which had been by them placed at the disposal of the plaintiff. In a letter written from Zeerust in April, 1893, the defendant stated that "the dear Lord has blessed us, as a couple joined together by Himself, with the pleasing gift of a healthy boy; his name will be W. J. Louw." In another letter the defendant stated that if anyone annoyed him, "she always soothes and calms me. I only now understand what it means to say my dear wife, for such a wife is really dear, with emphasis." In further letters, defen-

dant said that the woman to whom he was referring had been in his house for fourteen months, and that he was becoming young and healthy and stout. The letters contained frequent allusions to the Almighty.

Buchanan, A.C.J., said that he had glanced through the letters: they were full of the most disgusting blasphemy and sanctimoniousness.

The Court granted a decree of divorce, with costs, the plaintiff to have the custody of her own children.

WILLIS V. WILLIS.

1901.
Nov. 5th.

This was an action for divorce brought by Ireton Willis, residing in Cape Town, and engaged in the Civil Service, against his wife, Martha Magdalena Willis, on the ground of adultery. The parties were married at Beaufort West in 1879, in community of property, and there were nine children of the marriage, all of them being minors. The adultery complained of was alleged to have been committed by the defendant with a member of the military police forces at Beaufort West. The defendant admitted the adultery, but asked for the custody of one or more of the children.

Mr. Searle, K.C., appeared for the plaintiff; Mr. Close for the defendant.

Ireton Willis, the plaintiff, stated that he resided at Wynberg, and was employed in the Stationery Department of the Civil Service. He was married at Beaufort West in July, 1879, at which time he was a schoolmaster, teaching on the farm of his wife's father, which was some little distance from Beaufort. At the time of the marriage he was 37 years of age and his wife was 17. He continued to live in Beaufort West and Fraserburg, and ultimately came to Cape Town and entered the Civil Service, residing at Wynberg. Up to the time when he came to Cape Town, in 1887, he had lived indifferently with his wife. The great objection which she entertained for him was that he was not suited for the life in the country. He was always being upbraided with not being a farmer, and with the fact of his being of English parentage. There were in all eleven children of the marriage, two of whom had died, while nine still survived. Seven of the children were with witness, one (a little girl) was with the defendant at Beaufort West, and one had been adopted by Mr. Munnik. On coming to Cape Town the defendant had never liked

Wynberg, and she used to make visits to Beaufort West every year. Some time in the middle of the year 1900 he bought a house at Beaufort West, and the defendant went to live there at her own request. In the latter part of April of the present year she sent witness a telegram to say that she was coming down, but before that he had received an anonymous letter. On her return to Wynberg, he asked her what was the meaning of the letter. She asked to see the letter, and said "It is not true." Half a minute afterwards she said, "Yes, it is all true, but I did not mean them to inform you." The letter charged her with misconduct. The defendant said, "I wanted to inform you of this myself, but I did not wish them to write to you." She said that the man belonged to the Coldstream Guards, and witness then asked her what she was going to do with a fellow like that. She said, "If I cannot marry him, I am going to live with him." She said that he was a Roman Catholic, and witness pointed out that she would have a difficulty in getting married to a Roman Catholic. To this she replied: "I do not care; I shall turn a Catholic." The defendant stayed some few days in the house at Beaufort West, and was now living at Beaufort West, in the house which he had bought. He was willing to let her have the custody of the little girl who was now living with her, but the other children he would not part with. When he was married he had no property. His wife brought into the joint estate some £1,700 or £1,800, which had come to her from legacies. He had an amount of £1,000 on fixed deposit in the Standard Bank, and he was willing to give that to the defendant and to make over the whole of the Beaufort West property, which was valued at £500. His salary from the Government was only a little over £100 a year, and his total income was about £200 a year.

The evidence of Bernard Tancy, a private in the Coldstream Guards, taken at Steynsburg on commission, was read, in which he admitted adultery with the defendant at Beaufort West on several occasions.

The Court granted a decree of divorce, the plaintiff to have the custody of all the children with the exception of the little girl now living with the defendant, pending a further order, plaintiff having access to the child at all reasonable times. The Court further ordered a dissolution of the community of property, the defendant to take over as her share the £1,000 on fixed deposit in the Standard Bank, and the Beaufort

West property, to retain all movable property there, and to pay the costs of the action.

DAVIS V. TRUSTEE OF MINORS } 1901.
BRISLEY AND ANOTHER. } Nov. 5th.
" 6th.

Donatio inter vivos by a father to his children—Rights of wife married in community Registration of donation in excess of £500.

B. a domiciled Colonial, married a wife in England, the said parties not having entered into any ante nuptial contract. Thereafter he gave certain farms to two of his sons by the aforesaid marriage as a donatio inter vivos. These were duly transferred to the donees during the life-time of the donor. He also gave certain farms to another son, issue of the marriage aforesaid, which were not transferred until after the death of the donor. Thereafter B. died, leaving a will by which he conferred certain benefits on his wife. The widow thereupon set up her claim to half the estate, and the Court decided that she must be put to election. She now asked to have the various transfers of all the farms donated to her three sons set aside, as being in derogation of her rights under the community of property.

Held: (1) *That the donation of the farms transferred during the life-time of the donor, having been completed by acceptance and by registration during the donor's lifetime, could not be set aside.*

(2) *That the donation to the third son, not having been completed by registration during the lifetime of the donor, was valid only to the extent of £500.*

The plaintiff's declaration was as follows:

1. The plaintiff is Ella Carrie Holmes

Davis (born Gahagan), of Umzimkulu, in this colony, widow of the late Charles Brisley, but now married without community of property to Clement Holmes Davis, and is by him assisted, as far as need be. The defendant is Harry Gibson, of Cape Town, secretary of the South African Association, in his capacity as trustee of the property of the minors Cuthbert Everard Brisley, Gerald Gahagan Vyvian Brisley, and Vernon Hugh Brisley, children of the late George Charles Brisley and of plaintiff.

2. Plaintiff and the late G. C. Brisley were married in community of property, and in 1898 certain farms situate in Griqualand East and in the neighbourhood thereof were registered in the name of the said Brisley, and were portion of the joint estate of him and the plaintiff, his wife.

3. By a notarial deed, executed at Umzimkulu on March 14, 1898, the said Brisley purported to give and grant as a *donatio inter vivos* to his said minor children certain of the said farms, to wit, to Cuthbert E. Brisley the farms Elandskop, Knapdaar, Blue Gumsport; to Gerald G. V. Brisley the farms Zwartfontein, Rietpoort, and Lucknow, and to Vernon H. Brisley the farms Zounaportfontein, Kromdraai, Wittefontein, and Kiddelfontein, and the said Brisley further provided in the said deed that during his lifetime the rentals and income derived from all of the said farms should be paid to himself by one Marais P. H. le Roux, who was appointed trustee for the said minors, and on September 9, 1898, transfer of the six farms first mentioned was passed by him to the said Le Roux as trustee for the two first-named minors. The said farms were of considerable value, and formed a considerable portion of the joint estate.

4. The said Brisley died on October 4, 1898, and thereafter on March 18, 1899, transfer of the four farms last mentioned was passed by the said Le Roux as executor testamentary in the said Brisley's estate to himself as trustee for the last mentioned of the three minors.

5. The said donations were to the prejudice of the plaintiff, and were made by the said Brisley, knowingly and intentionally to the plaintiff's prejudice, and with the object of depriving plaintiff of her rights as being married in community of property to him, and entitled jointly with him to the common estate, and were thus void or voidable, and plaintiff now claims that they be set aside.

6. Thereafter the said Le Roux died, and defendant was appointed trustee for the said minors to hold the said property on their behalf.

The plaintiff therefore claims:

(a) An order that the said donations and the transfers made in pursuance thereof be declared to be to the prejudice of the plaintiff, and in derogation of her rights as married in community to the said Brisley, to the extent of one-half of the said farms, and that the said donations be set aside in so far as the half of the said farms is concerned.

(b) That plaintiff be declared entitled to the half of the said farms.

(c) An order compelling defendant to transfer a half-share or interest in said farms to plaintiff.

(d) Alternative relief.

(e) Costs of suit.

The defendant pleaded as follows:

1. Defendant admits paragraphs 1, 2, 3, 4, and 6 of the declaration, but craves leave to refer for greater certainty to the terms of the notarial deed referred to in paragraph 3 of the declaration.

2. Defendant denies the allegations and conclusions in paragraph 5, and says that the late G. C. Brisley made the donations *inter vivos* referred to in the declaration, for and in consideration of the great love and affection which he bore to his children, and the transfers referred to were duly and lawfully passed pursuant to such donations.

The replication was general.

The facts appear sufficiently from the arguments and judgment.

Mr. Searle, K.C. (with him Mr. Benjamin), for plaintiff: A question arises in this case which has never been previously decided, viz., "What are a husband's powers as to disposition of the joint property if he is married in community of property?" The question was touched upon in *Linde v. Beyers* (1 Juta, 411), but was not crisply decided.

[Buchanan, A.C.J.: That case applies rather to *Lex hac edictali*.]

Yes, but Roman-Dutch authorities do not look at the question in that way. They regard the giving of property to children by a former marriage as a legal fraud on the wife. In *Linde v. Beyers*, *Van der Linden* (p 214) was cited, as also *Voet* (23, 2, 54) and *Burge* (Vol. 1, p. 367). The real question for decision is, "Does the husband deal with the property in derogation of the rights of his wife?" If he does, that is legal fraud, even if it is not commonly

called "fraud" in ordinary lay language. *Voet* (23, 2, 54) refers to the matter at length, and the passage was quoted in *Linde v. Beyers*. See also *Van der Linden* (Book 1, Ch. 15, section 1, p. 123, *Juta's Tr.*), who practically agrees with *Voet*. Undoubtedly there must be the wilful intention to prejudice the wife in order that the gift may be set aside. *Burge* (Vol. 1, p. 313); *Von Wessel, De Connubio* (*passim*); *Rodenburg De Jure Conjugum* (1, 2, 10, p. 202. *Peckius De Jure Testamentario* (Bk. 1, Ch. 8, par. 3). The fact that the donor reserved to himself the usufruct, in itself affords presumption of fraud. (*Peckius—loc. cit.*)

[Maasdorp, J.: But there was no secrecy in this case.]

Yes, Brisley never consulted his wife as to this donation.

[Buchanan, A.C.J.: What was left to her by the will?]

Half of the residue of the estate and the usufruct of the whole, until the children should have attained their majority. In order to see whether these donations were made with the intention of prejudicing plaintiff we have only to look at the notes left by Brisley. He thought he could deal with the whole estate, and argued the point with his legal advisers. They told him that he could not thus dispose of the whole estate. He then asked whether he could get out of the difficulty by a *donatio inter vivos*.

[Maasdorp, J.: That question only means, "Can I do this legally?" There is no fraud.]

There was a wilful intention to prejudice his wife. He intended to take property out of his wife's half share of the estate, and he meant to do so after being told that he could not deal with the whole of it. He knew he was taking from his wife's share, and clearly meant to do so.

[Maasdorp, J.: How could he intend to injure his wife, if by his will he left her half of the property?]

He tried by all means to show that he was entitled to deal with the whole property. He first of all tried to show that his case fell under Lord Charles Somerset's proclamation; then he fell back on Griqua law; then he took up the position that most of the property had been acquired before his marriage. Lastly, he attempted to effect his purpose by a *donatio inter vivos*. How would the case have stood had he tried to deal with the whole estate. If he could not do that, then the question of

what he could do is a mere question of degree. If he tried to deal with a considerable part of the property, that was legal fraud. Now, he did attempt to deal with some £15,000 worth out of £23,000. He obviously intended to prejudice his wife contrary to law, and in Roman-Dutch Law, that is fraud. *Queen v. Van Vliet* (9 Juta, 273). See judgment of the Chief Justice. The wife has a right to half the estate, even during the lifetime of her husband, if they are married in community. *Chisholm v. Alderson's Trustee* (2 H.C., 497, and 2 Ap., 34). Applications have frequently been made to this Court to protect the rights of the wife during her husband's lifetime. Now, if she has a right thus to interfere with his action and administration, there must be some form of action by which she can rescind acts done to her prejudice, and here is a clear case of such prejudice. The husband takes £15,000 out of the joint estate with the intention of thereby prejudicing his wife. The only defence which is raised is that the wife consented to a division of the estate. That was not raised on the pleadings; but even if it had been so raised at the time of the arbitration, the ten farms had all been transferred into Le Roux's name. Thus they formed no part of the common estate at the date of the arbitration, and so the deed of submission could not have referred to them. I fully admit that the farms transferred, after the death of the testator cannot be included in the deed of gift. *Elliott's Trustees v. Elliott* (3 Menz, 86) and *Van Recnen's Trustees v. Versveld* (9 Juta, 161). Two things are necessary to constitute a valid donation, (1) acceptance, (2) registration, if the donation be beyond a certain amount. But registration is merely the best evidence of the transfer of the property. It also is the same thing in regard to immovables which delivery is in respect of movables.

[Buchanan, A.C.J.: A gift (say) of jewellery to a child, whatever the value might be, would be valid even if not registered.]

I am not altogether prepared to admit that. As to acceptance, see *Thorpe's Executors v. Thorpe's Tutor* (4 Juta, 488). In that case the amount of the donation was £500; if it had been more, no doubt registration would have been necessary. My second point is that Brisley intended to deprive his wife of a portion of the joint estate, and certainly some of the signs of such intention as named by the Roman-

Dutch authorities are present in this case. To begin with, the usufruct of the property is reserved to the donor.

[Buchanan, A.C.J.: Are not the farms which were transferred during his lifetime in a different position from those which were transferred after his death?]

Yes.

[Buchanan, A.C.J.: Another point is, is an unregistered donation good to the extent of £500.]

Yes, see *Van As v. Nel* (6 Sheil, 471).

Mr. Close (with him Mr. B. Upington), for defendant: The whole question of donation may be considered, (1) with respect to a donation made to a minor child, and (2) as to those made by a husband in prejudice of his wife. As to the second class, the authorities all agree that such donations can be upset only on the ground of fraud. *Rodenburg, De Jure Conjugum* (1, 2, 10) merely expresses a personal opinion, and does not profess to lay down the law on the subject. But see *Von Wessel* (p. 153, section 47) and *Voet* (23, 2, 54). The husband has full administration of the common property, and he can do anything he likes with it save dissipate it by making gifts for no good consideration. Love and affection to children is a good *causa*. All the cases cited for plaintiff turn on the question of fraud. See also the cases referred to in *Burge* (Vol. I., p. 303. *Grotius* (p. 17. Maasdorp's Tr), and *Van der Kessel* (Th. 91), both hold that the husband's power over the joint property is absolute. Even if he squanders it, the wife's only remedy is to obtain an interdict to restrain him from so acting in the future. *Regina v. Van Vliet* (9 Juta, 273). In this case there was no fraud on the wife; so far from there being any concealment she herself copied out the document, and it could not be supposed that a person of her intelligence, accustomed to copy legal documents for her husband, should not have understood its import. She admits that she understood it a few weeks after her husband's death, and yet she lies by all this time.

[Buchanan, A.C.J.: I see the executor is not represented in this action; he had better be joined as a co-defendant *pro forma*.]

Yes, for should plaintiff succeed, half the property given to the children will go to her. As to the question of prejudice, the terms of the deed of submission to arbitration are quite inconsistent with the position she takes up now. The deceased thought he had a right to deal with the whole pro-

perty, and was supported in this view by the opinions of some of the counsel consulted. Even if his views on this subject were erroneous, where was the fraud? In his will he speaks of his wife affectionately, and deals with her most liberally. The only question then is, were these gifts valid and complete? There can be no doubt as to those where the property had been transferred during the lifetime of the donor. The case of *Van Reenen's Trustees v. Versveld* (9 Juta, 161) has been cited to show the necessity of a gift being registered during the lifetime of the donor in order that it may be upheld as valid. But in that case the question was not so much the validity of a gift as the right of enforcing a gift. If a donation can be enforced against the donor it can be enforced against the executor.

[Maasdorp, J.: It can be enforced only to the extent of £500, unless it is registered.]

It can be enforced only to that extent as against the creditors of the donor, but as regards enforcement against the donor, the donee's rights are not thus limited.

[Maasdorp, J.: Yet the reason given by the authorities for requiring registration is that donors themselves might be protected from the effects of their own excessive liberality. See *Grotius* (3, 2, 15).]

In this case there was a clear giving by Brisley, who signed the deed of gift, and an acceptance by Le Roux, a public notary, on behalf of the minors. There is no case to show that registration is necessary unless the interests of third persons are involved. *Slabber's Trustee v. Neezer's Executor* (12 Juta, 167). As between donor and donee, the only value of registration is to prove acceptance.

[Maasdorp, J.: Have you any case in which an unregistered gift has been enforced beyond £500?]

I am not aware that the point has ever been clearly decided as between donor and donee. Here the contract between the two parties was clearly complete.

[Buchanan, A.C.J.: Suppose a person has drawn up a deed of gift of immovable property and has not passed transfer?]

The deed is an irrevocable power of attorney to pass transfer.

[Buchanan, A.C.J.: But was this deed irrevocable?]

Yes, it was given on a good *causa*.

[Buchanan, A.C.J.: If a donor gives more than 500 *aurei*, the gift cannot be enforced as against him without registra-

tion. A power of attorney is not necessarily irrevocable in law because it is called irrevocable. Where is your authority to show that this deed was irrevocable?]

If the donation has once been registered and was not obtained by fraud nothing can set it aside.

[Maasdorp, J.: There is nothing in this power which gives the trustee power to register the gifts. He has power to pass transfer, but that is not the same thing.]

The point is could the deed be registered by Le Roux? I submit it could. I contend, however, that registration in this case was not necessary. *De Kock v. Van der Wall's Executors* (9 Sheil, 496), in which *Voet* (39, 5, 13) was referred to.

[Buchanan, A.C.J.: But acceptance does not do away with the necessity for registration.]

This case differs from all previous cases. In them the donor disputed the donation; here he supports it.

[Maasdorp, J.: But the donation was not complete, even as a contract, beyond £500. The donor must be a party to the registration.]

He gave a power to the executor. But if the Court is against me on this point, I would urge that the plaintiff is estopped by her conduct from questioning the donation.

Mr. Searle (in reply) cited *Van As v. Nel* (13 S.C.R., 427), *Somerez* (Ch. 4, pp. 52, 58, Liby. Edition). He clearly means that a father must not be led by love to his children to prejudice third persons. Legal fraud means merely acting to the prejudice of third persons, and does not necessarily imply any criminal intent. If the late Brisley acted in prejudice of plaintiff, he committed fraud, and the Roman-Dutch authorities I have quoted in argument apply.

Buchanan, A.C.J.: The late Mr. Brisley acquired property in East Griqualand before the annexation of that part of the country to the Colony. After the acquisition of this property he went to England and married the present plaintiff without having entered into any ante-nuptial contract. The parties almost immediately returned to the Colony, where they resided till Mr. Brisley's death. Before his death, Mr. Brisley contemplated making his will. He thought that as he was a British-born subject, and had acquired property before his marriage, and had married in England, he was entitled to take advantage of Lord Charles

Somerset's proclamation of July, 1822, and that he could dispose of all his estate as he pleased. He took legal advice, and that advice was against him. He did not, however, appear to have changed his mind. Being possessed of considerable estate, and wishing specially to provide for the children, he gave to a trustee by written contract certain farms for the three sons of the marriage. The farms which he gave to two of these sons were subsequently transferred by the father into these sons' names, and are now registered in the sons' names. The farms which he gave to the third son were not transferred during the lifetime of the donor. After his death the trustee under the deed of donation, who also became the executor of the will of Mr. Brisley, carried out the provisions of the deed of donation, and transferred the property into the name of the son to whom the farms had been donated. The plaintiff, the widow, after Mr. Brisley's death came into court, and disputed Mr. Brisley's will, and set up a claim, under the law of community of property, to half the estate. The Court in that case held that Mr. Brisley's idea of the law, viz., that he was entitled to take advantage of Lord Charles Somerset's proclamation, was ill-founded, and the decision of the Court was that the widow was entitled to half the estate, but that she must elect either to take half the estate or accept the benefits given her by Mr. Brisley's will. On this judgment being given, the parties entered into an agreement to have this estate divided between them. The landed property, with the exception of the farms transferred to the children, was valued, and the valuation was accepted, and a division amicably arranged. The farms now in question—the farms donated to the children—were not included in that award. The widow now comes into court, and asks the Court to set aside the transfer of all the property donated to the three sons. In the declaration it is asked that the Court should declare that these transfers were to the prejudice of the widow, and in derogation of her rights to the extent of one-half of the farms. The defendant, who was also the executor in the estate as well as the new trustee under the deed of donation, alleged that the donation made was perfectly good, and was made for good cause and consideration. One of the incidents of marriage in community is to vest the husband with the power of dealing with the whole of the joint property during the

marriage. By virtue of the *jus mariti*, the husband can dispose of the estate during the subsistence of the marriage without the consent of and without consulting his wife in any way. If he squanders the estate or his conduct is prodigal or profligate, and such as would leave his wife and family destitute, the Court may step in and relieve him of the power of dealing with the estate. Unless this is done, the law empowers the husband to deal with the property absolutely at his own discretion. In this case Mr. Brisley, during his lifetime, exercised this power over the estate. It is argued, however, that by giving a donation of these farms, he was committing, at any rate, a legal, if not an actual fraud on his wife. Fraud, however, has not been specially pleaded, and the plaintiff was not prepared to make such a charge against her husband's memory. The case rests solely on the fact that the donations reduced the estate, and consequently the widow's half share was less than it otherwise would have been. Now if the husband during the joint lifetime of the spouses could not give a donation out of the property—if he must give it solely out of what ultimately would be his own half-share, it would mean taking away from him the power which the law gives him as manager of the estate under the *jus mariti*. There seems, however, to be some authority for holding that where the husband intentionally commits a fraud upon the wife, the wife can seek redress from the Court. *Voet, Van der Linden, Rodenberg*, and other authorities base this right to redress upon the ground of fraud, not on the mere fact that there was ultimate prejudice. In the case of *Linde v. Beyers* (1 Juta, 411), it was sought to set aside a donation made by a husband, who having children by a former marriage, sought to benefit such children without the second wife's knowledge, and *Voet* was cited to show that such an underhand dealing with the estate raised a presumption of fraud. I can find no wilful intention to prejudice the wife in this case. The donation was openly made in the lifetime of Mr. Brisley, the deed of donation was drawn up by a notary, and was actually copied by the wife. She was a woman of intelligence, and she must have understood what Mr. Brisley intended to do with the property. The donation was in favour of the children of the marriage. The will which Mr. Brisley made immediately after making this donation was generous to the wife. It gave her

half of the estate absolutely, and a life interest in the remainder during the minority of the children. There was nothing in Mr. Brisley's conduct which would justify the Court in coming to the conclusion that he was actuated by fraud or wilful intention to prejudice the wife. It is clear law that when a donation is made there must be a complete contract. A donation must be accepted, and must not be liable to revocation, and when the amount is above £500, it must be registered. This has been clearly pointed out in case after case which has been decided by the Supreme Court. The validity of a donation above £500 not completed by actual delivery depends on the due registration of the gift. The donation of the farms which were transferred to the two sons before Mr. Brisley's death was a completed donation. It was an accepted donation, it was not liable to revocation, and it had been duly registered, and delivery made in the lifetime of Mr. Brisley by transfer in the Deeds Registry. Therefore it is impossible now to attack that donation. As to the donation of the farms to the other son, however, no doubt there was an acceptance of the gift by the trustee, but the transaction was not completed and the donation was not registered until after the death of Mr. Brisley. Unless these requisites were complied with, the donation could not be enforced to the extent of more than £500. Mr. Searle admitted that, at any rate, to the extent of £500 this donation was good. The parties had agreed to accept Mr. Zietsman's valuation of the property, and to deal with this case as one affecting money and not property. At the time of the gift, the value of the property was, according to Mr. Zietsman, £4,200, but a subsequent valuation made now—and this valuation the Court must take—showed the property to be worth £6,200. As this donation was not completed by registration, the Court can only hold that it was valid for £500, and therefore the estate is entitled to the balance, £5,700. Mrs. Brisley claimed her right in community to half this property, and she was therefore entitled to half the amount of the property donated, and not registered before Mr. Brisley's death, less £500. The action was originally brought against the trustee for the children, but as the trustee was also executor dative of the estate, he was now joined in both capacities, and as executor, as well as trustee, he must satisfy Mrs. Brisley's claim. Judgment

will be given for Mrs. Brisley for the sum of £2,850, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. Faure and Zietsman.]

BLACK V. BLACK. { 1901.
Nov. 6th.

This was an action for divorce, the defendant (Julia Monica Black) being in default.

Mr. Close appeared for the petitioner (Alexander Black), who said he was a salesman residing at Woodstock. On May 24, last year, he went to the front with the Cape Town Highlanders. On the 3rd of February last he returned to Cape Town, and continued to live there with his wife until August 6, when his wife was confined. She at first asserted that he (the husband) was the father of the child, but on his saying he would see the doctor about it, she said that a man had molested her at Kimberley, where she had been residing during his absence. They were married in November, 1897.

Dr. Sellar gave evidence as to having examined the child, which was fully developed.

The Court granted a decree of divorce.

ROBERTSON V. ROBERTSON.

This was an action for restitution of conjugal rights, failing which, for a decree of divorce. The applicant was Mary Jane Robertson, and the respondent, Andrew Robertson, both of Beaufort West.

Mr. Close appeared for the wife, the defendant was in default.

Applicant said her husband was a railway guard, and lived at Beaufort West. They were married in July, 1899, at Victoria West, and after the marriage ceremony her husband took her to her father's house and left her at the gate. She had not seen him since. A child, of which defendant was the father, was born three weeks after the marriage, but had since died.

The Court made an order for the restitution of conjugal rights, calling upon defendant to return to or receive plaintiff on or before January 12 next, failing which, the usual rule for divorce would be granted, returnable on February 1.

EPSTEIN V. EPSTEIN.

Adultery—Proof.

The fact that a man has been seen coming out of a house of ill-fame is not sufficient proof that he has committed adultery.

This was an action in which the plaintiff, Rosa Epstein, sued her husband for divorce, by reason of his adultery. Counsel said the parties were married in December, 1894, in the Jewish Synagogue, at Belfast, Ireland.

Mr. Alexander called the plaintiff,

Rosa Epstein said that her maiden name was Cohen. She was married to the defendant seven years ago at Belfast, Ireland. The certificate produced was that of their marriage. (The document was in Hebrew, but there was an abstract on the back, and it was accompanied by a certificate as to the contents.) After marriage they went to Dublin, where they remained eighteen months. She then went back to Belfast, and her husband came out to South Africa. She joined him here seven months ago, but three months later, in consequence of what she heard, she left him, and now she lived with her sister. There were no children of the marriage.

Abraham Beld deposed that he knew the plaintiff and defendant in this case. On June 17 last he saw defendant coming out of a house of ill-fame. Witness saw a woman behind the door. He (witness) spoke to defendant, and asked him what he was up to, and defendant replied to him.

Simon Crupman, who was with last witness on June 17, gave corroborative evidence.

Counsel was heard on the question of the sufficiency of evidence, and contended that defendant's reply to the witness Beld was an admission that he had committed adultery. Counsel quoted the English case of *Loveden v. Loveden* (2 Consist R.), where Lord Stowel laid down the dictum that there was presumption of guilt when a man was seen coming out of a house of ill-fame.

Buchanan, A.C.J., said that was certainly evidence, but the question was whether it was sufficient.

Counsel submitted that there was evidence, and that therefore the defendant should have appeared to rebut that evidence.

Buchanan, A.C.J.: The only evidence in this case is that of one witness, who on the day in question saw the defendant coming out of a house of ill-fame, and who said that there

was a remark passed between them which might mean anything. There is no other evidence of any act of adultery. It would be opening the door to the easiest possible collusion to make this sufficient evidence in a case of divorce, to say that if one spouse only went into a house of ill-fame and was seen to come out again a decree of divorce should be granted. There is no sufficient evidence in the case, but if counsel would like the case to stand over to allow of further evidence being obtained that could be done.

Mr. Alexander said he would ask that the case be allowed to stand over until next term.

The case was accordingly ordered to stand over until next term for further hearing.

KEIM V. KEIM.

This was an action for divorce on the ground of adultery.

Mr. De Waal appeared for the plaintiff; the defendant was in default.

There was a further claim in the petition for a decree of nullity of marriage on the ground that the defendant had been previously married before being married to plaintiff, and that the former marriage still subsisted. Counsel, however, said that they had not been able to get sufficient proof of that allegation, and accordingly it was withdrawn.

Mr. De Waal called the plaintiff

George Keim said that he now lived in Cape Town, and was married to the defendant in New York on April 25, 1898. He received a certificate from the pastor who married them. It was only a slip of paper, and his wife had torn that up in front of his face, saying that there had been no marriage. Shortly after their marriage they went to the Transvaal and lived at Johannesburg, and then when the war broke out they went on a visit to Russia. When they came back his wife refused to live with him.

By the Court: They came back about fifteen or eighteen months ago. Two months ago he had seen his wife, and tried to make it up with her, but she said she would not live with him. He did not know where she was now.

Mark Gretch gave evidence as to the defendant having received the summons in this case. She had come to him, and he had translated it for her. Subsequently he saw defendant in the street, and she said she was not going to defend the divorce action, and, further, that she was going away to Durban.

E. Borowitch gave evidence as to an act of adultery committed by defendant. She was practising prostitution, and had solicited him in the street.

Decree of divorce was granted as prayed.

QUINN V. QUINN.

This was an action for divorce on the ground of adultery.

Mr. De Waal appeared for the plaintiff. Counsel said the defendant was in court, but she did not appear on her name being called.

Mr. De Waal called the plaintiff,

William Quinn said that he was married in community of property to the defendant, Catherine Felton, on July 21, 1891. In July, 1897, his wife left him, and went to live with one Peter Campion. There were two children of the marriage, aged 9 and 6½ years respectively. Since she left him, his wife had been living with this man Campion. Witness did not know why she left him. There was no row between them. The man Campion used to come to the house. Witness asked for the custody of the children.

James Hamilton deposed to having visited the defendant and Campion at the house where they lived together as man and wife.

Decree of divorce was granted as prayed, and defendant given the custody of the children of the marriage.

ARENDS V. ARENDS.

This was an action for divorce on the ground of adultery.

Mr. De Waal appeared for the plaintiff; the defendant was in court.

Johannes Arends, the plaintiff, deposed that he was married to the defendant in July, 1890. There were two children of the marriage, both minors, and he asked for the custody of the youngest child. Witness and his wife lived happily together for three or four years, and then she deserted him.

The defendant, in reply to the Court, admitted that she was living in adultery with another man, but said that her husband had lived for some time with another woman.

The plaintiff, questioned by the Court, admitted that he had lived with another woman.

Buchanan, A.C.J.: A plaintiff in a divorce case must come into Court with clean hands, and no order can be made in the present case.

JONES V. EKSTEEN. { 1901.
Nov. 6th.

Promissory note—Maker and surety
—Consideration.

E. had given a promissory note to one M., who had endorsed it. It then passed to a certain B., who had become surety and co-principal debtor in solidum for E. E. failed to meet the note, which B. paid, and then ceded to Jones. Jones sued E. on the note in the Magistrate's Court. The Magistrate gave absolution from the instance, and against this judgment the plaintiff in the Court below now appealed.

Held, that though B. had discharged his obligation as surety, seeing that the note was still in existence, the judgment of the Magistrate must be set aside, and the appeal allowed, with costs.

This was an appeal from a decision given in the Resident Magistrate's Court, Paarl, on August 12, in an action in which the appellant Jones sought to recover from the respondent Eksteen a sum of £23 12s. 1d. due on a promissory note in the following terms: "Franscherug, Paarl, September 13, 1897. Three months after date I promise to pay Captain J. Gordon Miller or order at National Bank S.A.R., Cape Town, the sum of £23 12s. 1d. for value received. (Signed) Z. Eksteen. As surety and co-principal debtor in solidum (Signed) Edward Bower," while on the back of the note was the following: "Pay to National Bank, S.A.R. (Limited), or order. (Signed) J. Gordon Miller." There was also a cession of the note as follows: "I do hereby cede all my right, title, and interest in and to the within-mentioned promissory note to Charles F. Jones. Stellenbosch, March 4, 1901. (Signed) Edward Bower." When the case first came before the Magistrate there was an exception to the summons on the ground that the plaintiff had no right to sue, inasmuch as he had no title to the promissory note by virtue of the cession signed by Edward Bower, the surety in the promissory note, and as such he had no right to cede.

The agent who appeared for the plaintiff

stated that the surety paid the amount to the principal, and therefore was the legal holder.

The Court held that as it would have to be proved that Bower paid the amount the liquidity of the document was destroyed and ordered the principal case to be gone into.

By consent the summons was allowed to stand, and Mr. Van Eyk, for the defendant then pleaded that Captain Miller gave no consideration for the amount, and as the note was ceded after maturity the plaintiff took such cession with all its equities and further pleaded the general issue.

After a postponement the case was heard on August 12, when the evidence of Bower, taken on commission, was read, as to the making of the note. Bower said that he accepted the promissory note for the first premium on a policy to cover the lives of the defendant and his wife, and they paid the premium by this promissory note. He ceded the note to the present plaintiff, receiving therefor the sum of £10. Captain Gordon Miller gave the National Mutual, of Australia, receipt for the premium as consideration for the note. He was the agent for the company here, and accepted the promissory note with Bower's endorsement as security. Bower's agents, Messrs. Silberbauer and Co., paid the promissory note when it fell due. They sent it to Bower, and sold it to the plaintiff, thinking that the defendant was dead. The plaintiff also gave evidence as to the note being ceded to him by Bower.

Mr. Van Eyk applied for absolution from the instance on the ground that it was not proved that there was any consideration given by Captain Gordon Miller.

Absolution from the instance was granted, with costs, the Magistrate's reasons for his judgment being as follows: C. F. Jones purchased the promissory note after maturity; there is no proof of consideration. It is alleged that the receipt was given for the payment of the National Mutual Assurance Company of Australia, but no proof was given of the issue of the policy.

Against this judgment the plaintiff now appealed.

Mr. Benjamin appeared for the appellant, and Mr. McGregor for the respondent.

After the reading of the records of the Court below, the Court intimated that they would like to hear what Mr. McGregor had to say in argument.

Mr. McGregor, in argument, contended that the note had been discharged, and for

the purposes of that case it was dead, Bower not being in the position of an endorser, but having signed it as surety and co-principal debtor, in *solidum*, he had to be regarded as the joint maker of the note. In support of his argument he quoted section 59 of the Bills of Exchange Act, No. 19 of 1893, also *Story on Bills and Promissory Notes* and *Chambers on Bills of Exchange*.

In reply to the Court, Mr. McGregor said there might be some process for Bower recovering the money he had paid, but it could not be done by suing upon that promissory note, which he strongly submitted was dead.

Buchanan, A.C.J.: A promissory note was given by the defendant Eksteen, promising to pay three months after date to Captain J. Gordon Miller, or order, the sum of £23 12s. 1d. This note was endorsed by Captain Miller, and with that endorsement the then holder, Bower, ceded it after due date to the present plaintiff. Bower had become surety and co-principal debtor in *solidum* for Eksteen. Eksteen never paid his obligation, and Bower having to meet the note, he, or rather his cessionary, instituted proceedings in the Magistrate's Court to recover the amount. For the defendant Mr. McGregor now contends that the note having been settled by the surety, because he had also bound himself as debtor in *solidum*, it was now dead, but it is clear that the obligation of the original debtor had never been discharged. The additional obligation undertaken by Bower to be surety has been discharged, but the note has not been discharged, and is still in existence. It might not be strictly in form to sue on the note as in a provisional case, but in the Magistrate's Court the principal case was gone into, the whole facts were before the Court. The Magistrate seems to have had the idea that because the plaintiff did not fully prove the consideration given by Captain Miller to the maker, the plaintiff must necessarily fail. But I think there is sufficient *prima facie* proof of consideration on the record. The defendant has not rebutted the evidence given for the plaintiff in any way. The Magistrate, however, on this ground granted absolution from the instance. This judgment must be set aside, and the appeal allowed with costs. As, however, the defendant Eksteen may have some defence on the note itself, the case will be remitted back to the Magistrate. The judgment of this Court will therefore be that the judgment of the Court below be set aside, the appeal allowed with costs of appeal, and

the case remitted back to the Magistrate for further hearing.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

B. LAWRENCE AND CO. V. } 1901.
SAMUEL ROSEN. } Nov. 7th

Mr. Russell moved for the final adjudication of the defendant's estate.

Granted.

ILLIQUID ROLL.

HOWARD AND SCOTT V. FRIEDMAN.

Mr. Russell moved for judgment under Rule 329d.

Mr. Solomon, on behalf of defendant, who had been barred, applied for leave to enter appearance. Defendant alleged that he had paid part of the amount claimed.

Buchanan, A.C.J., said that as there was a *bona fide* dispute and a defence on the merits, the Court thought that leave ought to be granted defendant to enter appearance. The laxity on the part of the defendant, however, ought to be paid for. Leave would be granted defendant on payment of costs.

GENERAL MOTIONS.

Es parte ROBERTS AND } 1901.
ANOTHER. } Nov. 7th.

This was an application for an order authorising the Registrar of Deeds to allow a certain house and premises situate in Table Valley, in Ward N, to be transferred to petitioners. The petitioners were Samuel E. Roberts and Percy R. Roberts, carrying on business as C. J. Roberts and Co. The petitioners were executors testamentary of the late Charles J. Roberts, and as such had taken out letters of administration. Petitioners had caused the pro-

perty aforesaid to be sold by public auction after the sale had been duly advertised, and it had been purchased by the petitioners at the said sale for £3,450.

Mr. S. Solomon, in moving, produced certificates from both the Divisional and Municipal Council, showing that they valued the said property at £1,000.

Buchanan, A.C.J., in making the order, said that it would be advisable to have an affidavit from the auctioneer in such cases, or otherwise, to prove the sale had been effected in a proper manner and for full value.

[Applicant's Attorney, Mr. C. J. Ber-range.]

Es parte VENABLES. } 1901.
Nov. 7th

Husband and wife—Marriage by contract—Marital power

Leave granted a woman married by contract, the marital power not being excluded, to mortgage certain property without the consent of her husband, he having deserted her some years before the date of the application, and his whereabouts being then unknown.

This was an application for an order authorising the Registrar of Deeds to pass and register a mortgage bond in favour of one Thomas Skinner, specially hypothecating certain pieces of land with the buildings thereon, situate in the village of Tarkastad. From applicant's affidavit, it appeared that she (Ellen Venables) was the wife of William E. Venables, to whom she had been married without community of property, and that by ante-nuptial contract duly registered) the marital power of the husband was especially reserved. On March 20, 1890, petitioner had purchased the aforesaid property from the estate of her late father, and a deed of transfer of the said property had been completed in her favour, and she had paid the purchase price out of her own money, her husband in no way contributing thereto. Some 15 years ago petitioner's said husband had deserted petitioner and her children, had never since contributed to their support, and his present whereabouts were unknown. Petitioner now wished to raise £300 upon first mortgage of the said property, but was precluded from so doing

without the order now applied for, save with her husband's assistance in executing a power of attorney to pass the said bond.

Mr. Buchanan moved and the Court granted, a rule *nisi*, returnable on December 12, 1901, to be served on petitioner's husband.

On the return day the rule was made absolute.

ESTATE KAMA V. ESTATE KAMA. { 1901.
Nov. 7th.

This was a motion for the removal of the case for trial from the Supreme Court to the Eastern Districts Court.

The applicants were the plaintiffs in the cause.

The affidavit of Mr. H. W. Murray, of King William's Town, one of the plaintiffs' attorneys, stated that there was a large number of witnesses from the district of King William's Town, and that it would save expense and be more convenient if the action were heard in the Eastern Districts Court. The issue depended on the credibility of the evidence of the witnesses, and there were no intricate legal points involved.

The affidavit of Mr. Hutton, attorney, stated that in his opinion there were several intricate points of law involved in the suit requiring the consideration of the Supreme Court. Questions of native law and customs would probably arise. The native witnesses could travel without great expense. Government witnesses, domiciled in Cape Town, would have to be called.

Mr. Searle, K.C. (for the plaintiff): This is an action brought by the executors of the late William Kama against the executors of William Shaw Kama. The defendants' plea is that (1) William Kama made a donation of the estate to William S. Kama; (2) that prescription has taken place; (3) that £2,500 have been expended in the management of the estate. The witnesses all live within a day's journey of Graham's Town, and if any questions of native customs should emerge in the course of the trial, the Eastern Districts Court, which has frequently to deal with such matters, is quite competent to decide.

Sir H. Juta, K.C. (for respondents): The plaintiff elected this Court as his *forum*. It is a very important case, and if heard in the Eastern Districts Court witnesses would have to be sent there at great expense, and there are important points of law to be decided.

Buchanan, A.C.J., said that the rules of practice provided that when a case could be more conveniently or more fitly determined in one Court than in another, it was lawful for the Court in which the case was pending to remove the case to such other Court. Plaintiffs applied for the removal of this case from the Supreme Court to the Eastern Districts Court, and they said the ground upon which the Court should remove it was because it could be more conveniently heard in the Eastern Districts Court, on account of there being a large number of witnesses from King William's Town. Defendants admitted that there were such witnesses, but said that there were several official witnesses in Cape Town. On the whole, the Court thought that the convenience of the parties and witnesses would best be met by the case being heard in the Eastern Districts Court. It was said that there were several important questions of native law in dispute. If the fact that there were points of law to be decided was made a ground for hearing all such cases only in the Supreme Court, the other Courts might as well be abolished. The application would be granted, costs to be costs in the cause.

BUCK V. GREENE.

Mr. Benjamin applied for the appointment of a commission *de bene esse*, for the purpose of taking evidence in Western Australia.

Granted.

GARRETT V. ANDREWS. { 1901.
Nov. 7th

This was an application calling on the respondent to show cause why an order for personal attachment should not be made for contempt of Court committed on November 2, 1901. The respondent had on that date removed and destroyed certain fences erected by applicant upon certain property adjoining the premises occupied by respondent, and situate off Wigton-road, Green Point.

The affidavit of Frederick Wm. Herbert, Deputy Sheriff of the district of the Cape, stated that in the aforesaid capacity he had attended on the second instant, at 1.20 p.m., upon the respondent, at his residence, Green Point, for the purpose of serving upon him an order granted by his lordship (Sir Jno. Buchanan), and dated November 2, 1901. He saw respondent, served upon him a copy of the said order, read it over to him, and showed him the original.

thereof, whereupon respondent locked the doors of the house, and refused to allow deponent to leave the premises unless he took away the copy of the order served. After a delay of about an hour, deponent took the copy, respondent opened the door, and deponent went out on to the stoep, and threw the copy of the order back into the house. Deponent told respondent that he was a sheriff's officer, and handed him his office card. At the time of service (1.20 p.m.) the fence was standing.

The affidavit of Charles John Andrews, the respondent expressed his regret for having disobeyed the order of the Court. He further said that the fence in question had been erected by the applicant across a road which lay between his property and that of respondent, over which road respondent claimed rights of user. He had been advised to pull down the fence, and notice had been given to applicant's attorneys that this would be done if the fence were not removed before four p.m. on Friday, November 1. No reply having been received, respondent commenced to pull down the fence at 1.15 p.m., and while engaged in so doing Herbert arrived, and served him with a copy of the order. Respondent stated that the said Herbert was very offensive, offered to fight, and threatened to smash windows. Respondent thought he was an impostor.

The affidavit of Richard Charles Wylde stated that up till two p.m. no person had entered on the ground in dispute or touched the fence, and this statement was also confirmed by the affidavit of applicant's wife.

Mr. Schreiner, K.C. (for applicant): Respondents removed our property, and it is a generally received maxim that *spoliatus ante omnia restituendus*. Even should parties hereafter proceed by action respondents should (1) be penalised for contempt; (2) be compelled to restore the fence which they have illegally removed; (3) they should be condemned to pay costs of the fence even in the event of their establishing a right to remove the fence. they had no right to take the matter into their own hands.

Mr. Searle, K.C. (for respondent), refers to the diagram of the property. Applicant had no right to block up the road. The fence, which was removed, is still intact, and can readily be put back again.

Mr. Schreiner (in reply): A future action may be avoided, and much expense saved if full affidavits are filed by next Thursday

Buchanan, A.C.J., said that there was a *bona fide* dispute between applicant and respondent as to the right of respondent to use a certain road which runs between the two properties. On this road there was a fence, and respondent gave notice that if this were not removed, he would remove it. Thereupon applicant came before a Judge in Chambers, and asked for an interdict. The judge considered that, there being a *bona fide* dispute as to the road, matters had better remain in *statu quo* until the dispute had been determined, and granted an interdict, pending application to be made on the next motion day, restraining the respondent from pulling down the fence. This order was served next day, and the respondent disobeyed it. He now expressed his regret for having done so. It appeared from the affidavits that he lost his temper and defied the messenger, but that he lost his temper was no excuse for disobeying the order. However, he had expressed his regret, and the Court would not make an order for personal attachment, but to mark the fact that these orders must not be disobeyed the Court would order him to pay the costs of this application, and to restore the fence, and would interdict him from making any further trespass pending proceedings to be instituted forthwith to determine the rights of the parties.

IN THE MATTER OF THE MINOR JOHANNES STEYN.

Mr. Joubert moved for leave to transfer certain property.

Granted in terms of the Master's report.

IN THE MATTER OF THE PETITION OF THE EXECUTORS OF THE ESTATE OF THE LATE CHOORMAL LUCHERAM.

Mr. Upington moved for an order authorising the Registrar of Deeds to pass transfer of certain property.

The matter was ordered to stand over for further information.

IN THE MATTER OF WILLIAM JAMES COUGHLAN, AN ALLEGED PRODIGAL.

Mr. Benjamin moved to have Coughlan declared a prodigal, and to interdict him from selling or dealing with certain property.

Affidavits were read to the effect that Coughlan was addicted to drink. The medi-

cal attendant said he had been informed that Coughlan had been intoxicated every day since his father's death. There was evidence that he had assaulted his wife when under the influence of drink.

The Court made an order declaring Coughlan a prodigal, and interdicting him from dealing with the property pending a further order. Mr. T. J. O'Reilly was appointed *curator bonis* of the joint estate of Coughlan and his wife.

GAY V. GAY.

Mr. Benjamin applied on behalf of Thomas Gay for leave to sue his wife, Nelly Gay, by whom he alleged he had been deserted, by edictal citation.

Leave was granted as prayed, the citation being made returnable on the 20th January next. Leave was also granted to serve intodit and notice of trial, personal service to be effected if possible, failing which, one publication to be made in the "Government Gazette," "Cape Times," and "Eastern Province Herald." The Court directed that a copy of the citation should be sent to the address of the respondent's mother by registered letter.

TERRIEN V. TERRIEN.

On the motion of Mr. Wilkinson, the return day for the rule issued in this case was extended until the 20th January next.

IN THE MATTER OF THE PETITION OF ANNIE JANE POLLOCK.

Mr. M. Bisset applied for leave to petitioner to sue *in forma pauperis* for damages for breach of promise and seduction.

The Court referred the matter to Mr. Bisset for report

REX V. YOUNG. } 1901.
Nov. 7th.

Forgery—Liquor permit—Alteration of figures—Mistake.

A conviction by a Magistrate for forgery quashed on appeal where it was clear on the facts that no forgery had been committed.

This was an appeal from the decision of the Resident Magistrate of Willowmore in a case in which the appellant, who is the wife of a painter, was convicted of forgery,

and sentenced to a month's imprisonment with hard labour.

The alleged forgery was in respect to a permit for liquor. A permit was given by Dr. D'Arcy for a bottle of wine and a bottle of brandy, and the allegation was that the appellant had falsified this in such a manner as to make the permit appear to be one for a bottle of wine and six bottles of brandy. The doctor said he had made no alteration on the permit, and that the one had been altered to six. The evidence showed that on receipt of the permit, defendant had sent it to a hotel, giving the messenger money to pay for a bottle of wine and a bottle of brandy. The person who served the messenger said that the permit was for six bottles of brandy, and the appellant thereupon sent the money for the other five bottles, which she obtained. It was said that the permit was now as it was when delivered to the accused. The grounds of appeal were that there had been gross irregularity on the part of the Court below, that there was no evidence to support the conviction, and generally the conviction was contrary to law.

Buchanan, A.C.J., after examining the document, said that he could not make a "six" out of what was alleged to be a six. It looked very much as though the canteen-keeper wanted to manufacture a six out of it. He did not think any reasonable person would have taken it for a six.

Mr. Upington submitted that if there had been any alteration at all, it was probably the doctor who had, for greater security, altered the figure "1" into writing, and made it "one."

Mr. B. Upington (for appellant): To constitute forgery there must be (1) a forged instrument, (2) intent to defraud. In this case the prisoner did not alter the permit. She wrote to the doctor asking for a certain permit; she no doubt believed that the permit he sent was the one she had asked for, so she had no inducement to alter it, and there is no evidence that she did so.

Mr. H. Jones (for the Crown): The evidence supports the charge of forgery. The doctor said that he had written the permit only three days before he gave his evidence before the Magistrate; the matter was therefore fresh in his memory, and he says that the alteration which had been made in the figures was not in his handwriting. He is the best evidence as to his own handwriting. It is a mere question of fact whether the mark in question is a "6" or an "11."

Mr. Upington was not heard in reply.

The Court upheld the appeal, and quashed the conviction.

Buchanan, A.C.J., said that the applicant was charged before the Resident Magistrate of Willowmore with the crime of forgery, although the charge-sheet was not very scientifically or accurately drawn, inasmuch as it did not describe the forgery committed, nor say there was the uttering of a forged instrument. The only charge made was, the falsification of a permit. What was wanted in this charge was also that there was the issuing of this permit. However, the Court need not go into technical points, but could dispose of the case on the facts. It appeared that the appellant, Mrs. Young, sent a letter to the doctor asking for a medical permit to get one bottle of brandy and one bottle of wine. The doctor sent back the permit, and a greater scrawl or more careless-like permit one could not see. This permit read, "Permit for one bottle of wine and (here came the word in dispute) one bottle of brandy." It was said that this word was originally the figure "1," and that this part of the note had been altered into six, and therefore the permit read: "and six bottle brandy." If it had been intended to forge the figure, his lordship thought the figure would have been altered into the figure 6, and the word "bottle" into "bottles." But looking at the note, he certainly never should dream of taking that word as representing the figure 6. It only showed that some canteen-keepers were only too ready to sell. His lordship thought that certainly no jury would ever have been justified in convicting on that document. It was true in regard to appeals from the Courts below that it was not the rule to upset the Magistrate's finding on facts, but here the Court had got the document before them, and he could not say that upon it any person ought to be convicted of forgery. On the facts of the case, therefore, the conviction would be quashed.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP]

COHEN V. TOWN COUNCIL OF CAPE TOWN. { 1901.
Nov. 7th.
„ 14th.

Municipal Regulations—*Ultra vires*
—Costs in criminal appeal.

C. had been convicted in the Court of the Resident Magistrate of Cape Town of having contravened section 36 of the municipal regulations by placing certain show boards in a public thoroughfare, and he now appealed against this conviction on the grounds: (1) that as a fact these boards were not in a public thoroughfare, inasmuch as they did not project beyond the plinth of the building tenanted by him, and (2) that if such exposure of the aforesaid boards was a violation of the section specified the said section was *ultra vires*.

Held (1) that as by a reasonable construction of the said bye-law, it applied only to public thoroughfares, and not to private property, it was not *ultra vires*.

(2) That as the Magistrate found as a fact that the said boards overhung a public thoroughfare, the appeal must be dismissed.

(3) That as appellant had given notice he would claim costs in the event of the appeal being upheld, costs must be granted against him.

This was an appeal from a decision of the Acting Assistant Resident Magistrate of Cape Town in a case in which the appellant, Elias Cohen, was charged with contravening section 36 of the Cape Town Municipal Regulations, framed under the provisions of Act 44 of 1882, promulgated by Government Notice 456 of May 29, 1899, as amended by Act 26 of 1893, in that upon or about October 9 last and at Cape Town

the said Elias Cohen did wrongfully and unlawfully place or permit to be placed or set up in the public thoroughfare in St. George's-street, Cape Town, certain two signs or show boards, from a part of the building known as 28, St. George's-street, without having first obtained the consent of the Town Council of Cape Town. The accused pleaded not guilty, but after evidence had been led was found guilty, and a fine of 10s. imposed.

In the Court below Police-constable Keeley gave evidence, and said that he saw the two signboards fixed on the wall (hanging). They were overhanging the footway. He saw the accused and asked him who placed the boards there. Accused said he had, and witness asked him to remove them, to which accused replied that he would not remove them for all the police in Cape Town. Accused occupied part of the premises 28, St. George's-street. In cross-examination witness said the boards were about 1½ inches thick. With the Town Council's permission goods might be hung outside shops, not exceeding six inches from the wall. The board was an obstruction, as hundreds of people crowded round it. In re-examination the witness said that the board was in connection with betting on horse races.—John Thompson deposed that the Town Council had not authorised the fixing of signboards there.—For the defence, Robert Duncan stated that the board on No. 28, St. George's-street (the other one being on No. 29) was on the plinth which ran along the whole face of the building. The board did not extend beyond the level of the plinth. There was a door in the building close to the boards, and on the other side of the boards there was a window-cill, both extending beyond the level of the boards. The boards did not in any way obstruct the street, and there were many boards on the street projecting further than those in question. In cross-examination, the witness said that the board rested on the plinth, and was fixed by a piece of string. There were none of the public when he was there.

The notice of appeal served upon the respondents set forth that the grounds generally upon which the judgment was sought to be reversed were as follows: That the section 36 of the Cape Town Municipal Regulations did not apply in the action brought against the appellant, and was *ultra vires*, and as the action brought was one to enforce a regulation to abate a nuisance caused by an obstruction in the street,

and as it had been proved in evidence that there was no such obstruction caused, the appellant had therefore not been guilty of any offence under the said regulation. Costs of the appeal were applied for against the respondents.

The 36th regulation, so far as it affected the case, was as follows: "It shall not be lawful for any person to beat or shake carpets or mats in any public streets, squares, or thoroughfares, nor to place or permit to be placed in the public streets, squares, or thoroughfares, any stall, board, chopping-block, show-board, or hinges, or otherwise, or to set up or continue any pole, sign-board, blind, awning-line, or any other projection from any window, parapet, or other part of any house, shop, or other building, without having first obtained the consent of the Town Council . . ."

Mr. Wilkinson (for appellant): Appellant had fixed a board on nails against the wall of his premises. This board rested on the plinth of the building, and did not project beyond it, and the A.R.M. held that by-law No. 36 of the Town Council had been infringed. "Any other projection" implies that the things thereinbefore enumerated must be projections into the street. Then again this board was not "in the public street." The evidence taken in the Court below showed that it did not extend beyond the plinth of the building, though one witness certainly did speak of "the board overhanging the footway." The A.R.M. seems to have assumed that a notice board may be an obstruction even if it does not project out into the street. I submit that the section under which this conviction took place does not apply unless in its very words there is "a projection in the public streets." This was not in the street, but within the line of building.

[Buchanan, A.C.J.: I would call your attention to the charge "into the public thoroughfare." It is a question of evidence whether the boards were in the street or not.]

No doubt in a loose way one might speak of a thing overhanging the street if it were hung against a wall at the side of the street.

[Buchanan, A.C.J.: Was it not for the A.R.M. to decide the question of fact as to whether the board did overhang the street?]

I would suggest that the A.R.M. was influenced by the fact that notices relating to betting were displayed on these boards.

[Buchanan, A.C.J.: That is not in the charge. If a man put these things into his

window he might not be liable to be convicted under this bye-law, but may not the plinth itself be a projection?]

The presumption is that the Town Council would never have allowed a plinth to project along the whole line of building. As to the projection, we have only the evidence of one policeman that these notices were overhanging the street.

[Buchanan, A.C.J.: I see that the first objection to section 36 taken by the agent in the Court below was that it is *ultra vires*. Do you argue this?]

If this bye-law has been correctly interpreted by the A.R.M., any notice pasted against one's own wall might be illegal. In *Foster v. Moore* (4 Irish Law Rep., 670), a bye-law against the use of the Curragh for racing purposes was interpreted only as applying to such uses as would create an obstruction. So also I contend that this bye-law is only against obstructions caused by projections.

Mr. Schreiner, K.C. (for respondents): We are brought here to show that section 36 is *intra vires*. The words "any projection" of the section have nothing to do with the antecedent word "board," and the words "in the streets" do not necessarily imply a projection; a house is "in the street." Surely people cannot be allowed to put up boards which during a hurricane might be blown down to the great danger of passers-by. I hold that the regulation gives the Town Council power to forbid the putting up of a board even within the plinth; but the evidence is contradictory as to whether the board in question was wholly within the plinth or not. In England a man may be indicted for a nuisance by causing a crowd to collect by exhibiting things in his windows. *Garrett on Nuisances* (p. 31). This was not a signboard; it was a board or a show-board. "In the public street" means "by, or in the neighbourhood of the street," not on the actual street. *Regina v. Carlyle* (6 C. and P., 636). In England the procedure for abatement of a nuisance is by indictment; here it is by interdict.

[Buchanan, A.C.J.: The bye-law may be reasonable, but does it bear the construction you put upon it? Suppose a man paints an advertisement on the wall of his house, would that be contrary to the bye-law?]

No, but it would apply in case of any projection. The Town Council may allow any man to put up a signboard, but they may, if they consider it desirable, prevent it in any special case.

Q 4

[Buchanan, A.C.J.: The charge here is "putting a board in the public thoroughfare."]

"Thoroughfare" means "street."

[Buchanan, A.C.J.: Supposing a building stood back from the street, would the bye-law apply in that case?]

There is an English case bearing on that point, but I cannot remember it just now. But here, "in the street" means only "abutting on the street." The policeman, however, said that the board was *overhanging* the footway. Lastly, there is no evidence either that the plinth belonged to appellant, or that it was not itself an encroachment on the footway.

Mr. Wilkinson (in reply): There is evidence that the plinth is not an encroachment. Even if it were, the Town Council stood by while it was being erected, and they are now estopped from coming forward and ordering its removal. Nothing can be correctly said to be "in the street" unless it projects beyond the plinth. My house may be in the street, but if I am in my house, it does not follow that I am in the street. It has been said that while a signboard must not project, a showboard must not be in the street, and a distinction has been drawn between showboards and signboards, between being in the street and projecting in the street. But suppose I have a house set back 50 feet from the road, shall I contravene the regulation by exhibiting a showboard? If so, the regulation is unreasonable; and it is no less unreasonable to hold that the Town Council can please itself about enforcing its own regulation, and is quite at liberty to enforce it against one or two people, and take no notice of others. As to cases relating to the exhibition of pictures, etc., in windows, these do not apply. *Barber v. Penley* (2 Ch. Ap., 1893, p. 447). It is only where an obstruction becomes habitual that a thing causing it becomes a nuisance.

Mr. Schreiner asked leave to refer to *Bruce and Co. v. Cape Town Council* (9 Juta, 8) and to Act 26 of 1893, sections 169 and 170, sub-section 19.

As the Magistrate had not forwarded any reasons, the further hearing was postponed to ascertain whether the Magistrate had found as a fact that the signboards in question were overhanging the public thoroughfare or not. The Magistrate subsequently reported that he had found that the signboards were overhanging the public thoroughfare.

Postea (November 14).

Buchanan, A.C.J. : This is an appeal from a conviction obtained in the Resident Magistrate's Court, on a charge made against appellant of contravening section 36 of the Cape Town Municipal Regulations, in that accused did wrongfully and unlawfully place or permit to be placed or set up in the public thoroughfare in St. George's-street certain two sign or show boards from a part of a building known as 28, St. George's-street. In the notice given to respondents, the appeal is founded first on a question of law, that the bye-law in question was *ultra vires* the powers of the Town Council; and, secondly, on a question of fact, that no obstruction of the thoroughfare had been proved. As to the first question, the bye-law is one of the Municipal regulations for the abatement of nuisances, and the nuisance against which it is directed is obstructions in public places. It deals with several kinds of obstructions, but the words applicable here are the following: "It shall not be lawful for any person . . . to place or permit to be placed in the public streets, squares, or thoroughfares, any show-board, etc., or any other projection from any window, parapet, or other part of any house or building, without having first obtained the consent of the Town Council." Counsel has contended that this regulation prevents any board or projection of any kind being placed on any house without the permission of the Council, whether or not such house is on the line of street or stands within its own grounds, and independently altogether of the fact whether such board projects into the thoroughfare or not. Against this it is urged that such a bye-law would be altogether unreasonable and *ultra vires*. I am of opinion that the true construction to be placed on the language used does not give the bye-law the extended effect contended for. It appears to me the bye-law is intended to affect only such property as is within the control of the Council, namely the public streets, squares, and thoroughfares, and is not intended to restrict owners of private property of any rights over their own properties. It may be open to discussion to what extent the Municipal Act empowers the Council to derogate from the rights of private ownership on property situated within the city, but I cannot hold that in this bye-law any such attempt is made. In so far as this bye-law regulates public spaces vested in the Council, it is perfectly reasonable, and as the construction the Court puts upon its language is to limit it to such property, the objection of *ultra vires* cannot be sustained.

On the question of fact, the evidence given on either side was in direct conflict. For the prosecution, it was stated the boards put up by the appellant were overhanging the footway, and caused an obstruction to the public. For the defendant, it was said that they did not extend beyond the level of the plinth of the building. Whether or not the plinth projected into the street was not shown. It was common cause no consent of the Council had been asked. As the Magistrate had not forwarded any reasons, the Court was not informed as to the conclusion arrived at in the Court below on the question of fact. The matter having been referred back, the Magistrate now reports that he found on the evidence that the sign or show-boards were overhanging the public thoroughfare. This question of fact being found against the accused, the Court is now unable to allow the appeal. As to costs, as a rule, in criminal cases, costs are not given either for or against the accused. But this is a case of a municipal prosecution, and the defendant gave special notice that he would claim costs if successful. The proceedings were taken to test a right, and the appellant having been unsuccessful, we are of opinion that the appeal should be dismissed, with costs.

[Appellant's Attorney, Mr. D. Tennant; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAARDORP.]

PROSSER V. PROSSER. { 1901.
{ Nov. 8th.

This was an action for divorce, on the ground of adultery, brought by Edward Percival Prosser against his wife, Johanna Helena Metzler (born Poole).

Mr. Solomon appeared for the plaintiff; the defendant was in default.

Counsel said that he had not all his evidence available that day, as the household where the parties were living at the time the offence was committed had been broken up, and he was therefore unable to bring before the Court that morning any evidence to cor-

roborate that of the plaintiff. The plaintiff, however, had to go to the front almost immediately, and therefore he asked that his evidence be taken, and the further hearing of the case could then be postponed.

Mr. Solomon then called

Francis Henry le Sueur, a clerk in the Colonial Office in charge of the marriage registers, who put in the marriage register of plaintiff and defendant.

Edward Percival Prosser, the plaintiff, was then called, and said that he was married to the defendant at Stellenbosch in November, 1897, at which time defendant was engaged there in a greengrocer's business. They lived together, but, owing to his wife's temper, not very happily, until the end of October, 1899, when witness, who was in the Royal Engineers' Corps, had to leave for the front. Before he left, however, his wife gave him cause to doubt her fidelity. He had found her in compromising attitudes with boarders in the house, particularly with a certain Sprules. He had found them sitting on the sofa many times, Sprules with his arm around the defendant. While witness was at the front he wrote to the defendant, and received letters from her in reply. Finally he received a letter from her stating that she was now in partnership with a gentleman called Barron. In this letter she also said that she had been untrue to witness, and that Sprules, who had left for England, had said that he was to write to witness. Witness returned to Cape Town at Christmas, 1900, and went to see his wife. He had a conversation with her, and she refused to come back to him or to have anything more to do with him. She repeated that she was living with Barron.

By the Court: Witness could not swear that she told him that she was living with Barron as his wife.

Further examined, witness said that the photograph produced was that of his wife.

By the Court: He had last seen his wife at Salt River a week ago. He had had nothing whatever to do with her since October, 1899. There were no children of the marriage, and there was no estate.

This concluded plaintiff's evidence, and the further hearing of the case was postponed until February 3, 1902.

SALFIELD V. SALFIELD.

This was an action brought by Lilian Mary Annie Salfield for an order for restitution of conjugal rights, failing which, divorce. The application was made on the ground of

alleged malicious desertion by the husband, Morris Felix Salfield.

Mr. Russell, who appeared for the applicant, said that the parties were married in January, 1899, at Wynberg. On the 6th May, 1900, defendant deserted the petitioner, and sailed by the Medic for London under an assumed name.

The petitioner said that she never lived with the defendant. She was going to live with him, but he was arrested and imprisoned, first for a month and afterwards for a year. After his release in May, 1900, he saw her, and said he was going to Germany. He asked her to go with him. At that time she did not feel willing to go with him. She did not feel reconciled towards him. He was liable to be arrested when he married her. He had no home to take her to in Germany, and no money to support her with, so far as she knew when he left. He sailed about five days after he asked her to go with him. She was willing to go to him if he could provide for her. She had not heard from him since he left her.

The Court granted an order on the defendant to make restitution on or before the 15th February, or to show cause on the 28th February. Personal service was ordered to be made, his lordship saying that, if personal service could not be effected, a further application could be made.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice JONES, and the Hon. Mr. Justice MAASDORP.]

REX V. DIALS AND OTHERS. { 1901.
Nov. 11th.

Mr. Justice Maasdorp said that a case had come before him from the Acting Resident Magistrate of Ladismith, in which Dials and three others were charged with contravening section 5, paragraph 29, of Act 27 of 1882, by loitering about the public roads and soliciting. They pleaded not guilty, but were found guilty, and sentenced to a fine of £10, or to a month's imprisonment with hard labour within the precincts of the gaol.

Under Act 44 of 1898, the largest penalty which a Magistrate could impose was a fine of £5. The sentence must therefore be reduced to a fine of £5, or thirty days' imprisonment. Otherwise the sentence would be confirmed.

OBERMAN V. OBERMAN.

This was an action for restitution of conjugal rights. The plaintiff was Louis Oberman, and the respondent, who was in default, was Rachel Oberman.

Mr. Benjamin, who appeared for the plaintiff, said that plaintiff lived at Cape Town and respondent at Observatory. The parties were married in New York in February, 1889, and it was alleged that the wife deserted her home on the 14th November.

Plaintiff said he was married to defendant on the 13th February, 1889. They had lived in New York until 1894, and then came to South Africa, going to the Transvaal. His wife went to Bulawayo for a time. In 1899 witness came to Cape Town to reside. His wife left him in Johannesburg before this. Witness met the defendant in the streets of Cape Town, and she said she did not want to live with him. She was now living at Observatory-road. Witness would take her back if she would return.

By the Court: There was no quarrel before respondent left him. He did not know why she went. She left the house without his knowledge. She had told witness she was going to Australia. This was about two months ago. Witness did not know what she was doing now.

Joseph Bernstein deposed that about two months ago he was sent by plaintiff to ask the wife to return. She refused.

The Court granted a decree, ordering defendant to return to plaintiff on or before November 20, failing which a rule *nisi* would issue calling on respondent to show cause why a decree of divorce should not be granted, the rule being returnable on December 12.

RICHOLD V. RICHOLD.

This was an action for divorce on the ground of the wife's misconduct.

Mr. Close appeared for the petitioner; defendant was in default.

Henry Edward Richold said he was married to respondent in November, 1891, at S. Mark's, Cape Town. There were three children, who were at present in England. They lived happily together for some years, and his wife and children had ultimately to

go to England. They went to Tudley, in Surrey, at the beginning of 1900. Witness received various affectionate letters. He subsequently went to England, and found his wife had moved from the original address. He received letters from his wife. She wrote him a letter which he had since lost, and made certain statements therein. He offered to forgive her, but she subsequently confessed to an affection for another man named Discombe. In other letters she said she had a child by Discombe, and that Discombe had abandoned her. He last lived with his wife in January, 1900.

John Laing, manager of the Whittington Hotel, deposed that respondent and another man lived for eleven days at the hotel as Mr. and Mrs. George in October and November.

A decree of divorce was granted, plaintiff to have the custody of the children.

ESTATE GRIMBECK V. ESTATE GRIMBECK. { 1901.
Nov. 11th.

Will—Massing—Survivor—Adiation.

G. and his wife were married in community of property and thereafter executed a mutual will whereby the survivor and children of the marriage were nominated as sole heirs of the joint estate; the survivor to have one half and a child's portion, the residue to devolve on the children in equal shares, and by representation on such of their descendants as might die during the lifetime of the testator. The surviving spouse was also to enjoy a life usufruct of the entire joint estate. G. died, and his widow thereafter made a will by which she nominated her son E.H.M.G. as her sole heir and executor. The said E.H.M.G. was removed from his executorship by an order of Court, and the plaintiff (A. R. Truter) was duly appointed. The said plaintiff now claimed (1) to be entitled to administer half of the joint estate and a child's portion: (2) to participate with the defendants in the administration of the entire joint estate. Held, that as no executor had

been appointed under the first (mutual) will it was competent for the survivor to appoint an executor by a second will made subsequent to the death of the predeceased, and that the executor so appointed was entitled to administer the joint estate conjointly with the executor of the estate, and further, that the said executor of the widow was entitled to administer any property acquired by her since the death of her husband.

The following was the statement of this special case:

1. The plaintiff is Abraham Robertson Truter, in his capacity as executor dative in the estate of the late Engela Fredericka Grimbeck (born De Jager), hereinafter called the testatrix.
2. The defendant is George William Steyler, the secretary of the Colonial Orphan Chamber and Trust Company, in his capacity as executor dative in the estate of the late Adolph Siegfried Grimbeck, hereinafter called the testator.
3. The testator and testatrix were married in community of property, and on March 14, 1868, they executed the mutual will whereof a copy (translated into English) is hereunto annexed, marked A.
4. Under the said will, the testators appointed the survivor, together with the children of the marriage, to be sole and universal heirs of the entire estate left at the death of the first dying; one-half of the said estate and a child's portion to devolve upon the survivor, and the remainder on the children in equal shares, the descendants of any child dying in the testator's lifetime to succeed by representation to such child's share.
5. The said will further provided that the survivor should remain in full and undisturbed possession of the joint estate, without giving any security, and should enjoy the usufruct thereof during lifetime, and that, at the survivor's death, the joint estate should be divided in equal shares amongst the children then living or the descendants by representation of children who had died during the testator's lifetime; also that, in case the survivor should marry a second time, he or she should be bound to have an inventory made of the joint estate and an appraisement, in order to ascertain the portions of the heirs

of the first dying, the survivor to pay out the shares of such of the children as might be majors, and to give security for the shares of the minors, and the survivor was appointed executor.

6 The testator died on August 14, 1889, without having revoked or altered the said will, and the testatrix took out letters of administration as executrix, and filed an account of the whole estate, a copy whereof is hereunto annexed, marked B.

7. No other account was filed by the testatrix, nor were any of the heirs paid out any shares by her, but she remained in possession of the whole estate, and enjoyed the usufruct thereof until she died on January 14, 1899, without having entered into a second marriage.

8. The defendant was thereupon appointed executor dative of the testator's estate.

9. The testatrix at her death left a will, executed on April 26, 1898, whereby she appointed her son, Edgar H. M. Grimbeck, sole and universal heir of her entire estate and executor thereof, as will more fully appear from a copy thereof (translated into English) hereunto annexed, marked C.

10. The said Edgar H. M. Grimbeck absented himself from the Colony, and was, by order of this Hon. Court, dated the 1st day of February, 1901, removed from his office, and the plaintiff has been duly appointed executor dative of the testatrix's estate.

The plaintiff contends: (a) That he is entitled to administer half of the joint estate and a child's portion, in accordance with the separate will of the testatrix of April 26, 1898; (b) that he is entitled to participate with the defendant in the administration of the whole joint estate of the testators.

The defendant contends: (c) That plaintiff and defendant are conjointly entitled to administer the joint estate of the testator and testatrix, in accordance with the provisions of the mutual will of March 14, 1868; (d) that plaintiff is entitled to administer only the separate estate of testatrix acquired by her since the testator's death, in accordance with the provisions of the separate will of the testatrix, dated April 26, 1898.

Wherefore the parties severally pray for judgment in favour of their respective contentions, and that the costs be borne by the party whose contention is upheld.

Mr. Searle, K.C.: Our contention is that the plaintiff could deal with the separate estate under the first (the joint) will, but it is admitted that she could appoint an

executor. Under the first will the survivor was the executor. In such a case the survivor can appoint an executor to administer the joint estate. Secondly, we contend that plaintiff is entitled to administer the estate jointly with the executors, the whole joint estate in the terms of the second will, and the question is whether we can now administer the whole estate under the second will, or only the separately acquired property. This case cannot be distinguished from *Lucas v. Hoole* (Buch. 1879, 132). The survivor was appointed sole heir to the whole estate.

[Buchanan, A.C.J.: This is clearly a massing of the whole estate.]

The Court held in *Lucas v. Hoole* that there was a massing, but in this case the survivor and the children were heirs of the entire joint estate. In *Lucas v. Hoole* they were appointed heirs of the first dying. The agreement seems to differ but little from that in the case of *Lucas v. Hoole* (Buch., 1879, p. 132). The only difference

that in this will the survivor was appointed sole heir to the entire estate, and in *Lucas v. Hoole* was appointed sole heir to the first dying.

As to *Mostert's case*, I admit that there the words as to massing are very strong. Plaintiff did, however, no doubt consolidate the joint estate, and did not take half.

[Buchanan, A.C.J.: It seems that it was clearly the intention of the parties to mass.]

The case seems hardly distinguishable from *Lucas v. Hoole* (Buch., 1879, 132) and from *Upton v. Upton* (Buch., 1879, 289).

[Buchanan, A.C.J.: If there has been a massing the plaintiff will be entitled under the first will to administer the joint estate and under the second to administer the property subsequently acquired.]

Mr. Schreiner, K.C. (for defendant), was not called upon.

Buchanan, A.C.J., said that the Court had no difficulty in construing this will. It was no doubt the intention of the parties to mass the whole joint estate and to distribute it. The widow, who was the survivor, agreed to this massing, and took all the benefits which the joint will gave her. Before her death the widow, as she was entitled to do, made a second will, and by that will she appointed an executor. Where there was a joint mutual will, and the survivor adiated under that will, the rule of law was that the sur-

vivor was not entitled by a subsequent testament to derogate from or disturb the distribution of the joint estate as provided for under the mutual will of the parties. Not having appointed an executor in the first will, there was nothing derogating from the mutual will in the appointment of an executor by the second will. It was agreed that the executor of the estate of the first dying, and the executor of the widow, were conjointly entitled to administer the joint estate. The executor of the widow was also entitled to administer any property acquired by her since the death of her husband, and which was not governed by the first will. Judgment would be in favour of the contentions of the defendant. Costs were ordered to be paid by the defendant in terms of the mutual prayer.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret; Defendant's Attorneys, Messrs. Van Zyl and Buissinné.]

VAN SCHALKWYK v. VAN SCHALKWYK. } 1901.
 } (Nov. 11th

Trespass — Lease — Termination —
Damages—Notice.

Damages given against a lessor who had entered upon the property leased before the termination of the lease.

This was an appeal from the decision of the Resident Magistrate for the district of Hopefield. The appellant (plaintiff in the Court below) summoned the respondent (defendant) for £20 damages for entering his property and doing damage thereto. The defendant had let a certain portion of a farm to plaintiff on a yearly agreement, which was attached to the proceedings. The point was whether defendant had given proper notice to terminate this agreement before entering the farm and committing the damage complained of. The record of evidence showed that the parties were brothers. The defendant rented portions of a certain farm to plaintiff and two other brothers on a yearly tenancy. In his evidence, defendant said he gave six months' notice, as provided by the agreement on the 15th February. Subsequently he fixed the date as the 3rd March, when he received the last rent. Defendant's wife said that notice was given on the 15th January, upon which

date the yearly tenancy began. The brothers also deposed to having received notice on this date. The Magistrate gave judgment of absolution from the instance. The summons in the Court below stated that on July 15, 1901, defendant had entered upon the premises and lands of plaintiff at Zoutgatfontein, in the district of Malmesbury, and that defendant did there and then break open an enclosed camp, rooted out several trees, and damaged several others, and also removed a load of poles, wood, etc., the property of the plaintiff, causing damage to the plaintiff in the sum of £20, and as the defendant refuses and neglects to pay the plaintiff the said sum of £20, plaintiff prays that he may be adjudged to pay him the said sum and costs of suit.

The judgment of the Resident Magistrate was as follows:

"I find that there was a yearly agreement to let the part of the undivided farm Zoutgatfontein by the defendant to the plaintiff and two of his brothers, and that six months' notice on either side could terminate this. For the last ten years plaintiff had occupied this part of the farm, recognised by the three brothers as the portion set apart for the defendant. On the 15th of January last the defendant gave notice of his intention to resume the occupancy of his land, and on July 15 (six months thereafter) proceeded thither, and took possession of the land by entering thereon, clearing out the garden space and taking away two loads of 'etompies' (roots). I consider that he acted thus within his right. No protest was made at the time by plaintiff, and the trees were the property of the occupiers of the land before plaintiff occupied it. Plaintiff had been warned not to touch the trees, but notwithstanding, shortly before the 15th of July he had removed 14 loads of wood. From the clear evidence of defendant's wife and of the two brothers, there is no doubt in my mind but that they all received due notice of his (defendant's) intention to terminate the hire. If the defendant made a mistake in the date of the end of each year's hiring then the plaintiff made a similar mistake, which the document dated January 15, and marked B, clearly proves. The two brothers admit signing this paper, nor did plaintiff deny his signature. The said two brothers when called upon to give up the land, willingly did so. They both declare that the trees plaintiff complains of having been rooted out were self-planted, and had to be

cleared out before gardening could take place.

Mr. B. Upington for the appellant.

Mr. Benjamin for the respondent.

Mr. B. Upington: The point is that defendant (now respondent) had agreed to let a certain part of the farm to the appellant, and the question is whether he gave appellant proper notice to terminate the lease. It is common cause that respondent went upon the farm on July 15, and removed certain stumps of wood while appellant was in possession, and the Magistrate in granting absolution from the instance had taken up the position that the lease was terminable on a six months' notice. We deny, however, that notice was given on the 15th of January.

[Buchanan, A.C.J.: The Magistrate seems to have found that due notice was given.]

We have a document, viz., a rent receipt dated March 2, which (taken in conjunction with defendant's evidence in cross-examination) fixes the date of the notice.

[Buchanan, A.C.J.: The plaintiff said that notice was given on February 15.]

Even if that was so, defendant was not justified in entering on the property on July 15. Defendant was bound by his own evidence, and the Magistrate had no right to go behind that. If the parties agree that notice was given on February 15 the Magistrate cannot say that they were both wrong, and that defendant's wife and brothers knew more about the matter than the parties themselves. As to the damages to which plaintiff was entitled, he estimates his two loads of wood at £6, and his young trees at 1s. 6d. each. In any case defendant was a trespasser, and plaintiff is entitled to some damages.

Mr. Benjamin: As to the length of notice required, if this contract of lease had been completed, it would be merely for the Court to construe it. But as the lessor did not sign it, it never was completed. All parties to a written contract must sign it—*Richmond v. Crofton* (6 Sheil, 220)—and although this was a case under the Masters and Servants' Act, the decision was based upon principles of common law.

[Maasdorp, J.: But a contract need not necessarily be in writing.]

No, but this writing is not a written contract, and therefore cannot be urged against the oral evidence. Plaintiff's wife says that two months' notice had to be given, and she wrote out the document.

Buchanan, A.C.J. : The plaintiff and his two brothers hired from the defendant certain property on lease at £10 per annum, subject to six months' notice of termination. The lessees divided their holdings into separate holdings, and each paid his proportion of rent to the landlord direct. The plaintiff therefore held a specific portion of the property, and paid his portion of the rent to the defendant. This lease had gone on for some ten years, when early this year notice was given of the termination of the lease. The date upon which this notice was given is in dispute, and the Magistrate has found it was given on the 15th of January this year, that is, the date upon which the year began to run. The plaintiff said he received the notice in February. The defendant himself said that he gave notice on the 15th of February, but in cross-examination he fixed upon the date as that on which the last rent was paid, viz., the 3rd March. In the face of this conflict of evidence the Magistrate has taken neither the date given by the plaintiff nor that given by the defendant, but the date fixed by the defendant's wife and the defendant's brothers, viz., January 15. This six months terminated on the 15th July, and thereafter the defendant came in and trespassed upon the property. The Magistrate held that

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorneys, Messrs. Van Zyl and Buissinne.]

Plaintiff—an architect—had been employed by defendant to prepare certain plans. The Court found as facts that these plans had been approved and that the architect's estimate of the cost of the work was in excess of the lowest tender received.

Held, that though the plans had never been carried out, the architect was entitled by way of quantum meruit to 3 per cent. on the lowest tender.

The case of De Witt v. Cape Canning Co. (4 Sheil, 116) distinguished.

This was an action to recover a sum of £86 10s. alleged to be due by defendant to plaintiff in respect of professional work done by the latter. The declaration alleged that in or about September the defendant instructed the plaintiff to prepare certain building and drainage plans, which he did. Thereafter when the plans had been submitted and approved of by the City Engineer the defendant instructed plaintiff to take out specifications and quantities, and call for tenders for carrying out the work. Plaintiff also made certain emendations in the plans, and then called for tenders, and these were received ranging from £1,669 to £2,598. For this work there was due to plaintiff the sum of £89 10s. Defendant had paid £3 on account, and the claim was for the balance, £86 10s.

The plea stated that in or about the month of September, 1900, the defendant instructed plaintiff to prepare plans for two houses and shops to be erected on a certain piece of land belonging to defendant, situated in Constitution-street. The plaintiff erroneously prepared plans for six shops, and thereupon the defendant instructed him to prepare second plans subject to the following conditions: (a) That the plans were to be submitted to the Town Engineer for approval, and (b) that drainage plans to complete the proposed buildings were to be forthwith prepared and handed to defendant, neither of which conditions, it was alleged, had been fulfilled. Thereafter the plaintiff submitted second plans, which were approved, and a charge of £3 made for them, which was paid.

Sir H. Juta, K.C. (with him Mr. Close), for plaintiff.

Mr. Benjamin for defendant.

Sir Henry Juta called

Henry Rowe Rowe, an architect, carrying on business in Cape Town, who said he was the plaintiff in this case. He knew the defendant, Mr. Gotthelf, who was a plumber in Cape Town. Witness was introduced to

him by a mutual friend, Mr. Shanker. Defendant had a certain property in Constitution-street, and he instructed witness to prepare plans with a view to effecting certain alterations thereon. Witness first drew a sketch plan and made certain preliminary drawings. He then prepared certain other plans, which the defendant approved of. There was also a drainage plan. These plans were both signed by the defendant, and thereupon witness drew up the application to the Town-house for the passing of these plans. Defendant himself took these plans to the Town-house, saying that he was passing that way.

Sir Henry Juta put in these plans, signed by the defendant, and said that there was evidently a great error in the plea, as there were the plans signed by the defendant and approved of by the Town-house.

Examination continued: Witness kept a diary, and jotted down things as they happened. From this diary he was able to say that the plans were sent to the Town-house on October 20 of last year. That was the day on which the plans were signed by the defendant. On November 9 witness received a communication from the Town-house, returning the tracing of the drainage plans, and saying they had been approved of. The building plans had been returned to him approved of from the Engineer's Department on November 7. On that date witness wrote to defendant saying that he had received the plans, which had been approved of, with the exception that the roof to the balcony was not allowed, as the street was not of the required width. Witness saw defendant after that, and received further instructions from him, being told to immediately prepare specifications and quantities, and call for tenders. Acting on defendant's instructions, witness inserted an advertisement in the newspapers, calling upon parties who would be willing to tender to send in their names. Witness drafted the advertisement, and defendant inserted it in the newspapers on November 20. They received replies from a large number of builders, and he and defendant selected fourteen. The object was to know how many bills of quantities to make out. To the selected fourteen bills of quantities were sent, and tenders received from ten. These tenders were handed to defendant, as well as copies of the plans and the specifications. That was on December 6. Defendant asked for all the papers and the original drawings, in order to go to his attorneys to raise money for the building. The highest tender was £2,598,

and the lowest, £1,669. When defendant first instructed witness to prepare the plans, nothing was said as to the estimate of cost. Before witness made the plans, he asked defendant how much money he wanted to spend, and the latter said "As little as possible." After defendant had approved of these plans, he asked witness what he thought the building would cost, and witness said about £1,700. That was before tenders were called for. After that there were certain extras added, which witness estimated would bring the cost of the building to £1,770. The lowest tender was £1,669. After the plans had been approved of by the Town Council, defendant was not satisfied with the elevation, which he wanted a little more elaborate, so that he would be able to raise more money for building purposes. Therefore he instructed witness to prepare a more ornate front, which, as it affected only the ornamentation and not the construction, did not require to be passed. When witness handed over these plans, specifications, and tenders to defendant, the latter asked what he had to pay witness. Witness said it all depended upon whether he wanted him to superintend these works or whether he was going to do it himself. He said he had not yet made up his mind, and that perhaps he might do the work himself instead of employing a builder, but he would let witness know. That was on December 13. He asked if witness wanted the money then, and the latter said that he was always ready to receive money. Defendant then said that he had only £3 10s. in his pocket, and asked if £3 would be of any use to witness. He said he would give witness the £3 on account. Witness therefore gave him the receipt produced for £3 on account. (The receipt was put in and read, "Received from Mr. Gotthelf, £3, on account of professional services.") Witness had been practising in the Colony as an architect for three or four years. He was an architect and quantity surveyor. It was usual for architects to make out the quantities if they had time to do so, or if they chose to do so. Witness had already expended £6 10s. on having the bills of quantities and specifications typewritten. In January witness wrote to defendant asking whether he was going on with the building. To that letter he received no reply. He did not receive any verbal answer. He called at defendant's place several times, but could never find him there. On March 6 witness sent defendant a letter, giving his charges for the services rendered, viz., £89 10s., being 5 per cent. on the

amount of the lowest tender. To this he received no answer, and eventually a letter of demand was sent, and then the present proceedings instituted. The charges were the ordinary ones, viz., 2½ per cent. for the plans and specifications, and 2½ per cent. for taking out the bills of quantities. Usually the latter charge would be added on by the contractors, and if the building went through they would pay it themselves. If the architect supervised the building he charged another 2½ per cent. If no tender was accepted the usual rule was to charge the percentage on the basis of the lowest tender sent in. If no tenders were called for, then it would be based upon the architect's estimate of the cost. Either the builder or the architect might take out the bills of quantities, but in this case witness was specially requested by defendant to do so.

By the Court: Witness had worked in an architect's office in England. He was not a member of the Institute of British Architects. It was not necessary for all architects to be members of the Institute.

Cross-examined: Witness did not make the first advances to Gotthelf, and did not urge him to have plans prepared. Defendant first sent Mr. Shanker to witness to make an appointment with him. Mr. Shanker came to witness's house one evening, and asked if he would go with him to the house of a party who wanted some work done. Witness did not know Mr. Gotthelf's name until he met the latter. Witness did not say to defendant that it was as well to have the plans prepared for a new building to be erected even if he sold the land with the present buildings, as it would enhance the value, seeing that it would show what kind of a building could be erected on it. Defendant said he wanted the plans prepared as speedily as possible, and passed by the Town Council, as he did not want his money to lie idle. Defendant at first had not made up his mind what he was to do with the land, and as he asked witness's advice the latter drew some sketch plans for six shops with rooms above. Defendant thought it might be difficult to let so many shops close together, and said that he would rather have one shop and two large houses. Witness then made a further sketch of a shop and two houses, and this was submitted to and approved of by defendant, who then told witness to go on with the plans, and get them through the Town-house as soon as possible. Witness did not all this time urge defendant to go on with the work. Defendant urged witness to use the greatest expe-

dition he possibly could. Defendant signed the drainage plans as well as the building plans. Witness, after the drainage plan had been approved, gave it to defendant, who afterwards returned it to witness, saying he could best take care of it. Witness had heard that other plans had been prepared, but of an entirely different description to witness's.

Re-examined: It would not pay witness to accept £3 for the work he had done. The new elevation was prepared after the plans had been approved, but the tenders were based upon that new elevation.

Frederick George Green said he was the architect for the new City Hall Buildings. He had had about ten years' experience in this country. The usual architects' charges were 5 per cent. upon the contract price. For convenience, that was divided into two items of 2½ per cent. for the preparation of the drawings and specifications up to the time of tender, and 2½ per cent. for the superintendence of the work. The quantities was a separate item, and the usual charge was 2½ per cent. based upon the tender, or if no tenders were actually received, then upon the estimated cost. It was usual in Cape Town for architects to take out their own quantities. Of course if a man had a lot of work to do, and could not afford the time to take out the quantities he would employ a man to do so. It should be stated to the client that it was a separate thing.

Hyman Shanker deposed to having introduced the plaintiff and the defendant. He was present when defendant signed the plans.

This closed the case for the plaintiff.

Mr. Benjamin called

Emanuel Gotthelf, the defendant, who said he purchased the piece of land, with the buildings on it, in Constitution-street in September or October of last year. He never sent for the plaintiff. The latter was brought to him by Mr. Shanker. The plaintiff told witness that he had heard that he (witness) wanted to build some property, and said that he would do it for witness at a reasonable price. Witness told him that he was not ready. Plaintiff said that if he drew him the plans they would always come in handy, as, even if he did not build, he could sell the place, and the plans would show up the ground. Witness told him he was not ready at the present time, and that he would let him know. Plaintiff met him one Sunday with Mr. Shanker, and called him up to his place, and again asked witness to allow him to draw out a plan. Witness still said that he could not do so. Mr. Rowe

met him afterwards, and spoke about the plans, saying he would draw them up at a reasonable price. Witness could not remember whether it was a little or reasonable price he said. Witness told him he could make plans according to his own mind, so long as he showed up the place to the best advantage. He drew up one plan, which witness did not like. Then he drew up another plan, but witness did not like that one either, because it did not show up the place. Witness told him it was not a proper plan. Witness would not have taken that plan. Then he drew up the third plan, with which witness would have been satisfied if it could have been completed in a certain time. It wanted a drainage plan. Then there was some argument about the balcony. Witness never got the drainage plan from plaintiff. He never saw it, except when he signed it. Plaintiff never handed him a copy of that plan after he had got it back from the Town-house. Witness was to carry out the drainage works himself. He never got the new drainage plan, so he could not start the new building. Afterwards he got a plan from Mr. Lyons. Witness paid plaintiff £3. He could not say whether that was in satisfaction of the whole claim. He was to charge witness afterwards, when the work was completed. He asked witness for £3, and witness gave him this amount.

Cross-examined: Witness signed two plans for the construction of the building and the drainage. He had not done contractor's work, except drainage work. Witness never took the plans to the Town-house. He took them to his house, and Mr. Rowe called and took them from him. It was after the pleadings in this case had been closed that witness had the plan made by Lyons. Witness never paid for the advertisement, nor did he take it to the papers.

By the Court: Witness saw the plans after they were submitted to the Town Council.

Sir H. Juta, K.C. (for plaintiff): The defendant had signed the plans, and had thereby approved of them.

[Maasdorp, J.: But must you not make a special agreement for taking out the quantities?]

No, it is quite sufficient if we told defendant that the 5 per cent. does not include the quantities. The plaintiff was specially asked to take out the quantities, and defendant was never asked to contradict plaintiff's evidence on this point. It is on evidence that 2½ per cent. is the usual charge for quantities. If it is not, why did not defendant call his new architect

to show that it is unusual? Again, the evidence shows that we are entitled to 2½ per cent. for plans and specifications.

[Buchanan, A.C.J.: Two and a half per cent. would have amounted to £77 8s.]

But no tender has been made of any sum.

[Buchanan, A.C.J.: Is it not only in the event of tenders being called for, and sufficient sent in that the architect takes out quantities and gets his 2½ per cent.?]]

The commission for quantities must be paid by either the employer or the contractor, whichever ordered the work to be done. In England they go much further than this. *Waghorn v. Dumbleden Local Board of Health* (Hudson on Building Contracts, vol. 2, p.p. 77, 78). If I ask a man to call for tenders that is virtually instructing him to take out quantities. An architect is not bound to call for tenders, but if he does, he gets his extra ½ per cent., and 2½ more if he takes out the quantities. As a rule tenderers employ the architect to take out quantities. If the employer employs him to do so and there is any miscalculation, the tenderer looks to the employer; whereas if the tenderer employs the architect to do this, he can only look to the architect, and not to the employer. *Stent v. Williams, N.O.* (4 Sheil, 365).

Mr. Benjamin (for defendant): The plans were not approved of in the sense of *De Witt v. Cape Canning Company* (4 Sheil, 116). There must be approval and adoption of plans by commencing the work. The English case cited goes no further than that. The architect must take the risk of his plans not being used, and if they are not used he has no claim.

[Maasdorp, J.: In your plea you say plaintiff submitted a second plan?]

That would seem to have been an error. Three plans in all were made, but the one on which they are now suing was not approved of by the Town Council.

[Maasdorp, J.: You say the second plan was approved of; have you paid for it?]

No, it was only an alteration to the elevation, but we are willing to pay £3 for it. As to the drainage plan, it ought to have been submitted to the Town Council, and it was never handed to defendant by plaintiff, that defendant might commence work. The plan, apart from the drainage plan, was never approved of. As defendant has lost the advantage of plaintiff's plan, plaintiff is not entitled to recover. *De Witt v. Cape Canning Company*. With regard to the quantities, plaintiff is not even

entitled to a *quantum meruit*, since he never intimated to defendant that he intended to charge for taking out quantities. At most, he can only claim architect's ordinary charges; and the fact that his plans have never been approved disentitles him to even these.

Sir H. Juta (in reply): It cannot be argued that an architect cannot charge for plans until the building is commenced. Plans may be used as a guide in accepting tenders, and surely if I avail myself of a man's work I must pay for it.

Buchanan, A.C.J.: The plaintiff in this case sues for architect's fees for work done for defendant. At defendant's request, the plaintiff prepared plans, which plans were submitted to the Town Council. An alteration was made by the Town Council. This alteration was adopted, and a new elevation was made by plaintiff, and thereupon tenders were advertised for and were sent in. It has been laid down in the case of *De Witt v. Cape Canning Company* (4 Sheil, 116), that an architect's work in preparing plans is at first provisional. The employment is to make plans which the employer can make use of, and if the architect fails in this respect he has performed no service for the employer in respect of which he is entitled to remuneration. He takes the risk of his plans being approved. Once, however, they are approved and adopted, then he is entitled to payment, and the question comes in as to the amount. If the plans are approved and acted upon, and the architect is employed to supervise the building of the premises according to his plans, the practice seems to show that he is entitled to 5 per cent. commission. If they are approved and accepted, but not acted upon, then the question would arise as to what would be a fair amount, *quantum meruit*. Plaintiff says that the fees for preparing the plans were 2½ per cent., and he says that he also asked to call for tenders, and to take out bills of quantities. For that he says he is entitled to an additional 2½ per cent. But he himself says that if the quantities had been accepted and the work carried out, the tenderer would have paid him and not the defendant. Of course, defendant would indirectly have had to pay it, but not directly to the plaintiff. I do not take it that it is conclusive proof of acceptance by the employer of the plans that they are submitted to and passed by the Town Council. That alone would not necessarily entitle the architect to payment. It may happen that

when tenders are called for it was found that the work would not be carried out except at a cost greatly beyond that estimated by the architect, and then the person who employed the architect would, in that case, if he dropped the work, get no benefit from the plans. But that is not the case here. In this case the architect estimated that the work would cost about £1,700, and a tender was received for something over £1,600, which is actually less than the estimate. There was no default on the part of the architect, and he complied with the request made to him. He was instructed to prepare plans. He drew up plans. They were submitted to the person who employed him, and accepted by him, and the employer then submitted them to the Town Council, by whom they were passed. Tenders were called for and sent in. The architect estimated that the buildings would cost about £1,700. A tender was received within the amount specified by the architect, but the employer, for no default of the architect, afterwards resolved not to proceed with the work. In this case, therefore, I think the architect is entitled to be paid. The plaintiff had to do some extra work, beyond preparing the plans and specifications, so that tenders could be called for, and under the circumstances we think that if we follow the English practice and allow 3 per cent. on the amount of the tender for all the work done by the architect it will be a reasonable amount. The amount of the lowest tender was £1,669; 3 per cent. on that would be about £50. Defendant has paid £3, and judgment will now be given for £47 and costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre and Bisset; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1901.
Nov. 14th.

On the motion of Mr. Benjamin, Charles Edward Price Hughes was admitted as an attorney.

PROVISIONAL ROLL.

ABT V. HEINTJES.

Mr. Solomon asked that this matter should stand over until the 28th inst.
Granted.

SOUTH AFRICAN ASSOCIATION V. JORDAAN.

Mr. C. de Villiers applied for provisional sentence for the sum of £9, being interest for six months on a mortgage bond.
Granted.

PARKER V. WM. TWINE, JUN.

On the application of Mr. Russell, this matter was ordered to stand over until the 21st inst.

SCHALK V. SCOTT.

Mr. Gardiner appeared for the plaintiff; Mr. Benjamin for the defendant.

On the application of Mr. Gardiner, Mr. Benjamin consenting, the parties were ordered to go into the principal case.

ILLIQUID ROLL.

JONES V. HAYWARD.

Mr. C. de Villiers moved for judgment, under Rule 329d, for the sum of £170 4s. 8d. for goods sold and delivered, with interest and costs of suit.
Granted.

SEALE V. CAUFIELD.

Mr. C. de Villiers moved, under Rule 319, for judgment for the sum of £43 11s. for goods sold and delivered and work done, with interest and costs.
Granted.

BELL V. CATHERINE RADZIWILL.

Mr. Buchanan moved, under Rule 329d, for the ejectment of defendant from certain premises hired by her from the plaintiff, the lease having come to an end on the 31st October. Counsel stated that there was a claim for damages, but plaintiff did not ask for that now.

The application was granted, with costs, defendant being ordered to vacate the premises within seven days.

GENERAL MOTIONS.

BRAND V. ISRAELSON AND } 1901.
MULLER. { Nov. 14th.

This was an application for the making absolute of a rule nisi restraining the respondents from transferring certain premises.

Mr. Schreiner, K.C., and Sir Henry Juta, K.C., were for the applicant, and Mr. Searle, K.C., for the respondents.

Mr. Schreiner applied for a postponement for a week, on account of the late service of an affidavit.

Mr. Searle opposed a week's postponement, and suggested that the case might be heard on Monday. The matter was in reference to the St. George's Hotel. Counsel said that it was a matter of great importance to the respondents that the case should be shortly heard, because, as was shown by the affidavits, the hotel property had been sold, and they wanted transfer to be immediately. If the matter stood over for a week, he was informed that the respondents would be very seriously prejudiced.

The Court ordered that the case should stand over until Thursday next, and directed that the affidavits should be filed before noon on Tuesday. Costs of the application to stand over.

GARRETT V. ANDRES. { 1901.
 { Nov. 14th.

Sub-divided land — Roads — Title deeds.

An estate of considerable size in the neighbourhood of Green Point had been cut up and sold in lots some years previous to 1896. Subsequently a certain lot held by one owner was sub-divided between the respective predecessors in title of applicant and respondent, and a road at the back of respondent's property in addition to one in front thereof was granted to his predecessor in title. This grant was endorsed both by respondent's transfer and by applicant's diagram. Applicant now contended that in spite of this transfer and diagram, the said predecessors in title intended only that there should be one road to respondent's property, giving access to the front

thereof, and he now asked for an order restraining said respondent from entering on the ground at the back of his premises.

Held, that as the order prayed could be granted only on evidence which would justify the Court in amending the original transfer, and as such evidence had not been produced the application must be refused with costs

The case of Ohlsson v. Whitehead (9 Juta, 84) distinguished.

This was an application for an order restraining the respondent from entering upon or using certain property. The property in question was situate at Green Point, near Cape Town, transferred to him by Mrs. Voss in August, 1901. The deed of transfer was free from any servitude of right of way in favour of respondent's property. Adjoining respondent's property was an open space of ground, never used as a road, but on respondent's diagram, which accorded with the description in the body of the deed aforesaid, his property was described as "bounded by a road." The question was as to whether he could rely thereon as establishing in his favour a right to the open strip or space of ground as a waste. Neither applicant nor his predecessors in title had ever used the ground as a road, and the applicant had enclosed it with fences at each end, treating it as his free and unburdened property. Upon the applicant's diagram the said strip of land was marked "road," but there was nothing in his title to show any servitude or right of way across this property. The affidavit of Mark Garrett, the applicant, was to the effect that the ground in dispute was a small piece of open ground in front of his premises, lying between his property and that of respondent, and that he (applicant) had been informed that this piece of ground was a portion of the property purchased by him to which he held title by transfer. This land he had enclosed with a fence. Respondent claimed a right of way over this ground, cut an opening in the back wall of his property, and entered thereby upon the land in question. Applicant denied that either respondent or any other person had ever used this land in any way, save as a repository for all kinds of rubbish.

The affidavit of Charles John Andrews, the respondent, claimed that the ground in question was a road, and that it was marked on his diagram as such, and also on that of applicant's property, and stated that it had frequently been used as a cart road. Respondent said he had no access to the back of his premises when he bought the property, save through a side door, which the vendor told him he would have to close as it was used only on sufferance. Respondent made the opening complained of in his back wall by way of asserting what he considered his rights when applicant began to enclose the land with a fence.

The affidavit of Jonathan Mere Wilson, who resides next door to applicant, supported respondent's contention as to the ground in dispute having been an open road running from Wigton-road to the western boundary of the properties of applicant and respondent. He stated that respondent's side yard door opened upon his ground, and that he (deponent) had a right to call upon respondent to close it at any time.

Mr. Schreiner, K.C. (for applicant): Seale's affidavit denies that Pattison (respondent's predecessor in title) ever had a right to the road in question, but the affidavit of Mrs. De Vos (who purchased from Seale) clearly claimed this road as her own property. Nothing in the deeds of transfer really bears on this case. In both English cases and cases which have been heard in our own courts it is, no doubt, presumed that property is bounded by the roads on which it abuts. But that presumption may be rebutted.

[Buchanan, A.C.J.: It seems to me that applicant should bring an action to amend the deed of transfer.]

That may be so, but my point is that the words "bounded by a road" do not mean the same as "bounded by a public road" or "by a common road." A road may be a private road, and the owner of the property on the other side of it need not necessarily have the use of such a road. *Beaufort West Municipality v. Wernich* (2 Juta, 36). It is admitted that we are the registered owners of the ground over which this road passes, and this is quite enough to rebut the presumption that this road is a common road. Again, when Pattison got the property from Seale, clearly he never expected to use this back road, for when he enclosed his property he left no opening as a means of access to this road. Andrews took over the property from Pattison, and then

for the first time a gate was opened at the back of the premises on to land which had never been used as a road at all. See *Hofmeyr's Executors v. De Waal* (1 Juta, 42); *Richards v. Nash* (1 Juta, 312).

[Maasdorp, J.: But may not the *dominium* of a road be in one man, while another has a servitude over it?]

No doubt, but there is no record of any servitude here. *Hofmeyr's Executors v. De Waal* shows that if a man gets a clean transfer no servitude can thereafter be claimed against the property thus transferred. The case of *Richards v. Nash* went to show that a servitude might be set up if the purchaser had knowledge of an undertaking made by the vendor to grant such servitude. *Jansen v. Fincham* (9 Juta, 289) was a later case, and in his judgment (p. 293), *De Villiers, C.J.*, went fully into the law on the point, and discussed the earlier cases. If respondent had no other access to his property it might be that he could claim this road as a *via necessitatis*. The case of *Porter v. Philip* (Buch., 1876, p. 192) touches the high-water mark in this matter by giving proprietary rights in the soil of the road as distinguished from mere rights of servitude. That went further than any other case; but even there the Court held that the words "remaining extent" did not include a road. See *Hidding v. Topps* (4 Searle, 107), which was fully discussed in *Ohlsson's Cape Breweries v. Whitehead* (9 Juta, 84). There the defendant failed because he claimed a right to a road further than it extended *ex adverso* to his property. In the present case the original vendor did not intend to transfer the *dominium* of the road. See judgment of *De Villiers, C.J.*, in *Ohlsson's* case.

[Buchanan, A.C.J.: But in this case respondent is the owner of property adjoining the road.]

That was so also in *Ohlsson's* case. Just as in that case, our fence does not abut on respondent's land. It is beyond his road, and beyond the boundary of the ground covered by his title.

[Maasdorp, J.: But you shut up a road on which his property abuts?]

But not where it abuts. If respondent had any right to the road at all, and we do not admit he had, still we say that he had no right to use it where we have closed it up. It was neither a public road nor a servitude road, nor a *via necessitatis*, because he has access to the Wigton-road by the road in front of his premises.

Mr. Searle, K.C. (for respondent): The argument by applicant's counsel based on the registration of title deeds would upset the whole practice of the Deeds Office. The practice is to leave roads registered in the transfer of "the remaining extent." That has always been the practice of late years, and this property was cut up only in 1896. And this is a very reasonable practice. Otherwise if a man bought a whole block and wished to sell various portions thereof, he might find himself unable to give transfer of the roads leading to some of the portions sold. The diagrams show that this is a public road. This case differs from *Ohlsson's Cape Breweries v. Whitehead*, for in that case the road closed was a mere *cul de sac*. Here it is not so, for Wilson has no right to close it. He admits that he has not, and he is the only person who has known the ground for the last five years. In *Ross and Williams v. Hite's Executor* (9 Sheil, 73) it was held that where certain land had been sub-divided into lots and sold according to a general plan by which certain roads were laid down, that the owner of each lot was entitled to use all such roads as might be reasonably necessary for access to or egress from the public roads of the district. In *Ohlsson's* case it was shown that the road which had been blocked up was useless to defendant unless he went where he had no right to go. Here applicant's only remedy is to apply for a rectification of his title deeds, as in *Sanyman v. Le Grange* (Buch., 1879, p. 10). Applicant could never have supposed that he was buying the open ground outside of the elaborate iron fence erected by Seale. Then, again, if this were a private road, it would not have been marked "road" on the general plan. As a rule private roads are not marked. In *Hirsch v. Gill* (10 Juta, 156) the Court admitted that where the title deed and diagram are consistent, the diagram might be of great assistance to the Court in deciding the case, and that case was decided on the diagram. Here it is admitted that there is no road save the one in dispute which gives respondent access to the back of his premises.

[Maasdorp, J.: But cannot you get out by the other end of this road?]

No, there it is a mere *cul de sac* blocked by Wilson's property.

Mr. Schreiner (in reply): As there is a road in front of this property giving access to a public road, it cannot be contended that this is a *via necessitatis*. On the plan this path is only marked "road," and it is

quite open to me to show what kind of road it is. There may be a presumption that it is a common road, but I submit that I have rebutted that presumption. This is quite on all fours with *Ohlsson's* case. Here respondent had no right of access to Wigton-road, just as Whitehead had no right of access. It does not lie in the mouth of respondent now to say that Garrett could not have thought this or that, if he swears that he did think it. I do not agree with what has been said as to the practice of the Deeds Office. The usual practice is to say that a public road is left open.

Buchanan, A.C.J.: The applicant has called upon the respondent to show cause why an order should not issue restraining him from entering upon a certain piece of ground, the property of the applicant, in the rear of respondent's premises. It would appear from the documents put in that all the ground in the locality was formerly owned by one person. A very large piece of ground was cut up into lots and portions sold at different times. In 1896, one Seale owned the lots now held by the applicant and by the respondent. It was one piece of ground at that time. In 1896, when Seale sold to respondent's predecessor in title the portion now held by the respondent, and gave transfer, the diagram annexed to that transfer showed that the piece of ground cut off and sold was bounded on the north by a road 20 feet wide and on the south by a road 20 feet wide. The deed of transfer gave the same description of the property, so there could be no doubt what was actually transferred. On the original diagram which Mr. Seale then held these two roads were laid down and marked off. Mr. Schreiner admitted that this raised a presumption that it was intended to give a road both at the back and front of the premises. He admitted that the presumption was so strong that he was not able to rebut it as regarded the road on the north, but he contended that the evidence adduced rebutted the presumption as regarded the road on the south. As the case stood, there was a contract between the respective predecessors in title of the present applicant and of the present respondent by which two roads were given to the respondent's property, and that this contract was evidenced both by respondent's transfer and by applicant's diagram. The applicant, however, now wished to go against this registered title. He wanted to prove that although the transfer presumably gave two

roads, it was not intended by the parties to give two roads. If he succeeded the effect of his motion would be to amend the deed of transfer, which was registered. In my opinion, to rebut the presumption arising from title deeds like those, would require evidence as strong as would justify the Court in amending the original transfer deed or grant. Any order which might be made in this case would be registered against the title, and would be in effect an amendment of the title granted by Mr. Seale to respondent's predecessor. In the present instance I think that there has not been such a case made out as to justify any such rectification, and the case becomes stronger when it is considered that subsequently other parties obtained possession without any such rectification having taken place. Of course the mere registration of the road on the respondent's title is not conclusive against any purchaser of the remaining extent. But in several of the cases cited it appeared to be the practice, where ground was cut up into lots, to register a plan showing all the sub-divisions of the property in the Deeds Registry, and that such general plan would show what roads had originally been laid out. In this case there has not been any such general plan registered, but instead the roads have been laid down on the diagram annexed to the original title deed which has now come into the possession of the applicant. These roads correspond with the roads marked on the diagram annexed to the transfer which was granted by Mr. Seale to the respondent's predecessor. I think that this was sufficient notice to the holder of the transfer of the remaining extent of the existence of these roads, and was equivalent to the registration of a general plan of sub-division. The object of registration is to give notice to anyone concerned, and on looking at the title which the applicant now holds, one would immediately be put on inquiry as to what is the meaning of the two roads appearing on his diagram. It has been stated that the road in question had never been used by the respondent or his predecessors in title, but the roads were only granted, and the transfer made as recently as 1896, and even if there had been no user during that time, the transferee would not have lost his right in five years. If it is granted that the title deeds are against the applicant, the only question is whether the applicant has raised a sufficiently strong case to justify the Court in going behind the

title deeds and diagram and giving an order which would have the effect of amending the title deed held by the respondent. Here it is not a question of a road by necessity, but a road established by a distinct contract. As to the case of *Ohlsson v. Whitehead*, which had been so much relied upon, it was clearly differentiated. In that case the road claimed did not adjoin the lot held by the plaintiff; here the lot adjoined the road, and was bounded by it. Then if we come to look at the other circumstances of the case, we see that the applicant's predecessors in title had built a substantial wall and fence alongside the road, leaving that ground vacant, the respondent's predecessor in title building in like manner a piece of fence along his side of the road. The applicant said that when he bought, it was his belief that this piece of ground was part of the property purchased by him, and in a way he was right. It was part of the ground included in the remaining extent, but although he might have the ownership of the soil, he must take it subject to the rights acquired by others. It is clear that this was a road intended for the use of respondent as well as applicant. If the road were utterly useless, there might be some question as to whom the soil might be appropriated, but it was shown that this road led into another road, which was a public road, and is of very great use to the respondent. It is true that the question has been raised on motion, but the parties have expressed a wish to have it so decided, rather than go to the expense of an action. If there were any facts in dispute, the applicant could yet have recourse to an action, if he still thinks he could make out such a strong case as would justify the Court in amending the title deeds; but he could not hope to succeed unless he could bring forward good cause to show that the original transfer from Seale was altogether wrong, and ought to be amended. This matter has been brought on upon motion as a convenient way of settling it, and from the circumstances disclosed by the affidavits, the Court is of opinion that the applicant has not succeeded in rebutting the presumption which the title-deeds established in this case, and that the applicant is therefore not entitled to the order he asked for. The application will, therefore, be refused, with costs.

Maasdorp, J., concurred.

In reply to Mr. Schreiner, Buchanan, A.C.J., said he would express his per-

sonal opinion that the road between these two parties was a common road.

[Applicant's Attorney, A. W. Steer; Respondent's Attorneys, Messrs. Reid and Nephew.]

O'CONNOR V. WARREN. } 1901.
Nov. 14th.

Mr. Benjamin moved for a rule nisi for leave to sue *in forma pauperis*.

Rule nisi granted as prayed, returnable on November 21.

COLONIAL GOVERNMENT V. } 1901.
COERT GROBBELAAR. } Nov. 14th.

Edictal citation—Rebel.

Leave granted to sue by edict an inhabitant of the Colony who had joined the Boer forces and was in rebellion against the King.

This was an application for leave to sue the defendant by edictal citation. The petition of the Assistant Treasurer and Receiver-General of Revenue set forth that the defendant was truly and lawfully indebted to the Colonial Government for the balance of the purchase price of water erf No. 61, Daniel's Kuil, Barkly West, which was purchased by him under the Act 15 of 1887, as amended by Act 40 of 1895, on September 9, 1898, together with £7 11s., being a fine of 1s. per diem from October 9, 1899, to March 8, 1900, due under section 4 of Act 40 of 1895, and also interest at the rate of 4 per cent. per annum from September 9, 1898. That from inquiries that had been instituted by the Civil Commissioner of Barkly West, it appears that Grobbelaar is an absconded rebel, at present with the Boer forces. That the petitioner is desirous of suing the said Grobbelaar by edictal citation for: (a) The recovery of the various sums referred to above; (b) an order declaring that if payment is not made within one month after judgment, the sale of the said lot of ground shall be null and void, and the payments already made forfeited in terms of section 2 of Act 15 of 1887 as amended by section 4 of Act 40 of 1895.

The prayer was that the Court would be pleased to grant leave to sue by edictal citation, and give directions as to the mode of service of summons, and for the time for the appearance of the defendant.

Mr. Sheil, K.C., appeared for the Government.

The Court granted leave to sue by edictal citation, and that failing personal service, one publication to be made in the "Government Gazette" and one in the "Diamond-field Advertiser," and ordered the process to be returnable on January 12, 1902.

COLONIAL GOVERNMENT V. DE KLERK AND
COLONIAL GOVERNMENT V. HAVENGA.

These were similar applications for leave to sue by edictal citation.

Mr. Sheil, K.C., moved.

The Court granted the orders as prayed, process to be returnable on January 12, 1902.

THE TRUSTEES OF THE SIR } 1901.
LOWRY-ROAD WESLEYAN } Nov. 14th.
CHURCH V. JANE EAYRS.

This was an application for an order compelling the respondent to vacate the premises rented by her at the corner of Muir-street and Sir Lowry-road, Cape Town.

Mr. Searle, K.C., appeared for the applicant.

Mr. Gardiner appeared for the respondent.

Mr. Searle read the affidavit of William Abbott, treasurer of the Board of Trustees of the Wesleyan Church property in Sir Lowry-road, from which it appeared that the premises were leased verbally to the respondent for twelve months provided that the rent was paid in advance on the first of each month, and that should it in the case of any one month not be paid on the first day, the yearly tenancy should cease, and she would remain in the premises as a monthly tenant. The respondent on several occasions failed to pay her rent on the first day of each month. About the end of July he informed her verbally the property was to be disposed of, and on August 15 he gave her written notice to vacate the house on October 31. She failed to vacate on that date, and was still in possession, wherefore petitioner prayed for a writ of ejectment, as the property had been sold and certain alterations had to be made.

Mr. Gardiner read an affidavit by Mrs. Eayrs (the respondent), declaring that the lease was for one year, from May 1, 1901, and that nothing was said about it being terminable if the rent were not paid month by month. She further denied that she undertook to vacate the premises under the lease, unless she got other premises. She had not succeeded in getting other premises.

and considered that she was entitled, under the lease, to remain where she was. She was quite willing to vacate at the end of the term of the lease.

Mr. Searle read a replying affidavit by Mr. Abbott to the effect that the rent was continually overdue.

Mr. Searle, K.C. (for applicants): It is common cause that applicants gave respondent a year's lease on condition that she paid the rent of the premises leased punctually. She failed to do so, and then, in accordance with the arrangement entered into between the parties, the yearly lease was determined, and she became a monthly tenant. On August 15 she received notice to quit, and there and then consented to accept that notice, and yet on November 1 she, for the first time, sets up the defence that she was a yearly tenant. Meanwhile the property had been sold, and we had undertaken to give possession to the purchasers on November 1. This Court has previously given an order of ejectment on motion. *Mills v. Jones Bros.* (9 Sheil, 543).

[Buchanan, A.C.J.: The respondent disputes your allegation that she did agree to become a monthly tenant in the event of her being in default with her rent. It is a mere question of her word against yours.]

If the Court thinks that the case should go to trial, I submit respondent should be put upon terms to go to trial this term.

Mr. Gardiner (for respondent): The Court will not grant ejectment on motion where the affidavits are so contradictory: *Ohlsson v. Parsons* (11 Sheil, 165). I submit that we ought never to have been brought into court on a motion of this kind, and are therefore entitled to costs.

Mr. Searle (in reply) was not called upon.

The Acting Chief Justice, in giving judgment, said that there had been cases where the Court had granted orders for ejectment on motion, but then the affidavits had clearly established the right of the applicant. In this case the only point of common cause was that a lease had been entered into by both parties for twelve months. The plaintiff said there was a condition that if the rent were in default the lease would lapse into a monthly tenancy. The respondent denied this. The Court could not express any opinion on the point, but would simply give the plaintiff leave to let the notice of motion stand as a summons in the case, costs to be costs in the cause.

Ex parte BARNETT AND WIFE.

Post-nuptial contract.

Parties had been married in the Transkei at a place where no notary or attorney resided, under the impression that by a post-nuptial contract they could exclude community of property. They now applied for leave to execute such post-nuptial contract. The Court refused the application.

This was an application by William Theodore Barnett and Annie Beatie Barnett (born Kavanagh) for leave to enter into a post-nuptial contract.

The petition of the first-named petitioner stated that he and his wife were married at Kentani (Transkei) on October 7, 1901. At the date of the marriage petitioner was under the impression that he could enter into a contract after his marriage whereby community of property was excluded. Immediately after marriage, viz., on October 9, 1901, he repaired to a notary to execute such contract, when he was informed this could not be done. Petitioner lives in an outlying district, in which there are no attorneys or notaries. Since the date of the marriage no debts have been incurred by either petitioner or his wife. Wherefore he prayed that he might be allowed to enter into a post-nuptial contract.

The petition of Annie Beatie Barnett (born Kavanagh) stated that she was aware of the terms of her husband's petition, approved of the same, and was desirous of entering into a post-nuptial contract with him excluding community of property.

Mr. Benjamin moved in terms of the above petition.

Buchanan, A.C.J.: The petition contains no allegation that the parties entered into the contract of marriage with the intention of excluding community of property. Post-nuptial contracts are only allowed to be registered where it is shown that the parties intended to be married out of community of property, and where, through some mistake on the part of the attorneys, or through some other mistake, the contract was not executed before marriage. Under the present circumstances, no order can be granted.

[Applicant's Attorneys, Messrs. Godlonton and Low.]

Ex parte JOHAN CAREL WIN- } 1901.
TERBACH. } Nov. 14th.

This was an application, made by Johan Carel Winterbach, in his capacity as trustee in the insolvent estate of Jacobus Johannes Roselt du Plessis, for an order restraining the trustee in the insolvent estate of Dorothea J. M. du Plessis from disposing of certain assets.

Mr. Gardiner appeared for the applicant.

It appeared that the applicant in this case had been appointed trustee in the insolvent estate of the husband, and that the respondent was later appointed trustee in the estate of the spouse (deceased). As the parties were married in community of property, it was contended that the assets claimed by the respondent were really vested in the husband's estate, and that, therefore, the applicant was entitled to those assets which he now claimed. He also asked for an order interdicting a sale by the respondent of the assets claimed, which was advertised in the Worcester "Standard" to take place on the 16th inst.

The Court granted a rule nisi, to act as an interdict on the sale, calling on the respondent to show cause, on the 28th inst., why he should not hand over the assets claimed to the applicant.

STRASBURG AND CO. V. FOULD AND CO.

On the motion of Mr. Benjamin, the return day in this case was extended to January 12 next.

J. SMITH AND CO. V. THE COLONIAL GOVERNMENT.

Mr. Gardiner appeared for the applicant.

Mr. Searle, K.C., appeared for the respondent.

Leave was granted the applicant to appeal to the Privy Council from the judgment of the Supreme Court in the above case, execution, however, to be carried out in the meantime on the usual security being given.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

KRAWITZ V. FRIEDGOOD. } 1901.
Nov. 15th.

Breach of contract of lease—Damage for want of occupation.

Plaintiff, acting for his son, had taken a lease of certain shop premises from defendant. Defendant contended that it was stipulated in the said lease that these premises should not be used as a grocery or haberdashery shop. Plaintiff denied that he knew anything of this restriction when he entered into the said lease. The building was not then completed. A sum of money was paid at the time as a deposit and a receipt was given by defendant, in which no other condition of the lease was named than that the rent should be paid monthly in advance. Plaintiff, however, admitted that this receipt did not contain all the conditions of the lease. When the building was completed, defendant refused to give possession. Plaintiff now claimed damages for want of occupation of the said premises.

Held, on the evidence, that defendant had discharged the onus which was on him to prove the restriction on the user of the premises, and that judgment must be for defendant, with costs.

This was an action for damages for breach of a contract of lease. The declaration set forth that the plaintiff was a shopkeeper, of Cape Town, and defendant was the owner of a certain piece of land situated at Somerset-road, Cape Town, and was the owner in the month of January last. In that month defendant was erecting a shop, and this shop was now completed. On or about January 18, defendant agreed to let, and plaintiff to hire, the shop for a

term of twelve months. Defendant agreed to give plaintiff possession of the shop when the same was completed, and plaintiff made a deposit of £5. The shop was completed in the month of March, but defendant refused to give possession. In consequence of this refusal plaintiff had suffered damages through loss of profit until he got another shop two months afterwards, and by reason of expenses in obtaining assistance. He estimated his damages at £100, for which amount he claimed judgment. In his plea, defendant stated that he was not the owner of the shop in January. The owner was David Friedgood, for whom he acted as agent. He was liable under a certain agreement to a penalty of £250 if he let the shop for the purpose of a grocery business. In the month of January he agreed to let the shop to plaintiff for the purpose of a fruit and greengrocer's business. Plaintiff agreed to meet at an attorney's office to execute a proper lease, but did not keep the appointment, and thereafter refused to execute the lease unless the restriction of the use of the premises was withdrawn. The lease contained, *inter alia*, a condition which provided that the shop should not be used for a grocer's business. This lease plaintiff refused to execute, and defendants thereupon gave notice that unless plaintiff performed his part of the contract, he would cancel the agreement. Defendant had always been ready to pay the £5 deposit, and had offered, and now tendered to do so. In his replication, plaintiff admitted that he had refused to execute the lease unless the restriction were removed.

Mr. Gardiner for plaintiff; Sir H. Juta, K.C. (with him Mr. S. Solomon), for defendant.

Philip Krawitz, the plaintiff, said that he knew Mr. Friedgood, whom he first saw in January in Somerset-road, at the place where he was erecting some shops. Witness asked if he was going to let the shops, and defendant said one was let. This was on January 18. Defendant said there would be four shops. There was one for which he wanted £12 per month. Witness asked if he could hire the shop. Defendant said he could, and asked what business he proposed carrying on. Witness said he would carry on a general dealer's business. The same evening witness agreed to take the shop at £12 per month. Witness told defendant he had a similar business in another part of the town. Defendant said he must not use the place as a coffee shop, as another of the shops was to be so used. He said witness could use the

shop for any trade except a coffee shop. Witness paid a deposit of £5. Defendant did not say anything about a greengrocer's and fruit shop. Defendant said the place would be finished in about a fortnight. Witness asked for a two years' lease. Defendant said he would give him a lease for a year when the property was finished. Defendant gave witness a receipt for £5, on which the following words were written: "Conditions, rent to be paid in advance monthly." Witness had a partner named Levine, with whom he entered into partnership after he took the place. Subsequently witness went with Levine to see Friedgood. Witness saw the latter on the property, and asked him when the place would be finished. Witness asked him about the lease, and Friedgood told him to go to his residence on the following Sunday. Witness went up, and defendant submitted a paper to him. The paper was to the effect that he must not keep anything except fruit and vegetables. Defendant said that if he would come up the next Tuesday for the lease he would let witness keep everything. On the Tuesday defendant told him that he could not keep anything but fruit and vegetables, and witness said he could not be expected to pay £12 a month for the shop, with this restricted use. Witness received a letter on the 28th February—after this conversation. In this letter defendant's solicitors wrote stating certain conditions, amongst which was a stipulation that the shop must only be used as a vegetable shop. Witness's solicitor wrote back objecting to this condition, and stating that it was not in the original agreement. Defendant's attorneys then wrote stating that the place was let exclusively as a green shop. They gave notice that unless the lease were signed the defendant would cancel the arrangement, and hold plaintiff liable. They tendered the £5. Defendant's solicitors refused the tender, and they then sent £7, being balance of the month's rent, which was refused. In answer to further questions by Mr. Gardiner, plaintiff said it was impossible to make the place pay, as a greengrocer's shop at £12 a month. The greengrocer's business was not good all the year round. Witness had engaged his brother to work at the shop, and had agreed to pay him £10 a month and board and lodging. Witness had paid his brother £10—£10 for wages and £6 for cost of living. Witness had a letter of demand for this money. Witness got another place in Plein-street on the 1st May. He only stayed there until the 13th May. He could not keep it on as it

was too expensive. He was paying £18 a month rent. In his Caledon-street shop witness made from £30 to £20 or less a month. He believed the Somerset-road shop would be a better paying establishment, as there was a better class of people living there. If witness had not engaged a partner he would have had to employ another assistant, whom he would have paid £3, £4, or £5, everything found.

Cross-examined by Sir Henry Juta: When witness went to Friedgood on the 18th January a man named Joseph Fine was there. They were talking about a shop. Friedgood did not tell him then that his brother had bought the shop from the original owner subject to a condition that it was not to be used as a grocer's shop, and that if this condition were broken there would be a fine of several hundred pounds. Defendant told him this six weeks afterwards, when he went with Levine on the Sunday afternoon. Notwithstanding that defendant said that there was this condition and this fine, he told witness that he should use the shop for everything. He did not except grocery. Witness did not promise defendant on the 18th January to go to his lawyer about the lease on the next day. Witness did not, on the following Monday, tell Morris Keyser that if he could get Friedgood to let him have the shop for a grocery business he would pay another £3 a month, and would also give Keyser, who was a broker, a sum of £5 as brokerage. Witness paid his brother £16 for the month of February, before he was to get possession.

Re-examined: When witness went up to Friedgood on the 18th a man named Chasan was present, and heard the conversation.

Cross-examined by Sir Henry Juta: Witness had paid Chasan some money for the latter's employer. Witness thought he might want some of the money back to pay Friedgood if an agreement was arrived at. He asked Chasan to go with him.

Abel David Chasan said he went with the last witness to Friedgood's house on the 17th or 18th January, in the evening. He heard them bargaining for a shop. Friedgood wanted £12 a month, and plaintiff wanted the place for £10. It was agreed that Krawitz should pay £12. Krawitz said he wanted the place as a general dealer's shop. Friedgood did not say anything about its only being used as a greengrocer's shop. He said it must not be used as a coffee-shop, as there was one on the corner. He said the shop would be ready in two or three weeks. Krawitz said he was going to use

the shop for the same business he was carrying on in Caledon-street. He had previously told Friedgood that the Caledon-street shop was a general dealer's.

Cross-examined by Sir Henry Juta: On the day in question plaintiff met him in Vandeleur-street, and asked him to accompany him to Friedgood's shop. He gave no reason. Plaintiff had paid witness money for his employer that day.

Herman Krawitz, the brother of the plaintiff, said he went to defendant's house one day with his brother and Levine. That was on a Sunday afternoon in March. Plaintiff and Levine went to see about the lease. Defendant pulled out a list of groceries which they could not keep. Plaintiff asked why he was not told about that when he paid £5. Defendant then said he would let the plaintiff keep anything, and he could call for the agreement on Tuesday. His brother engaged witness to assist him at a salary of £10 per month and everything free. When he could not get the shop, plaintiff at first refused to pay witness, but afterwards he paid him £6 for board and lodging, and later on, when witness went to a lawyer, paid him another £10.

Israel Lavine said he was made partner in this shop. He was present at the conversation on the Sunday. Defendant told them what they must not keep. He read from a list that they must not keep dried figs, cigarettes, minerals, or groceries. Witness's partner complained, and then defendant said he would make it right for them to keep what they wanted. This conversation was before defendant wrote his letters. Witness thought they would have made from £15 to £25 a month in that shop. Witness had been at the shop recently, and saw that groceries were being sold there now. Witness was present on Wednesday, when a gentleman bought groceries, including chocolate, sugar, cigarettes, biscuits, etc. The plaintiff only wanted to sell groceries, the same as was now being done.

Cross-examined: Witness could not say whether the conversation on the Sunday was before or after defendant wrote the letter. He would now say that he did not think it was before. Witness did not know the months. It was about two weeks after they had entered into partnership that the conversation took place. Defendant never told witness that there was a contract which prevented the shop being used for the sale of groceries. He could not say whether defendant told Krawitz that. It was a small room they were in. When they went out

Krawitz told witness that defendant would not give the shop for groceries. He did not say anything about the agreement and fine for breaking the agreement. Witness said that if they could not carry on a general dealer's business the shop would not do. When witness was in the room, plaintiff and defendant were disputing about the groceries. He heard a few words. They were speaking in Yiddish. Witness said to defendant that the place would not pay if they could not sell groceries. Defendant did not reply that he could not help it, as he had an agreement preventing him letting it for that purpose. They left that place that Sunday afternoon knowing that they could not get the shop as a grocer's shop.

Re-examined: Afterwards defendant said he would make everything right, so that they could keep everything except the coffee-shop.

Samuel Isaac Davis deposed that he had been at this shop in Somerset-road on Wednesday last, and bought sugar, candles, tobacco, sweets, cigarettes, and biscuits. The things were displayed in the shop.

This closed the case for the plaintiff.

For the defence, Sir Henry Juta called

Moritz Keyser, who said he was related to defendant, and knew plaintiff. Witness and his brother were erecting some buildings in Caledon-street, when plaintiff and his brother came to them. It was on a Monday, shortly after January 18. Before they saw plaintiff witness's brother saw him. Then witness saw plaintiff, who told him that he had taken the shop in question for a green and fruit shop, but his partner objected to the shop unless they could keep groceries. He told witness that if he could get defendant to consent to their selling groceries he would give him £5, and also told witness to tell defendant he would give £3 more if he would give the right to sell groceries. Witness went to defendant, and communicated his message. He offered defendant £2 more for the right, but defendant said he could not allow plaintiff to keep groceries even if he gave him £25. Witness then offered £3 more to defendant, and the latter took out the document produced and showed him that it was an agreement under which he could not let the shop for the sale of groceries or ladies' drapery, there being a fine of £260 if he did so. Witness saw plaintiff the same day, and communicated to him what defendant had said. He also told plaintiff about the document defendant had shown him. Plaintiff appeared to know about the restriction, and said that Fried-

good could alter it if he liked. Witness knew plaintiff's shop in Caledon-street. In January last it was used for the sale of fruit, vegetables, mineral waters, and cigarettes. Two or three months ago the shop was enlarged, and groceries were now sold there.

Cross-examined: Witness knew the plaintiff did not keep candles in January, because he had then gone there and asked for some, thinking it was a grocery shop. He did not get the candles. He just went there because it was the nearest place to his place. Witness was Solomon Friedgood's son-in-law. They did a good deal of business together, going in for joint ventures.

Jacob Keyser, brother of the last witness, gave corroborative evidence.

Joseph Fine said he lived in Cape Town, and knew defendant. Witness had gone to him in January to see if he could get one of the shops in Somerset-road to carry on a fruit, greens, and grocery business. Witness was there in the morning, and again in the evening, and on the latter occasion he saw plaintiff and Medofsky there. They were speaking about the shop and the conditions, and defendant said no groceries could be kept. Then plaintiff asked why, and defendant said that when he bought the shop from the other man the condition was made that no groceries or ladies' drapery could be sold in it. He heard defendant tell plaintiff that. Defendant told witness the same thing. Witness was willing to take the shop for fruit, greens, and mineral waters without groceries, and he offered £10 per month. After plaintiff had made a deposit of £5 defendant said that next day they would go to the lawyer. Plaintiff was satisfied.

Cross-examined: Witness offered £10 per month for the shop, but afterwards he was willing to give £12 per month.

Harris Medofsky said he knew defendant, and in January went to his house to see about a job on the alterations he was making on his shop in Somerset-road. He saw the last witness, plaintiff, and another person there. He was there all the time they were talking. The conversation was about leaving the shop in Somerset-road. He saw the £5 paid, but defendant said to plaintiff that he must not forget the conditions about selling no groceries or ladies' drapery. Something was said about going to the lawyer in the morning. Witness had no interest whatever in this case.

Cross-examined: Witness had not done any work for defendant or the Keyser.

Solomon Friedgood said he became owner of this property in Somerset-road in June

last. In the month of January his son was owner, and witness acted as his agent. In terms of the agreement between his son and the former owner of the property, there was a restriction imposed upon the use of the premises, under which they could not be used for the purpose of selling groceries or ladies' draperies, so long as certain persons carried on business. In January plaintiff came to witness. There were also present at the house at the time Modofsky and another man, whom witness did not recognise. Plaintiff came about the hiring of the shop. He had spoken about it to witness before this. Witness asked what kind of a business he was carrying on, and plaintiff said that he had a shop in Caledon-street, where he sold groceries and greens. Witness told him that he could not lease the shop for groceries, as the condition on which the property was bought prevented that being done. Fine was willing to give witness £10 a month to carry on a greengrocery and fruit business. Plaintiff also offered £10, but when he saw the other man come, he offered £12. There were several conditions made in addition to that regarding groceries and draperies, among them conditions relating to sub-letting, alterations, etc. He also told plaintiff that he could not carry on a coffee-shop, as he had already let the corner shop as a coffee-shop. Plaintiff gave witness £5, and telling him he must remember the conditions, sat down to write the receipt. He commenced putting down the conditions on the receipt, but did not put them all down, saying that they could arrange that when they went to the lawyer in the morning to draw up the lease. He mentioned on the receipt about the rent being payable in advance. On the following morning Keyser came to witness, saying he had been sent by plaintiff about the shop. At this time Keyser did not know about the condition which prevented the shop being used for a grocery or drapery business. On the Sunday when plaintiff, his brother, and Levine came to witness, he told them that he would not let a grocery business be carried on for £25, and that he could not, for the sake of a few pounds, pay £250. On the Tuesday evening Krawitz came by himself, and asking to see witness by himself, they went into the front room. There plaintiff said he wanted to sell groceries, and witness replied, "How many times have I told you that I cannot say anything on that?" Plaintiff replied, "Never mind, my receipt says nothing about the shop not being let for the sale of groceries." Witness said that the receipt

was only for the £5, and plaintiff did not come to the lawyers to arrange the lease, as agreed. That was the last time witness saw him. A man named Nichols now had the shop, and he paid £11 a month rent. He kept a green-shop, and sold non-intoxicating drinks. He was prohibited by agreement from selling groceries. That was entered into in April.

Cross-examined: £12 was not a high rent for a fruit and vegetable shop, as the shop was in a good place. Mr. Nichols had promised to pay more. If the shop was used for the sale of groceries, no profit would be made out of it, as Mr. Berghout next door carried on a large grocery business, which had been established for years. It could only be used for selling groceries, as a little shop keeping open until midnight.

This closed the case for the defendant.

Mr. Gardiner (for plaintiff): The whole case hinges on a mere matter of fact. At his interview of January 18 with defendant, plaintiff said he wished to carry on a general dealer's business in the premises let to him, as he had done in Caledon-street. The evidence of Kaiser went to show that he was not carrying on such a business, and in a case of conflict of parol evidence we must fall back on documentary evidence, and here the only documentary evidence we have is the receipt.

[Buchanan, A.C.J.: Yes, but it is admitted that all the conditions of the tenancy are not inserted in the receipt.]

Then as respondent drew up the receipt, he must suffer for not fully inserting the conditions. The whole question is "What were the terms of the contract?" If the Court is with me as to no stipulation having been made that these premises should be used only as a greengrocer's shop, I come to the question of damages.

[Buchanan, A.C.J.: According to defendant's evidence, he was willing to pay £3 a month more if he could get a lease free from the restriction, i.e., £36 a year. Then there was the £16 for a shopman.]

Sir H. Juta (for defendant) was not called upon.

Buchanan, A.C.J.: The plaintiff in this action alleges that in the month of January last he entered into a contract with the defendant to lease a certain shop in Somerset-road for a period of twelve months at a rental of £12 a month; and that defendant was to give him possession of the shop as soon as the same should be completed. Plaintiff at the time of the contract paid a deposit of

£5 on account, and he says that when the shop was completed, in or about the month of March, defendant refused to give possession. The plaintiff does not now seek to compel a specific performance of the contract, but claims damages for breach of contract. The defendant admits that a contract was entered into, but he says there were certain conditions attached to this contract which are of importance, which conditions are denied by the plaintiff, and he says that if these conditions had been complied with he was quite willing to execute the lease. It is common cause that on January 18 there was a verbal contract made between the parties. What that contract was is in dispute. Both parties are agreed that this contract was to be reduced to writing, but this was never done. Defendant acted for his son, though he admits his liability to plaintiff. Defendant states that his son bought the premises under a contract which expressly prohibited any grocery or haberdashery business being carried on on the property sold as long as the vendor had a similar business in the neighbourhood, under penalty of a fine of £250. Defendant was altering the premises at the time of the agreement with plaintiff, and he says at the time he so agreed he distinctly told the plaintiff of this restriction which existed upon the property. I think on the evidence it is clear that the document imposing this restriction was brought to the defendant's notice before the contract was entered into. In the face of the great conflict of testimony, great reliance would ordinarily be placed on the documentary evidence, and especially upon a receipt for the deposit given at the time. In this receipt the only condition named is that the rent be paid in advance monthly. This, under the circumstances, is a minor condition, though it may be considered by the plaintiff the most important. There is no mention of restriction that the premises were not to be used either for a grocery or haberdashery business. Unfortunately for him, the plaintiff's own case is that this receipt does not contain all the conditions agreed upon. In the first place, the vital condition is not specified, namely, that these premises were to be leased for twelve months. It was also agreed that if the defendant put another story on the building there was to be a reduction of the rent, because of the inconvenience which would be caused to plaintiff during the

alterations. Several stipulations which he says were come to were not contained in the receipt. Therefore the Court is forced to go behind this receipt. I think the onus which is on the defendant in this case to show that there was a restriction on the user of the premises has been proved. It is this condition, that the shop is not to be used as a grocer's shop, which has caused the whole dispute. It seems to me perfectly clear that the defendant was willing, in the first place, to take the shop with this restriction, but when he consulted the partner whom he had taken into the business his partner said that unless they got permission to sell groceries they would not be able to pay the rent. The plaintiff himself would at the time have entered into the lease if it had been submitted to him before he had consulted his partner. It was only after he saw his partner that he objected to the restriction. I think on the facts that we are bound to find that this condition was a condition made at the time of the contract, and that the plaintiff's refusal to consent to have this restriction inserted in the lease alone prevented the lease from being signed. The defendant has not gained any advantage from the breach of contract; on the contrary, he has really been placed at a disadvantage. It is true that he re-leased the shop, but he re-leased it at a lower rental than the plaintiff had agreed to pay. Moreover, in his re-lease, he has put in the condition that the shop must not be used as a grocery shop. At the time of the contract plaintiff told defendant that he (plaintiff) was carrying on a greengrocer's business in Caledon-street, selling such things as lemonade, cigars, and cigarettes. Defendant states he said, and I have no doubt he did so, "You may do all that, but you must not carry on a grocery business." The terms alleged by defendant is the contract which the Court finds was really entered into, and the plaintiff having failed to substantiate his version of the contract, judgment must be given against him. Judgment will be for defendant with costs.

His lordship added that the judgment would, of course, be subject to the tender.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. Friedlander and Du Toit; Defendant's Attorneys, Messrs. Dempers and Van Ryneveld.]

SUPREME COURT.

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon. Mr
Justice MAASDORP.]

DU PLESSIS V. HERHOLDT'S { 1901.
EXECUTOR. { Nov. 18th.

Fraud—Notarial instruments—Execution.

D. being fully aware of his rights under his parents' will executed two notarial instruments by which he undertook to sell all his right, title, and interest in a certain farm worth about £4,000 for £1,500 to his stepfather.

Held, that in the absence of proof of fraud, the transaction could not be impeached.

This was an action for a declaration of rights between Stephanus Christian du Plessis and Jan Charl Marthinus Venter, in his capacity as executor testamentary of the estate of the late Albertus Johannes Herholdt, and Petrus Jacobus Venter, in his capacity as the executor dative of the estate of Susara Aletta Margaretha Jacobus du Plessis.

The plaintiff's declaration was as follows:

1. The plaintiff, Stephanus Christian du Plessis, resides at Philip's Town, and is the son of the late Gert Jacobus du Plessis and of his late wife Susara Aletta Margaretha and testatrix respectively.

2. The defendants are Petrus Jacobus Venter, who is sued in his capacity as executor dative in the estate of the testatrix, and Jan Charl Marthinus Venter, who is sued as executor testamentary in the estate of the late Albertus Johannes Herholdt.

3. By mutual will, dated June 21, 1861, the testator and testatrix bequeathed to the plaintiff their share of the farm Rietfontein, in the division of Philip's Town, formerly Colesberg, the said property to be transferred to him six months subsequent to the death of the survivor of the testators upon payment into the estate of the sum of 4,000 Ryksdaalers.

4. At the date of the said will, the testator held, by transfer dated April 17, 1857, jointly with one Charles Jacob du Plessis, the said

farm Rietfontein, measuring 5,081 morgen 383 square roods.

5. The testator died on or about January 10, 1863, and thereafter, on May 3, 1864, partitional transfers of the said farm were passed by the said Charles Jacob du Plessis, and the testatrix (assisted by her husband, the late A. J. Herholdt, to whom she was married after the testator's death), in her capacity as executrix of the testator as follows: (a) To Charles Jacob du Plessis, 2,574 morgen 553 square roods; (b) to testatrix personally the remaining extent, 2,506 morgen 430 square roods.

6. In or about January, 1895, the late A. J. Herholdt purchased from the plaintiff all right, title, and interest during the term of his (the said Herholdt's) natural life in and to the share of the said farm bequeathed to plaintiff as aforesaid: the purchase price was the sum of £1,000, £500 whereof was paid or settled by the said Herholdt at date of the said purchase, and for the balance a promissory note dated February 1, 1895, was given to the plaintiff by the said Herholdt, payable six months after the death of the survivor of the said Herholdt, and his wife, the testatrix.

7. On or about February 1, 1895, the plaintiff was wrongfully and fraudulently induced by the said Herholdt to sign documents before one Lodewicus Jacobus Coetzee, a notary public; one whereby he (the plaintiff) purported to sell to the said Herholdt the said share for the sum of £1,000 and the other wherein he agreed that the said 4,000 Ryksdaalers, for which the said property was bequeathed to him, should be paid by the said Herholdt into his (plaintiff's) mother's estate; but he (plaintiff) was ignorant of the terms of the said documents when he signed them, and signed the same under the bona fide belief that they were documents setting forth the agreement of sale mentioned in paragraph 6.

8. The testatrix died on September 14, 1895, leaving a joint will, executed on August 29, 1895, by her and the said Herholdt, wherein they purported to dispose of the said share of the farm Rietfontein in manner inconsistent with the testator's will, referred to in paragraph 3; the said Herholdt was appointed her executor.

9. Thereafter, on September 30, 1895, the said Herholdt, in his capacity as executor of the testatrix, sold a portion (measuring 1,183 morgen 215 square roods) of the aforesaid remaining extent to one Carl Friedrich Battenhausen, for the sum of £944 10s.; and thereafter, on January 11, 1896, passed trans-

fer of the same to him, leaving a remainder of 1,323 morgen 215 square roods still standing registered in the name of the testatrix.

10. Thereafter, in or about January, 1901, the said Herholdt died, and the defendant, Jan Charl Marthinus Venter has been appointed executor testamentary in his estate, and the defendant Petrus Jacobus Venter has been appointed executor dative in the estate of the testatrix, and are the proper parties to be sued in this action.

The plaintiff claims: (a) That defendants be ordered to transfer to him the said remainder (measuring 1,323 morgen 215 square roods) of the said farm now standing in the testatrix' name; (b) that the said defendants be ordered to pay to the plaintiff the sum of £944 10s., being the value of the portion of the said farm sold to the said Battenhausen, the plaintiff tendering to pay to the said defendants, in their capacities as aforesaid, the sum for which the property was bequeathed to him; or (c) in the alternative to (a) and (b), that the defendant Jan Charl Marthinus Venter, in his capacity as executor testamentary in the said Herholdt's estate, be ordered to pay to the plaintiff the sum of £5,000 as damages; (d) alternative relief; (e) costs of suit.

The defendants' plea was as follows:

1. The defendants admit the allegations in paragraphs 1, 2, 3, 4, 5, 8, and 9 of the declaration.

2. As to paragraphs 6 and 7, they annex hereunto, marked A and B respectively, true translations of the two documents referred to in paragraph 7, which were duly executed before the notary Lodewicus Jacobus Coetsee, by the one of which the plaintiff sold to Herholdt all his right, title, and interest in the share of the farm Rietfontein for the sum of £1,000, and by the second of which the said Herholdt undertook and agreed to pay to the persons entitled thereto the amount of 4,000 rix dollars, mentioned in the will of the testator and testatrix, and payable by the plaintiff six months after her death.

3. The plaintiff fully understood the said documents and the terms thereof at the time of the execution thereof, and the defendants duly paid the said amount of £1,000 to the plaintiff and satisfied the claims of the persons aforesaid entitled to the amount of 4,000 rix dollars aforesaid.

4. Save as aforesaid the defendants deny the allegations in paragraphs 6 and 7 of the declaration, specially denying that the plaintiff sold and Herholdt bought only a life interest in the aforesaid share of the said

farm, and that Herholdt wrongfully or fraudulently induced the plaintiff to sign the aforesaid documents.

Wherefore they pray that the plaintiff's claim may be dismissed, with costs.

The replication was general.

Mr. Searle, K.C. (with him Mr. Benjamin), appeared for plaintiff; Mr. Schreiner, K.C. (with him Mr. Percy Jones), for the defendants.

Mr. Searle said the action was originally brought against Albertus Johannes Herholdt, but he had died in the course of the proceedings. His death was not known for some time after it occurred. The plea was filed in his name, and the proceedings went on in his name until August, though he died previously. The witnesses were there ready for the trial in August.

The following are the notarial documents referred to in the pleadings:

(A.)

Be it hereby known that on this 1st day of February, 1895, at Philip's Town, Cape of Good Hope, before me, Lodewicus Jacobus Coetsee, notary public, there appeared Stephanus Christian du Plessis, of the first part, and hereinafter called "Du Plessis," and Albertus Johannes Herholdt, sen., of the second part, hereinafter called "Herholdt," both of Philip's Town.

And the said Du Plessis declared that whereas in terms of a certain mutual will, a true copy of which is hereunto annexed, made by his parents, Gert Jacobus du Plessis and Susara Aletta Margaretha Koekemoer, dated at Rietfontein, now situate in this district of Philip's Town, on the 20th day of June, 1861, the said farm was bequeathed to him for the sum of 4,000 rix-dollars, to be paid six months after the death of the survivor of his said parents, and whereas his said father is now deceased, and his said mother has contracted a second marriage with the said Herholdt, who, after his marriage aforesaid had the said farm transferred to his name, and that whereas he has now agreed with the said Herholdt to cede all his right and title to the said farm;

Now therefore be it hereby known that for and in consideration of the sum of £1,000 sterling paid by the said Herholdt to the said Du Plessis, receipt of which he hereby acknowledges, he (the said Du Plessis) has for himself, his heirs, and executors, for ever relinquished, as he hereby does relinquish, all his right, title, and claim in and to the said bequest to and in

favour of the said Herholdt, absolutely for his own use and profit.

And the said Du Plessis does hereby irrevocably appoint the said Herholdt to be his true and lawful agent and attorney for the purpose aforesaid, to demand and receive the bequest aforesaid from the executor of the said testators or from any other person or persons answerable therefor, with power of substitution and under promise of approval.

In witness whereof the said Du Plessis and Herholdt have affixed their signatures hereunto, year, month, and day as aforesaid, in the presence of the subscribing witnesses.

(Signed) S. C. DU PLESSIS.

(Signed) A. J. HERHOLDT.

As witnesses:

(Signed) GEO. ROBB.

(Signed) A. P. J. FOURIE, JUN.

Quod attesor,

(Signed) L. J. COETSEE,
Notary Public.

(B.)

Be it hereby known that on this 1st day of February, 1895, at Philip's Town, Cape of Good Hope, there appeared before me, Lodewicus Jacobus Coetsee, notary public, Stephanus Christian Du Plessis, of the first part, and hereinafter called "Du Plessis," and Albertus Johannes Herholdt, sen., of the other part, hereinafter called "Herholdt," both of Philip's Town.

And the said Du Plessis declared that whereas in terms of the mutual will made by his parents, Gert Jacobus du Plessis and Susara Aletta Margaretha Koekemoer, dated at Rietfontein, now situate in this district of Philip's Town, on June 20, 1861, the farm Rietfontein was bequeathed to him for the sum of 4,000 rix-dollars, upon certain conditions contained in the said will, reference to which will furnish fuller information, and whereas he must pay the said sum of 4,000 rix-dollars for the said bequest six months after the death of his said mother, as his father is already deceased, and whereas he has made over all his rights and title in the said bequest to the said Herholdt, and it has been agreed that the said Herholdt shall pay the said sum in consideration of the concession aforesaid;

So be it hereby known that the said Herholdt does hereby bind himself for himself and his executors to pay after the death of the mother of the said Du Plessis to Diederik Rudolph du Plessis and Anna

Cecilia du Plessis the said sum of 4,000 rix-dollars, and hereby to release the said Du Plessis for ever from payment of the said sum, and to guarantee him against any claim which might be made upon him later on account of the bequest aforesaid.

In witness whereof the said Du Plessis and Herholdt have affixed their signatures hereunto, year, month, and day as aforesaid, in presence of the subscribing witnesses.

(Signed) S. C. DU PLESSIS.

(Signed) A. J. HERHOLDT.

As witnesses:

(Signed) GEO. ROBB.

(Signed) A. J. P. FOURIE, JUN.

Quod attesor:

(Signed) L. J. COETSEE,

Notary Public.

Stephanus Christian du Plessis, the plaintiff, said he lived at Philip's Town. The farm Rietfontein, which was within a short distance of Philip's Town, was bequeathed to him by his parents. His father died forty years ago, when witness was six years old. His mother died in 1895. She married Mr. Herholdt within about a year of his father's death. Witness lived in the neighbourhood of Philip's Town. He had not had much education, and could not read or write. He could write his name, in a way. In January, 1895, Mr. Herholdt was living in the village. Witness was living on a place called Slingersfontein. In January, 1895, witness's mother was dropsical and very weak, and was confined to her bed. She died that year. Mr. Herholdt was a strong, hale man. Mr. Herholdt pressed witness to enter into a sale of the farm. Witness was in Herholdt's house, and Herholdt called him into the yard and asked him to grant him the life interest so long as he lived. Witness said he could not. Mr. Coetsee, attorney, was present, and said witness could do it. Then Sarel du Plessis came in, and Mr. Herholdt said to him, "I am glad you have come; I want you as a witness to the agreement." Herholdt said he wanted an agreement with witness for a life interest so long as he lived. Mr. Du Plessis said witness could not grant a life interest, but Mr. Coetsee said he could, and witness thereupon said he would grant Mr. Herholdt a life interest. Herholdt said he would give witness £500, and £500 in two months. He said he would give him an erf in two months' time as security for the cash. Witness agreed. They went into the house, and Herholdt wrote out a document, which witness and the others signed. Witness asked Du Plessis

if it was all right, and he said it was good. The value of Rietfontein was then about £3,500. The part which witness's mother had was worth between £4,000 and £5,000. The farm produced a rental of £250. In the same month Herholdt asked witness to go to Coetzee's to sign the papers for the transfer of the erf. Witness went. Only witness and Coetzee were in the office. Witness told Coetzee that Mr. Herholdt had sent him to sign the documents for the transfer of the erf. He signed documents; he could not say how many. None were read to him, and he did not sign in the presence of witnesses. In July, 1895, Mr. Herholdt told him to go to Coetzee's and sign other documents in connection with the transfer. Witness went to Coetzee's office. He could not say whether a man named Brinkman was there. In April witness went to Coetzee's office and got a document. Witness's wife read it to him, and witness took it back to Coetzee, and afterwards went to Herholdt, who was very angry with witness. Witness never spoke to Herholdt afterwards. Herholdt told witness to go and fetch the document (which was presented to him as a deed of security) from Coetzee, and he would tear it up. In July Herholdt came to witness and said there were other documents to be signed. After July he did not speak to Herholdt. Witness first heard about the sale to Battenhausen after his mother's death. Witness heard that Herholdt had sold the ground to Battenhausen. Witness never spoke to Coetzee about the matter. Witness went in April, 1895, with a person named Venter, to see Coetzee. Venter asked Coetzee if he could not help witness to get £500, portion of the purchase price. Coetzee said that the matter had been muddled owing to witness's ignorance, and that he (Coetzee) could not help it if Herholdt had humbugged witness in this way. Witness consulted Mr. G. du Plessis when he came there. No one was there to consult before Mr. G. du Plessis came.

Cross-examined by Mr. Schreiner: There was an attorney named Neiser in the place, but he had gone before 1895. Witness was 46 years of age. Witness did not sign a document (produced) on the 15th January. Witness did not sign a document in the presence of Battenhausen and Coetzee. Witness only once signed documents in Coetzee's office previous to July. He did not know how many documents he signed on that occasion. Witness had been to a school in 1870. He could not read Dutch. He had never written letters

to Coetzee. Witness had never offered Battenhausen to sell his rights. Battenhausen was in business there with a man named McNaughton. Witness ran up an account for £47 while he was a minor, and this was then paid by Herholdt. Herholdt did not then get witness to sign a document making over the rights to him. In 1881 witness commenced proceedings against Herholdt, but the latter coaxed him into a settlement, and said he would pay costs. Witness then engaged Mr. Coetzee as his attorney. At the beginning of January—before witness came to the agreement with Herholdt—there was not an effort to settle the whole matter. There was nothing to settle; the property belonged to witness. Witness did not remember a document being prepared by Mr. Coetzee to settle the matter, nor did he remember Herholdt objecting to the costs. Witness never spoke to the Rev. Mr. Louw about the matter. Witness did not ask Battenhausen for his advice as to whether witness was doing a wise thing in entering into the transaction. Witness did not go with Herholdt to Coetzee's office on the 1st February, 1895, and there sign documents in the presence of Mr. Robb. Battenhausen never paid witness £100 in January, 1895. Witness did not want to take the promissory note for £500, payable after Herholdt's death. He told Mr. Coetzee that and the latter kept it. Afterwards the note was sued upon. On his mother's death witness had to pay £300 into the estate, the other heirs receiving £150 each.

Re-examined: Witness was sure that in January, 1895, he never received £100 from Battenhausen. He had a shop account with Battenhausen, and gave him a bond for £50 on the erf.

Sarel Johannes du Plessis said he was a farmer and lived at Philip's Town. He knew Mr. Herholdt, and also knew the plaintiff, who was a distant relation. Witness knew the farm Rietfontein very well, having lived on it for four years. The value of Herholdt's and Battenhausen's parts of the farm was £1 10s. a morgen, that would be between £3,000 and £4,000. It was good ground. Witness was present when Mr. Herholdt and the plaintiff made the agreement regarding Rietfontein. He heard Herholdt say to plaintiff "Go on and do as you are told." Herholdt said to witness that he had been there a whole hour trying to persuade plaintiff to do something. He said he was trying to buy the life interest of the farm Rietfontein. He said he would give an erf worth £500 and £500 in cash in

two months, and that if he did not give the £500 he would give good security on another erf. He said that of the £500 he would set aside £300, so that in case of his mother's death plaintiff would have the money required to pay out the heirs. Witness knew the terms of the will, Herholdt having previously read it to him. A document was drawn up according to which, after Herholdt's death, plaintiff was to take possession of the farm. Witness signed this document as a witness. In July, 1895, witness met Herholdt, and after going with him to his house said that there was talk going about the village that Herholdt had bought the farm. Herholdt said "No," and getting up, brought out a document and asked witness whether he knew it. He then read out the document again. It gave Herholdt a life interest in the farm. He said a farmer would be a fool if he sold for £1,000 a farm worth £4,000. About the beginning of February, 1895, witness was sent for, and went to Coetzee's office, where he saw Herholdt and Coetzee. Witness stood at the door as Herholdt said he had some business, and witness must wait a moment. Witness heard a few words spoken between Herholdt and Coetzee about getting the whole property for all time for £1,000. He heard Herholdt say that Phanie was very innocent and would just sign the document, that they could get him to sign it, and then get a couple of witnesses. In April, 1895, witness again saw Herholdt, and the latter said he had a new plan. He said he wanted to give back the life interest he had obtained from Phanie, and that the latter must then give his consent to selling Rietfontein, because he had got a good offer for it from the Kerkeraad. He said he had asked the Kerkeraad £4,000 for the farm, but that if they reserved a certain piece of land, he would let them have it for £3,500. The Kerkeraad never bought the farm. Witness was 64 years of age, and Herholdt was four years older. They went to school together when they were boys.

Diedrick Johannes Venter said he knew Mr. Herholdt and plaintiff. Witness hired a portion of the farm Rietfontein from Mr. Herholdt, and a document of lease was drawn up between them. Witness sent Piet Booysen, his son-in-law, to arrange the matter, and subsequently a lease was drawn up, which gave the lease of this land during the lifetime of Herholdt. Witness knew the whole farm Rietfontein. It was worth £1 10s. a morgen. In April, 1895, witness went with the plaintiff to Mr. Coetzee's office. Witness asked Coetzee if he could help plaintiff to get the

£500. Coetzee said that plaintiff could not get his money as he had muddled his case through ignorance. He said he could not help it if plaintiff would allow Herholdt to take his property like that.

Cross-examined: The plaintiff never told witness that he had sold his farm to Herholdt for £1,000. Witness did not know what plaintiff had sold. He went to Coetzee's to try to get cash for that promissory note for £500. Witness did not know of the will by which Herholdt left the farms to his son after his death, and provided for the payment of the £500 due on the promissory note to plaintiff.

Zacharias Petrus Booysen, the son-in-law of the last witness, said that in February, 1896, Mr. Venter asked him to go and see Mr. Herholdt with reference to the leasing of a portion of Rietfontein. Witness did so, and told Mr. Herholdt that his father-in-law wanted to hire a piece of ground. Witness further asked him if he could sell the ground. Herholdt said he could not sell it as he had only got the life use of the ground. Afterwards it was agreed that Venter should have the lease of the piece of ground in question during Herholdt's lifetime. Witness knew the whole farm Rietfontein, and would say that its value was between £3,000 and £4,000.

Cross-examined: The lease was made in February, 1896.

Isaac G. Visagie said he was a farmer, living at Philip's Town. He was a member of the Kerkeraad of the Dutch Reformed Church of Philip's Town. During the lifetime of Mrs. Herholdt witness went, on behalf of the Kerkeraad, to Herholdt, to try to purchase the farm Rietfontein. Herholdt wanted £4,000, and witness said he had the authority of the Kerkeraad to give £3,000. Herholdt pointed out a certain piece of ground, and said that he would reserve that and sell the remainder for £3,500. The Kerkeraad did not buy the ground. After Herholdt had sold portion of the ground to Battenhausen witness met him, and he said that Dr. Louw wanted to buy the remaining portion of the farm for £3,000. Witness said that that was too much, but Herholdt answered "No, I have sold the bone, but I have retained the marrow." He referred to the fact that he had retained the part with the stream of water on it.

This closed the case for the plaintiff.

For the defence Mr. Schreiner called Lodewicus Jacobus Coetzee, who said he was an attorney and notary public, practising at Philip's Town. He knew the plaintiff

and the deceased Mr. Herholdt. In 1894 witness was professionally consulted by plaintiff, and came down to Cape Town. That was in connection with his claim against Mr. Herholdt. The document produced was a genuine document, and the signature on it was the signature of the plaintiff, signed in the presence of witnesses. Witness had received several letters from plaintiff to which his name was attached. Before that document was made, there had been an attempt to settle the long-standing dispute by another document. This document was drawn up by witness, and was in the handwriting of witness's clerk. This document was signed by Mr. Herholdt, but was never executed. The reason for this was that when they were together, plaintiff asked how much the costs would amount to, and witness said they would be between £70 and £75, including the expenses of his trip to Cape Town. Herholdt said they would not pay a man £75 for writing a few lines, and that as witness was not the only man who could write they would go elsewhere. That must have been early in January, 1895, before the document was drawn up about the sale of the erf. That was drawn up after there had already been a discussion as to the terms upon which plaintiff's rights to Rietfontein were to be disposed of. They had had several talks about that at witness's office. Witness totally denied any such conversation as that which Sarel du Plessis had alleged he had heard as to plaintiff being a very innocent person and would just sign. The documents were specially drawn in Dutch so that plaintiff could understand them, and there could be no dispute as to the terms, and they were read over to him. Everything was read over to plaintiff. As a matter of fact, he was familiar with the two documents before he signed them. It was not true that he was only once in witness's office. Witness knew nothing of another document drawn up by Herholdt and witnessed by Sarel du Plessis. There was a document with regard to the £47, but this was destroyed when the present arrangement was made.

Buchanan, A.C.J., pointed out that in the document, which had never been executed, and which the witness admitted he had recommended plaintiff to sign, £900 was being given to persons who were only entitled to £300. That document, however, really secured more to plaintiff than he eventually got under the document which was executed.]

Witness (continuing) said that both documents of the 1st February were witnessed

by Mr. Robb and Mr. Fourie, jun. The latter had since died. The documents were drawn up by witness's clerk—Brinkman—from instructions given by witness. Both Robb and Fourie were present when the documents were executed. Herholdt and Du Plessis both gave instructions. There was no dispute about anything except the £500, about which there was a hitch as to when it should be paid. The promissory note was given witness by plaintiff to keep. Witness kept it for a long time, but plaintiff subsequently took it from him. The promissory note was the one put in in connection with the provisional case. Witness was surprised to hear plaintiff say he could not read or write. He had been to school for about a year with witness.

Cross-examined by Mr. Searle: Witness had heard about the document by which the rights were given for £47. Witness first saw it when the other documents were signed. He told Herholdt it was worthless, and that he could not proceed on that. Herholdt tore it up. Witness found when he came to Cape Town in 1894 that the farm belonged to plaintiff after the death of his mother. The farm was worth £3,000, and under the will plaintiff only had to pay £300. It was a family matter, and witness thought that if they were all satisfied the arrangement would be all right. Witness acted for plaintiff.

Asked as to why he advised plaintiff to give away a property worth £3,000 for £1,000, witness said he had not then seen the document by which it was alleged that plaintiff had sold his rights for £47.

[The Acting Chief Justice: But you knew that he was a minor, and that only £47 was paid for his rights to this valuable property.]

Witness: That is what plaintiff told me.

[Buchanan, A.C.J.: You could have sent for the document, and have seen it.]

Witness: I tried to get it from Herholdt several times.

Mr. Searle pointed out that the declaration of purchaser and seller drawn up in the witness's office showed the sale to have taken place on the 12th July.

[Buchanan, A.C.J. (to witness): Can you explain that?]

Witness: No; I can give no explanation.

[Buchanan, A.C.J.: It's very extraordinary.]

Witness said the document was drawn up by Brinkman, who was a Justice of the

Peace. Witness did not see the contents of that document. He did not see all the documents that passed through his office.

Further cross-examined, witness said that had he known the contents of the £47 document he would have advised plaintiff not to sell. Witness did not know if he gave a copy of the documents to the parties. Witness could find no written instructions given by either party. Herholdt was a cute business man, and Du Plessis an ignorant man. Witness thought that Herholdt had driven a hard bargain. This was his explanation of Du Plessis making away his property for less than its worth. Du Plessis was badly off at the time. In November last year Herholdt sent witness some receipts. These had been stolen from his office, which had been broken into. One of these was a receipt from the plaintiff.

Buchanan, A.C.J., pointed out that all the others, Du Plessis and Venter, were to get was £150 each under the will. Why did the witness, as Du Plessis' legal adviser, advise him to pay £300 to each of two people who were only to get £150 after the mother's death?]

Witness said he could not now say what his reasons were. He thought it a good settlement.

Buchanan, A.C.J.: In the absence of any explanation, it only seems that your poor client suffered very badly at your hands, as his legal adviser. But of course that is quite another thing from fraud.]

Carl Frederick Battenhausen, merchant, of Philip's Town, said that he signed the document of the 15th January. Plaintiff fetched witness to sign the document, and he told witness that he was going to sell Rietfontein for £1,000. Witness paid plaintiff £100 some time in January on account of Herholdt. He also paid Jacobus Venter £100 some time in January on account of Herholdt. He also paid Jacobus Venter £150. Witness was purchaser of a part of Rietfontein for £944 10s. This part adjoined witness's farm, and was more valuable to him on that account. Witness was in business with MacNaughton when plaintiff ran up an account for £47. This was paid by Herholdt.

Cross-examined by Mr. Searle: Plaintiff told witness he was selling the farm, which was worth £3,000, for £1,000. Witness thought it would be best for him, as he was a poor man. Witness told him that he had better sell for £1,000 if he could not get more. Witness knew he was only getting an erf and £100 at once.

Evidence for the defendant, taken on commission, was then read. In this, George Robb deposed to seeing the two documents signed by plaintiff in Coetzee's office. He could not remember what were the contents of the documents, but they were connected with the sale of Rietfontein. The documents were read over to plaintiff. They were not hurriedly read over. The parties appeared satisfied with their contents.—L. Brinkman deposed that in 1895 he was an articled clerk in Mr. Coetzee's office, and the two documents were in his handwriting.

Mr. Searle, K.C.: This is an action to set aside an agreement made in 1895. The case for the plaintiff is that if he had known what he was signing he would not have signed it. About 25 years ago Herholdt got plaintiff, then a minor, to sign away his rights for £47. That shows (1) that Herholdt was anxious to get hold of the property, and (2) that he was not very particular as to the means he employed for doing so. In 1895 Herholdt again tried to get possession of the farm. The document was drawn up by Herholdt, and it is very unsatisfactory in its terms. Herholdt said he had only a life interest in the property. Another strange fact was that whereas Herholdt died on January 31, 1901, the plea was filed on February in the name of the deceased, and not of the executors. This suit was commenced before Herholdt's death. The reason the case had been so long hung up was that Coetzee was the only person who could act.

Mr. Schreiner was heard on the misjoinder of parties, and the costs thereby incurred on May 31.

Buchanan, A.C.J.: The plaintiff in this case is the son of the late Gert du Plessis, and of his wife Susara. By the joint will of his parents he was left a portion of the farm Rietfontein, in the division of Philip's Town, to be transferred to him six months subsequent to the death of the survivor of his parents, upon payment into their estate of the sum of £300, or 4,000 rix-dollars. The plaintiff's father died in 1863, and his mother the next year married Herholdt. As under the will the plaintiff could not take possession of his property until after his mother's death, he had no immediate benefit from the bequest; and if he wished to deal with it at all, he could only deal with his vested interest. He was apparently a man in somewhat impecunious circumstances, and several times he had had transactions with Herholdt after Herholdt had married his

mother. He, while still a minor, ran into debt, and Herholdt had paid his debts and had taken from him a cession of his rights. This cession, being made while he was still a minor, could only have been valid if ratified by him after his coming of age. It never was so ratified, but on several occasions he applied to Herholdt to obtain some benefit from the property. In 1895, the transaction now attacked took place between the parties. The declaration alleges that in or about the month of January, Herholdt purchased all plaintiff's rights under the will for the term of Herholdt's natural life for a sum of £1,000, and the declaration goes on to allege that thereafter, on the 1st February, Herholdt fraudulently induced plaintiff to sign a notarial document by which he purported to sell his rights absolutely, and not limited only to an interest during Herholdt's lifetime. This case depends upon whether this charge of fraud is established or not. The deeds, which were entered into on the 1st February, 1895, have been annexed to the proceedings, and they show that the parties appeared before one Coetzee, a notary public, and by contract entered into before this notary public the plaintiff sold all his right, title, and interest under the will of his parents out and out to Herholdt for the sum of £1,000. It is said that the property was worth between £3,000 and £4,000, and the evidence, I think, shows that it was worth £3,000 at the time, but though the property might be worth £3,000 at the time, the plaintiff had no present right to the property, but only a future interest dependent on the life of his mother. At that time the mother was 60 or 61 years of age, while Herholdt was about the same age, perhaps a year older—62 or 63. Plaintiff therefore could not reasonably anticipate coming into possession for some time to come yet. That being the case, he could not have expected to get the full value of the property, so that under the circumstances this fact alone is not conclusive evidence of fraud. But he has endeavoured to establish fraud by *viva voce* evidence. Plaintiff deposed that he entered into a contract with Herholdt whereby he sold only his interest during Herholdt's life. The only corroboration of this is to be found in a reported conversation which another Du Plessis, a distant relative of the plaintiff's, said he had at the time with Herholdt. He said that Herholdt told him he had only bought the life interest, and

that he (Sarel du Plessis) witnessed an agreement to that effect. He also says that afterwards Herholdt read this document to him. Now unfortunately this document has not been produced. If Herholdt had still been alive and had admitted there was such a document and did not produce it the Court might presume greatly against him. The executors are unaware of the existence of any such document, but even if there had been an agreement in the terms stated, it would not necessarily have been conclusive, because afterwards there was an agreement by which he sold absolutely his whole right to the estate. This document was executed before a notary public. If there was fraud committed in the execution of this document, one could not hold the notary to be altogether free. The only person present at the execution of this document who alleges it was a fraud is the plaintiff himself. But against him we have the evidence of the notary, we have had the evidence of the one witness who signed the document—the other witness is dead, and Herholdt is dead. In the face of this evidence, and of the publicity given to the transaction, and in the face of the subsequent conduct of the parties, I think the Court is driven in this case to the conclusion that fraud has not been established. The onus is upon the plaintiff to establish fraud. Coetzee, the notary public, who acted as legal adviser to the plaintiff before that time, knew what plaintiff's rights were under the will of his parents, and yet knowing this, he was the notary to execute this document, selling the whole of these rights for the sum of £1,000. One cannot compliment Coetzee upon the advice he gave his client to accept the alternative arrangement which he had recommended between the parties, but it is one thing not to have given sound or good advice and quite another thing to say he had been a party to or had allowed fraud to be perpetrated in his office. That would be going very far indeed, and it would require much stronger evidence than had been led in this case before the Court could come to the conclusion that any fraud had been perpetrated in Coetzee's office. The amount for which the property had been sold was £500, payable cash down, and £500 payable at a subsequent date. The deed which was executed says that this £1,000 has been paid. That is not the case, because it is common cause now that a promissory note was given at this date for £500 for the balance of the purchase price,

that this note was written by the notary public, and was payable to plaintiff six months after the death of Herholdt. There again the plaintiff knew that a few months after Herholdt had bought from him the right to the property he had sold to one Battenhausen portion of this farm, and had given transfer. This transaction took place in 1895, some eight or ten months after the sale had taken place. Plaintiff says he knew of this sale and of this transfer, and he must have known that this sale to Battenhausen was in direct fraud of his rights if it was the fact that he had sold only the life interest to Herholdt; but yet he took no steps to question this transaction. It is a fundamental principle that when a person discovers fraud, he must not lie by for years before he attempts to seek redress, because, as in this case, the rights of other persons may be affected. If fraud had been committed, there was notice given to plaintiff in 1895 that Herholdt was dealing with the property as being his own when, as plaintiff alleges, Herholdt had only a life interest, yet an action is instituted only five years afterwards, shortly before Herholdt's death. We have also the fact that plaintiff sued upon this promissory note for £500 after Herholdt's death. It is true this cannot be conclusive that he sold the property absolutely, as he says this £500 was given only for the life interest, but when we look at the circumstances, it seems almost inconceivable that Herholdt, who was only a year or so older than his wife, should have given £1,000 simply for a life interest in this estate, to begin after the death of his wife. There is some indications that Herholdt was a person inclined to make a good bargain, and if that is so, it is most improbable that he would have given such an amount for so limited a right. There is also the fact that Mrs. Herholdt transferred the property in 1864 to herself. The plaintiff questioned this transfer, and very probably, rightly so. He, however, did not press an action, but he allowed this transaction to stand all these years. It is said he was not a man of means, but if he had such clear rights and had not entered into this transaction with his father-in-law, one would have expected him to have questioned his mother's action before this. The only question we have to decide is one of fraud, and under the circumstances to which I have referred, I think it is impossible for the Court to come to the conclusion that fraud has been established. The plaintiff having

failed on that issue, he has no other ground for setting aside the contract entered into. He has accepted the benefit of that contract, and has had, on his own admission, £500 of the purchase money, and is now suing for another £500. Where there is a charge of fraud that fraud must be clearly proved. The testimony in this case is not sufficient even to establish a presumption of fraud. Judgment must therefore be given for defendant, with costs. The provisional case, in which plaintiff sued the executor of Herholdt on the promissory note, stood over pending the result of this action. On the provisional case, judgment will be given for plaintiff, with costs, as prayed, but on the main action, judgment will be given for the defendants, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, Mr. C. W. Herold;
Defendant's Attorney, Mr. G. Trollip.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

SWEMMER V. SWEMMER. { 1901.
 { Nov. 19th.

Adultery—Divorce.

Decree of divorce refused where the plaintiff, the husband, admitted that he had committed adultery during the continuance of the marriage.

This was an action for divorce brought by Petrus Franz Swemmer against his wife Johanna Katrina Swemmer, the allegation being that she had committed adultery with one Keet.

Mr. Buchanan appeared for the plaintiff; the defendant appeared in person.

Francis Henry le Sueur, clerk in charge of the marriage registers at the Colonial Office, produced the duplicate marriage register of plaintiff and defendant.

Petrus Franz Swemmer, the plaintiff, said he was married to the defendant at Wyn-

berg in August, 1890. After their marriage they lived for some time at Newlands. Afterwards witness became coachman to Mr. Berrange at Sea Point, but his wife would not accompany him, and remained at Newlands. Eventually witness took a room for her in Cape Town, and she remained there for some time. She had not lived with witness since 1891. Witness was now employed as a coachman at Port Elizabeth.

By the Court: He did not know why his wife left him. They had had quarrels shortly after their marriage. They could not get on together, and only lived together for a year. Witness had supported defendant up to the end of 1891.

Examination continued: When he left his wife he had reason to suspect her, but could never find it out. Lately he had found out that she was living along with Marthinus Keet in Queen-street, Cape Town. He went to the house to see her, and she called him into her room, and told him that she had a better life with Marthinus Keet than she had had with witness, and that she had been with Keet six years now. There were two rooms and a kitchen in the house. Besides defendant and Keet, the latter's father and mother and a little boy lived there. In defendant's room there was only one bed. There were no children of the marriage, nor was there any property in the estate.

In reply to the Court, the defendant said that plaintiff left her after he had assaulted her and given her a black eye, and she had had him before the Magistrate's Court and fined 10s. Since then plaintiff had never come to see her nor had he supported her. Defendant also alleged that since then plaintiff had lived with another woman.

Plaintiff, in reply to the Court, admitted that he had lived with another woman at Johannesburg.

Buchanan, A.C.J.: Where a husband sues his wife for divorce on the grounds of her adultery, he must come into Court with clean hands, and must not himself have committed adultery. Under the circumstances disclosed in this case, the Court cannot help the plaintiff, and no order can be made in this case.

MASTER AND OWNERS OF "THE INGRID" V. S.A. MILLING CO. { 1901.
Nov. 19th.
,, 20th.

Demurrage—Custom of port—Charter party.

A charter party after providing for the cargo to be taken on board

contained the following clauses
"and being so loaded the ship shall forthwith proceed as ordered by the charterer direct to Cape Town, Algoa Bay, East London or Port Natal, one port only, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow the ship to enter at all times of high water such port according to its custom." "and there deliver the cargo agreeably to bills of lading and as customary from ship's tackle into any vessel, or at any wharf, dock or pier where the ship can safely lie (always afloat) as ordered by the charterers or their agents."

Held, that the latter clause had reference only to a place where ships could lie in safety and not to a place where they could only occasionally lie in safety.

Held, on the question of custom, that it had not been proved that it was the custom of the Port of Algoa Bay to lighten ships of large draught and then order them alongside the jetty.

On the construction of the charter party the plaintiff was held entitled to ten days' demurrage.

This was an action brought by the master, and as such representing the owners of the barque Ingrid, against the South African Milling Company (Limited), on behalf of the charterers of the said vessel, to recover an amount alleged to be due for demurrage.

The plaintiff's declaration was as follows:

1. The plaintiff is Nils Olai Olsen, the master of the barque Ingrid, and as such represents the owners. The defendants are the South African Milling Company (Limited), carrying on business in Port Elizabeth and elsewhere in South Africa, and who are sued as agents of and representing the charterers of the said vessel.

2. The said company are also the consignees of the cargo of the said vessel, consisting of wheat, by bill of lading dated

April 12, 1901, to which plaintiff craves leave to refer when produced at the trial.

3. By charter party entered into at Adelaide, dated October 27, 1900, it was agreed between the agents of the owners and the charterers that the said vessel should proceed from a port in South Australia with a cargo of wheat or flour, as ordered by the charterers, direct to Cape Town, or Algoa Bay, or East London, or Port Natal, one port only, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow ship to enter at all times of high water such port according to its custom, and there deliver the same agreeably to bills of lading and as customary from ship's tackle into any vessel or at any wharf, dock, or pier where the ship can safely lie (always afloat) as ordered by the charterers or their agents. The plaintiff craves leave to refer to the said charter party when produced at the trial.

4. It was further provided by the said charter party that fifty working days should be allowed to the charterers or their agents for discharging the vessel at port of discharge, reckoned from the arrival of the said vessel at the port of discharge; the said charterers or their agents to have the option of keeping the said vessel ten days on demurrage at 4d. per register ton per day for every day detained beyond the total number of lay days; such demurrage to be payable day by day when and where incurred.

5. The said vessel arrived in the port of Algoa Bay on June 26, 1901, and the plaintiff was thereafter at all times willing to discharge the cargo, and notified the same to the defendant company on the said date.

6. The lay days provided for in the said charter party terminated on August 14, and on August 13 the plaintiff gave notice of the above to the defendant company, and that he would claim demurrage from noon on the 14th.

7. The defendant company repudiates any liability for demurrage, on the ground that the plaintiff has refused to bring the said vessel alongside the jetty, in order to discharge the cargo there.

8. The plaintiff admits that he refused to bring his vessel alongside the said jetty, on the ground that such is not the customary method of discharge at the port of Algoa Bay, and further, that the said jetty is not a place where his said vessel can safely lie, and contends that the terms of the charter party above referred to justify his refusal.

The plaintiff claims: (a) A declaration

that, according to the true construction of the said charter party, he is not bound to bring his vessel alongside the jetty for the purpose of discharging her cargo, and that the defendant company is liable for demurrage reckoned from the 14th day of August until such time as the cargo is discharged; (b) judgment for the amount of demurrage already due at the rate stipulated for in the charter party; (c) alternative relief; (d) costs of suit.

The defendants' plea was as follows:

1. The defendants admit paragraphs 1 and 2, and as to paragraphs 3 and 4, they beg to refer this Hon. Court to the terms of the said charter party.

2. The defendants admit that the said vessel arrived in the port of Algoa Bay on June 26, 1901, but deny the rest of paragraph 5, and the defendants admit paragraphs 6 and 7.

3. The defendants say that after the said vessel had been sufficiently lightened, in terms of the charter party, they did in terms thereof order the plaintiff to deliver the said cargo at the wharf and that the plaintiff refused to do so.

They deny that such is not a customary mode of discharge at the port of Algoa Bay, and say that the said wharf is a place where the said vessel can safely lie. They say that they were justified in terms of the said charter party in ordering the plaintiff to deliver the cargo at the said wharf.

Save as above they deny the allegations in paragraphs 3, 4, and 8.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

The replication was general.

The essential parts of Charter Party in question were as follows: Adelaide, 17th October, 1900.—It is this day mutually agreed between George Wills and Co., as agents for and on behalf of the owners of the good ship or vessel called the "Ingrid," classed x100 A1, of the measurement of 750 tons or thereabouts, now reported on passage to Cape Town, whereof _____ is master, of the one part, and Messrs. W. R. Cave and Co., of Adelaide, charterers, of the other part.

That the said ship being tight, staunch, strong, and every way fitted for the voyage, shall with all convenient speed proceed to Semaphore for orders to load at any one safe port in South Australia (such orders to be given within 24 hours after captain reports his arrival to charterers, or lay days to count), or so near thereunto as she may safely get, and there load at such safe

dock or wharf and (or) anchorage as charterers may direct, as customary from charterer's agents, a full and complete cargo of wheat and (or) flour in bags and (or) other lawful merchandise, ore excluded, which the said charterers bind themselves to provide not exceeding what she can reasonably stow, etc. . . . And being so loaded, shall forthwith proceed as ordered by charterers direct to Cape Town, or Algoa Bay, or East London, or Port Natal, one port only, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow ship to enter, at all times of high water, such port according to its custom, and there deliver the same, agreeably to bills of lading, and as customary, from ship's tackles into any vessel, or at any wharf, dock, or pier, where the ship can safely lie (always afloat), as ordered by the charterers or their agents. The cargo to be brought to and taken from alongside the ship at risk and expense of charterers, etc.

Mr. Searle, K.C. (with him Mr. Benjamin), for the plaintiff.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for the defendant.

In reply to the Court, counsel said that the sole point in the case was whether the plaintiff was bound to bring his vessel alongside the jetty at Algoa Bay for discharge of cargo in terms of the charter party.

Mr. Searle said that they had the evidence of the master of the barque, Captain Olsen, taken on commission at Port Elizabeth, it being doubtful in September whether he would be here at the time of the trial. However, the captain was still here, and he (counsel) would like to put further questions to him. It would save time also if the evidence taken on commission was put in.

Buchanan, A.C.J., said that of course the witness being present the commission would fall, unless counsel on both sides agreed that it should be put in, and then any further questions they wanted could be put to the witness.

Counsel agreed to this being done.

Mr. Searle then read the evidence of Nils Olai Olsen, taken on commission. In this witness said he was the master of the barque Ingrid, and represented the owners in this case. She was an iron vessel. He had been master for twenty years, and had had much experience in dealing with and discharging cargo in various parts of the world. That was the first time he had been in Algoa Bay. On October 17 last a charter was entered into between the owners of the Ingrid and Messrs.

Cave and Co., of Adelaide, by which the vessel was chartered for a cargo of wheat from a port in South Australia to a port in South Africa. He put in the charter. In accordance with that charter party, he took in a cargo of wheat at Port Germein for the port of Algoa Bay. He arrived with that cargo at Algoa Bay on June 25, and gave notice to the Milling Company, who, he learnt, were his consignees, on June 26. In that notice he intimated his arrival, and readiness to discharge. He subsequently saw Mr. Pringle, the managing director of the defendant company. Pringle told witness that the Rathlin Island would be discharging at the Jetty on the next Wednesday, and that he wanted witness to come then to the Jetty for discharge the following day. Witness did not reply. The Rathlin Island did not go to the Jetty, but went there about two or three weeks after. Witness saw her at the Jetty. Pringle told him to do so. On seeing her there, witness thought she was in an unsafe state, and he reflected that it would be unwise to go there himself. He did not tell Pringle of that. Witness saw him frequently after that. On July 25, he wrote Pringle to the effect that he was quite willing to take his ship alongside the Jetty provided the Milling Company would guarantee to pay any damages that his ship might sustain in consequence of going alongside; that he was quite willing to assist in every way that he could, but that he could not take a risk not provided for in the charter party or his insurance policy. Witness was still of opinion that it was a risk not provided for in his charter party, and uncovered by his insurance policy. In reply to his letter, he received a communication from the defendants on July 27, saying that the company declined to give the guarantee asked for, inasmuch as no such guarantee was required under the charter party. The letter further said: "When your vessel is lightened sufficiently to permit of her being brought to the jetty in accordance with the rules of the Harbour Board, and the Harbourmaster being satisfied that there is no danger, due notice will be given you." Witness had never had notice from the Milling Company or from the harbour authorities to go alongside for discharge. Between the 25th July and 14th August, his vessel was lightened by discharging at night about 400 tons at the anchorage in the roadstead. Her draught was 17 feet 3 inches, and after discharge, 14 feet 6 inches to 14 feet 9 inches. After receipt of the letter of July 27 from defendants, witness saw

his Consul and attorney (Mr. Chabaud), and asked him to reply to that letter. Mr. Chabaud replied to the letter, pointing out that the charter party contained no clause compelling witness to go alongside a wharf "which the Harbourmaster may consider safe"; that the charter party stipulated that the master had to deliver the cargo as "customary," or at any wharf "where the ship could safely lie." Mr. Chabaud further pointed out in his letter that it was not customary for ships to go alongside the jetty; it was an exceptional procedure, and it could be shown that certain vessels which had gone alongside had sustained damage, and that it could also be shown that at the present time other ships had been asked to go alongside, and declined. The letter went on to say that the master (witness) would abide by his decision not to go alongside without a guarantee. To this letter a reply was received stating that ten years ago a barque carrying grain from Cape Town to Port Elizabeth for the company had, during a period of twelve months, come alongside every trip without any damage, and that since then the practice had been common for vessels not exceeding the regulation size. Further, that the reason the company refused to give a guarantee was that no guarantee was required under the charter party. It was also stated that the company would refuse to pay demurrage if the master still declined to bring his vessel to the jetty. The lay days under his charter party expired on August 14, and he wrote to defendants to that effect. After that, onwards daily, he rendered demurrage accounts, and had rendered demurrage accounts, and claimed that he was entitled to that until he was discharged. He had been in the port nearly four months, and most of the ships were discharged by lighters in the Bay—a few only at the jetty. Cross-examined, witness said that he thought that on the 4th August the vessel had over 700 tons, perhaps 800 tons, of cargo left. He had seen vessels damaged alongside the jetty; the Kornmo was one. She was damaged by the swell, but not much damaged. In re-examination, witness said the Kornmo was a wooden vessel, and there was a great difference between the two classes of vessels in respect of their going alongside the jetty for discharge. He saw the Umvoti discharging alongside the jetty on July 18, but did not see her damaged.

Captain Olsen was then further examined by Mr. Searle, and said that since he gave that evidence in September his vessel had

been lying in Algoa Bay, and the work of discharging had only been finished on the 12th of this month. Witness could not get lighters between the 14th August and October. He had asked the plaintiffs and the Harbour Board authorities for lighters, but could not get them. If witness had wanted to undertake the discharging himself he could not have done so, as he could not get lighters. Since he had arrived in Algoa Bay he had seen some vessels go to the jetty. He only saw one vessel damaged, that was the Kornmo. The vessel was damaged by the jetty wall. There was a difference between iron ships and wooden ships going to the jetty. It was more dangerous for an iron ship to go to the jetty than for a wooden ship. A plate might easily be started in an iron ship, while on a wooden ship there was more to hold, and it would not so easily receive damage. While witness had been in the Bay the bulk of the ships had been discharged in the basin. At the time witness gave his evidence in September there had only been 1,400 tons discharged at the jetty by sailing vessels, while thousands of tons had been discharged from vessels in the Bay. The bulk of the work of discharging had been in the Bay. The ships which went to the jetty were small ships, and a few iron ships smaller than witness's. There was a steamer which went there. This steamer was the Shamrock. It was employed in lighter-ing vessels. Witness called ships of from 400 to 600 tons small vessels. His ship was 1,157 tons burden, and 750 tons register. When he came to the Bay it was impossible for him to go to the jetty owing to the draught of his vessel. He had found out that the depth of water at the jetty at low water was 18 feet. That was the South Jetty. In any case witness had to lighten his vessel before it could go in. Witness knew the ship Werner. It could not lie alongside the jetty. It had to leave the jetty because it commenced to blow. It was impossible to be at the jetty when the south-east wind blew. When that happened vessels were taken out if they could, and then when the wind fell they took them back again if the captain would go back. The Rathlin Island went in and had to come out again, and the captain then refused to go back. That vessel was damaged on the starboard bow, and there was something started so that she was leaking too. The Umvoti was damaged also, having two plates damaged. Since witness was there the North Jetty had not been used for ships. The lighters went there.

The South Jetty was the jetty witness was asked to go to. That was the jetty where there were 18 feet of water at low tide. It was more dangerous for a sailing vessel than for steamers to lie at the jetty, because a steamer could run out at once if the weather came on bad. There had been steamers at the jetty lately. Besides, sailing vessels had to lie closer in to the jetty to discharge than steamers had, because the former had to use the cranes on shore, while the steamers used their own cranes on board. Most of the vessels that had been at the jetty during the time witness had been in the Bay had been steamers, with a few small sailing vessels.

Cross-examined: Witness had not had lighters since August until recently, because his turn had not come. (In reply to the Court, Mr. Schreiner said that the turn of vessels to have the use of the lighters was determined by the Harbour Board.) Witness said he knew nothing about that. It was his opinion that an iron ship was more likely than a wooden ship to be damaged by going alongside the jetty. Even if it had been a wooden ship, he would not have gone alongside the jetty, as he did not consider it a safe place to lie in. Witness never complained after his vessel had been lightened that he never got notice to go to the jetty. He would not have gone even if he had had notice. Witness himself had taken the depth of the water at the jetty for a fortnight. He took the depth at the South Jetty, on the north side. The Port Captain must know better than witness what the depth was there. Some large steamers had lain there, but only small sailing vessels. After being lightened, the draught of witness's vessel would be about 15 feet. Even then he refused to go in. Witness's ship was over middle size. Very much larger steamers had lain there since witness had been in the port. The Antarctic, a sailing vessel, was there and discharged.

Mr. Schreiner said that this vessel drew 16 feet, and discharged 300 tons.

Witness said he only took notice of sailing ships. He admitted that he was bound to go to another place if it was safe. He could not go from the first mooring without an order from the Harbourmaster. He never got an order. He was only asked the question whether he would go to the other place. The Kornmo was moored when the damage occurred. He could not say whether it was properly moored. There were no proper chains and anchors provided by the Harbour Board on the north side of the South Jetty for mooring a vessel at that time. The

chain and the anchor provided were not strong enough to hold witness's vessel when the north-easter was blowing. Witness had not seen sailing vessels placed on the south side. Asked as to whether the expenses of being towed in and connected with shifting the berth were offered to him, witness said he was told nothing about expenses.

Re-examined by Mr. Searle: The question of expenses was not raised.

By the Court: During that time there were 14,000 or 15,000 tons discharged in the Bay from sailing vessels.

Further evidence taken on commission was read.

For the plaintiff, the following witnesses were examined on commission:

William Messina, launch proprietor, deposed that he had been at Port Elizabeth for forty years. The usual method of discharging was into lighters, which discharged at the jetties afterwards. It was exceptional for vessels to discharge at the jetty, although they occasionally did so. It was not customary for vessels between 600 and 800 tons to discharge there. It was dangerous to discharge alongside in bad weather, and in ordinary weather it was dangerous—more dangerous, he thought, to an iron than to a wooden vessel. He had frequently seen vessels damaged at the jetty while discharging there.

Carl Wellhoefer said he was master of the S.S. Shamrock, a vessel specially engaged for taking cargo from vessels in the harbour and discharging it at the jetty. The Shamrock had frequently been damaged whilst so discharging. He did not consider that the jetty was a safe place for a ship to discharge at.

Emil Shronsén, master of the Norwegian barque Copeland Island, said he did not consider the jetty a safe place for a vessel to lie alongside. While there, in September last, his ropes broke three times forward and once aft, because of the swell. He would not go back again unless he was guaranteed against risk.

William Hoseason, retired master mariner, said he had practised as a marine surveyor at Port Elizabeth since 1884. The general mode of discharge was into lighters. Small vessels (400 to 500 tons) discharged at the jetty. There had been two or three large vessels discharged there. The Glen Ida came there to finish about half a day's work. She got damaged on her quarter. A Norwegian barque—Viking—was damaged, as also was the Umyoti, and the damage was

reported to him as having occurred at the jetty.

Mr. Searle closed his case.

For the defence, the following witnesses' evidence was read:

Samuel Harrison Palmer, marine surveyor, and master mariner, residing at Port Elizabeth, said that vessels could lie alongside the jetties in safety in fine or moderate weather. The only drawback was the draught, but the Harbourmaster would ascertain that. Witness's firm had had a 4,000-ton steamer of the Clan Line alongside the jetty, and she did not suffer any damage. The appliances for mooring vessels were good. It was more frequent of late for vessels to go to the jetty to discharge; it was nearly a daily occurrence now. He only knew of one vessel having been damaged when alongside the jetty. This vessel injured her quarter by bumping the bollard. The bulk of cargo was discharged by lighters.

Evan George, master of the barque Antarctic, 615 tons, said his vessel had discharged about 300 tons alongside the South Jetty. The weather was between fine and moderate, with a bit of a swell. He considered it was safe for him whilst there, and, in similar weather, for other vessels also.

Wm. Pringle, managing director of the defendant company, said that Captain Olsen declined to go alongside the jetty, saying that the jetty was not in Algoa Bay, that he ought to have been asked before, and that he considered it dangerous, and not according to the custom of the port. Deponent agreed to pay Olsen's men 5s. a night each in order to get the ship lightered to meet the Harbour Board regulations. They got her down to the proper draught for the jetty, and witness went on lightering, knowing it would be a long time before the vessel's day turn came, but the captain told him definitely on the 6th August that his men were no longer available at night, although they were not discharging in the day time. Witness saw the captain of the Rathlin Island daily, and never until before the Commissioner had he heard of any damage to her. He had no recollection that the Anita was damaged at the jetty while discharging.

William Macintosh, chairman of the Port Elizabeth Chamber of Commerce, said that the two jetties were lengthened by the Harbour Board not long ago, one of the main objects being to enable vessels to go alongside to discharge instead of discharging in the anchorage. In his opinion, the discharge of vessels alongside the jetty had become a

William Edwin Clift, Marine Superintendent to the Harbour Board of Port Elizabeth, said that in his opinion a vessel such as the Ingrid could lie at the jetty in safety in fine or moderate weather if the draught was not more than 15 feet 6 inches. He considered it was a custom for vessels to discharge at the jetty.

Alfred Charles Harding, Assistant Marine Superintendent, gave similar evidence. He put the Viking and the Umvoti at the jetty, and had heard of no damage to either.

Mr. Schreiner then called

Ernest Bertram Beck, who said he was Harbourmaster at Port Elizabeth, and had been in that office since April, 1900. He had been associated with the port from February, 1889. There were two jetties, the North Jetty and the South Jetty. The former was the older jetty, used for the mooring of vessels, and was extended in 1894. The South Jetty was then a small jetty, supplied only with steam cranes. This year the South Jetty became the principal jetty to which vessels were moored. It had been customary for vessels to go to a jetty since 1891. The South Jetty was well fitted with appliances for mooring vessels. The appliances were there before August. The north berth was preferential. There was a 49-cwt. anchor 600 feet ahead, and two other anchors 300 feet apart, with chains. A sailing vessel could work there in a south-easter with safety. The head moorings and chain would hold any ship practically that ever came to the jetty. With the south-east wind the whole strain came on one part of the jetty, and to relieve this strain vessels were taken out when dirty weather threatened. Witness had prepared a return (produced) showing the work done at the jetties for the last ten years. During the present year there were many vessels of greater draught than 15 feet 6 inches, and several sailing vessels of 15 feet 6 inches or more. The depth was 20 feet 3 inches at 300 feet in at low water, spring tides. (Mr. Schreiner put in a notice published in 1891, stating the limitations for vessels which desired berths. The draught was limited to 15 feet 6 inches.) Witness said the draught was the main thing in regard to sailing vessels. The agents for the ships were responsible for towage charges. By the custom of the port, the charges, as a rule, were borne by the consignee unless otherwise specified. The ballast was 2s. a ton cheaper at the jetty than at an outer anchorage. Taking this into consideration, the charges were less

anchorage. The Shamrock and Eberstein were used as lighters. They were meant to be bumped, as they lay alongside ships or alongside the jetty. The Harbour Board had a printed form which masters or agents had to sign if they wanted to take a vessel from an outer anchorage to the jetty. It was a recognised mode of discharge at the port of Algoa Bay to discharge at the jetty. With ordinary seamanlike care there was no serious danger to a ship of 600 or 800 tons drawing 15 feet 6 inches at the jetty. Witness had no knowledge of damage being done to the Glen Ida. Witness fancied the witnesses were mistaken in the vessel, and meant to refer to the Barrosa, which, when being towed in calm weather, was damaged. Witness knew nothing of the supposed damage to the Umvoti or the Viking. Witness had never heard about damage to either of these vessels. If damage were caused by the jetty witness would certainly hear of it. As to the Copeland Island, that vessel was lying 100 feet off the jetty practically the whole day. He knew nothing about the Anita. If the captain had not refused to come alongside on the 4th August witness could have provided a berth. If two hatches could be worked the discharge of the cargo would probably take two days. If one hatch were worked it would take about three days. There was practically no bad weather between the 1st and the 14th August. The plaintiffs' vessel could have come in at any time between those dates, except on the 5th August.

Re-examined by Mr. Searle: Witness would not, except under special circumstances, act as a surveyor. Witness would not say of every vessel which had been damaged when reported to him. Witness had prepared a list showing vessels which had been reported to him as having been damaged, which he had seen. In the case of the Anita, the Harbour Board had paid £25. The Eberstein was damaged at least half a mile from the jetty, when being towed away, no claim had been made. The Kornmo was damaged when being made fast. The jetty could be used in any weather except a heavy breeze from the south-east. There was no vessel lying at the jetty when a fresh breeze from the south-east was blowing. Witness handed in a list of the vessels which entered the port during the last seven months. During the last few months the Eberstein and the Shamrock had been acting as lighters, discharging at the jetty. More than 100,000 tons were discharged from the jetty since

At present nearly 100,000 tons a month were discharged, the Shamrock and the Eberstein discharging about one-tenth of the quantity. The rule of the port was that a tug must stand by a vessel at the jetty during the night.

By the Acting Chief Justice: If a heavy swell or wind came up during the night the tug had to tow the vessel out.

Re-examined by Mr. Schreiner: In 1891 the Anita and the Catherine Marie sustained certain damage. In the case of the Anita the damage was done in her coming alongside the jetty. The tug brought her in in such a way that she came in contact with the jetty. He did not know how the Catherine Marie was damaged. He would infer it was from being brought alongside. He remembered the case of the Magda. The captain asked permission to remain alongside throughout the night. It was then the custom for vessels to go out during the night. Witness granted the permission on condition that additional hawsers were put out. This was not done, and next morning 25 inches of iron were torn off the jetty. In 1895 a Norwegian barque struck the ground at low water. Her draught was 18 feet. She struck very lightly and was got off. In 1896 the Gainsborough, an old-fashioned sailing vessel with broad channels, was brought alongside the jetty, and caught in the piles. Between 1896 and 1901 he had no record of any vessel being damaged. In 1901 the Kornmo was damaged in being brought up to the jetty. There was no exceptional danger in the piers of Port Elizabeth, more than there was in the piers of other places. Appliances had been introduced to guard against danger. They were not there before 1896.

By Mr. Justice Maasdorp: Witness did not agree with Captain Cliff's evidence on some points. He considered a vessel could be alongside the wharf during a fresh breeze. He did not think there was any risk in a south-east breeze, but he would never attempt to bring up a vessel in bad weather. If there was a big swell a vessel drawing 15 feet 6 inches would be liable to bump in 18 feet of water. Soundings were taken every spring tide, and up to last month it had never been less than 20 feet 3 inches.

Charles George Elliott deposed that he was a partner in the firm of Innes and Elliott, attorneys (of Port Elizabeth) for defendant. He led the evidence taken on commission for the defence, and Mr. Chaband was attorney for the plaintiff.

alongside the jetty. It was agreed that this was unnecessary, and that the pleadings would be taken as notice given.

Mr. Searle, K.C. (for plaintiff): The point is what is a reasonable construction of the charter party between Wills and Co. and Cave and Co., of Adelaide. Four ports are named therein, viz.: Cape Town, Port Elizabeth, East London, and Durban. The lightering spoken of in the charter party was merely to enable the vessel to come into port. That does not apply to Port Elizabeth, as there the only harbour is an open roadstead, and no lightering is necessary to enable vessels to enter that. The clause "as customary" governs the whole contract. At Port Elizabeth the custom is to discharge by lighter. Even now, only one-tenth of the cargo landed at that port is discharged at the jetty. It is on evidence only one-tenth of the cargo landed at that port is discharged at the jetty. It is on evidence that a vessel like the *Ingrid* would have been exposed to danger had she gone alongside the quay, but quite independently of that consideration, I wish to call attention to the two points: (1) that the charter party spoke of the customary usage of the port; (2) when the ship had once dropped her anchor she was not bound to shift to another berth. She could not have gone to the jetty when she came in, as she then drew 15 feet 6 inches. Now, it is contended that the ship was bound to discharge part of her cargo at one place, and then to go elsewhere to discharge the remainder. The defendants contend that the vessel was bound to lighter to enable her to enter the port. That was not so. She had already arrived at the port, but could not get to the wharf. Her obligation was only to deliver her cargo as customary, and she could not be sent from pillar to post when she had discharged a part of her cargo. Very few sailing vessels come to the jetty at Port Elizabeth. The size of the vessel must be considered. We have figures as to the vessels which have come in to the jetty. In 1901 there have been four steamers and no sailing vessels. In 1900 there were four steamers and no sailing vessels of tonnage similar to that of the *Ingrid*. In 1899 there were eleven vessels in all. In 1898 there was the *Viking* and some smaller vessels; the largest was the *Anita* (322 tons). Meanwhile hundreds of other sailing vessels were discharged in the Bay. The charter party was entered into in October, 1900. At that time no vessels dis-

port was then to discharge by lighter. Charterers cannot order a ship to be moved from one place to another unless so provided by a clause in the charter party. Here the charter party only provided that the vessel was to be discharged according to the custom of the port, and the customary mode of discharging at Port Elizabeth is by discharging in the bay.

[Maasdorp, J.: Suppose the quantity of shipping in the bay does not admit of the vessel being berthed at the quay, cannot she be afterwards ordered to remove thither?]

The charterer cannot insist on one part of the cargo being delivered at one place, and the remainder elsewhere. See *Carrer on Merchant Shipping* (p. 500, sec. 448, last edition, and p. 224, sec. 196); also *The Alhambra* (6 Prob. D., 68). Here they want us to go to the wharf after lightering in the bay. They have no right to demand this. *Shield v. Wilkins* (5 Ex., 304). That case, it is true, refers to loading, but the principles applicable to loading and to discharging are analogous. See also *General Steam Navigation Co. v. Slipper* (11 C.B., N.S., 493); *Reynolds and Co. v. Tomlinson* (1 Q.B.D., 1896, p. 586. That is a very recent case, a very strong case, and quite applies here.

[Maasdorp, J.: How can discharge at the quay be customary if the place is not safe to lie at?]

Exactly, and that cuts away the whole defendant's case. In the case of Table Bay to "discharge as customary" might mean partly in the bay and partly at the jetties. *McAloney v. Spilhaus* (11 Sheil, 509.) Assuming we had to deal with a port where both modes of discharge are customary, as at Table Bay, there might be something in the defendant's contention; but this is not the case as regards Port Elizabeth. Even the evidence of defendants' own witnesses shows that it is not always safe to lie there at the jetty. This is sufficiently shown by the rule that a tug had to stand by sailing vessels berthed there.

[Maasdorp, J.: But does that affect the question of the custom of the port?]

No number of large vessels go to the quay. Small vessels are not exposed to great risk. But if some people are willing to take the risk, it does not follow that all are bound to do so.

[Buchanan, A.C.J.: What was the draught of the *Ingrid*.]

Seventeen feet three inches.

laden. When ordered to go in, she drew 15 feet 6 inches.

[Buchanan, A.C.J.: The captain says that on the 8th of August her draught was 15 feet 3 inches?]

But when she came in, it was 17 feet 3 inches. The evidence for the defendants shows that with a fresh south-easterly wind the place is not safe; and Captain Harding could not contradict this statement. A jetty in an open roadstead is not a safe quay. The Formax was damaged even while the Ingrid was waiting to go in. The captain, however, was willing to go in if he were offered an indemnity. Messina, who had known the port for 40 years, said it was dangerous for vessels to go alongside the jetty.

[Buchanan, A.C.J.: The vessel could not lie at the jetty if a fresh south-easterly wind is blowing.]

But the wind may freshen in the course of a few minutes. We cannot compare an open roadstead with the Cape Town Docks. My points are: (1) It is admitted that the ship could not come to the jetty without discharging some part of her cargo. (See *Pringle's Evidence*.) (2) According to the charter party, the vessel was to discharge "as customary." (3) This is not such a wharf as an iron sailing vessel (the most dangerous class of vessel) could lie at with safety.

As to damages, the demurrage was 4d. per ton, which would amount to £12 10s. per diem for 10 days. This is a clear case of demurrage. See *Carver's Carriage by Sea* (p. 609).

Mr. Schreiner, K.C. (for defendants): With regard to the charter party and the construction thereof, it has been argued for plaintiffs that the clause as to discharging at a jetty does not apply to Port Elizabeth. As, however, it is one of the four ports named, it would be very strange if it were to be excluded in interpreting this clause.

[Buchanan, A.C.J.: The custom of each of these four ports may be different.]

I shall come to the custom of the port later. The ship was bound to deliver her cargo as ordered. On July 24 she was ordered to deliver alongside the jetty. On July 25 she refused to do so, and then as a *pis aller* we sent out lighters. We were quite within our rights in insisting that a vessel with a draught of 17 feet 3 inches should discharge at a jetty where there was 20 feet 3 inches of water. It is quite possible that there may be two customary

modes of discharging at the same port. *McAloney v. Spilhaus* (11 Sheil, 509). From 1891 to 1901 sea-going ships have discharged at the jetty at Port Elizabeth; 240 vessels have so discharged, and one-tenth of the entire cargo now landed at that port is so discharged. If a ship drawing 15½ feet may be ordered to discharge at the jetty, my case is made. It is true that the evidence on this point applies mainly to steamers, but sailing vessels of 17 feet draught have been berthed at the quay even in the present year. Even if some of the cargo had been discharged, provided we do not delay the counting of lay days, or charge the master with the expense of moving, we can send him to any safe place we name. It would be absurd to say that if some 20 tons of cargo had been taken out of the ship, we could not order her to go elsewhere. The master, however, would not move unless he had a guarantee against danger. The whole question therefore narrows itself down to this: "was there danger to the ship at the jetty?"

[Buchanan, A.C.J.: He refused to go alongside because he did not consider it a safe place?]

No, he refused because he did not consider it his duty to do so. As to custom of the port, see *Scrutton on Bills of Lading* (p. 19), citing *Postlewaite v. Freeland* (5 Ap., 616), *Hudson and Others v. Clementson and Another* (18 C.B., 213), and *McAloney v. Spilhaus* (11 Sheil, 509), and *Carver's Carriage by Sea* (Ed., 1885, Art. 459). In case of a "general ship," the place of discharge is at the option of the owner, but in the case of a chartered vessel, it lies with the consignees. *The Felix* (Law Rep., 2 Adm., 273) and cases cited in the judgment in that case.

[Maasdorp, J.: In this case the master was ready to go to any place which was safe. In the case you have cited the master insisted on going to a certain specified place.]

[Buchanan, A.C.J.: I do not quite see how that case is in point.]

I submit it is very much in point. I am now arguing on the custom of the port. We admit that we are chargeable in respect of the lay days from June 24, and also that we are liable for all expenses incurred in moving the ship to her new moorings. See paragraph 1 of the port regulations of 1895, which are still in force, under section 33 of Act 36 of 1896. The master was bound to obey any reasonable order of the charterer as to the place of discharge. It

is no argument to say that his insurances would not cover risks at jetty. My second point is as to where the ship could safely lie. See *Carrer on Carriage by Sea* as to safety (p. 429, art. 449), citing *Smith v. Dart* (14 K.B.D., 105). Safety is a comparative term. Seafaring occupations are always more or less dangerous, and the degree of safety must depend very much on the nature of the port. In *Smith v. Clark*, the judge directed the jury as to what constituted a safe loading place, and the Court of Appeal did not reverse the judgment on the ground that this direction was erroneous. Here some 240 ships have come into the jetty, and some five or six only have been damaged—in most cases owing to their own negligence. In this connection I would like to refer to the evidence taken on commission. We all admit that it is dangerous to move a ship in Algoa Bay in bad weather, but the point is, is it dangerous to moor a ship, which has once been moved to the north side of the south jetty? Was it reasonably safe for a vessel to lie there if all reasonable precautions were taken. Of course, there is always a risk in moving a ship, but the legal point is, was there an unreasonable risk? Clift's evidence all turns on the danger of moving a vessel. Palmer (a man of great experience) said he would consider it dangerous to work a ship on a stormy day, but then a tug was in attendance, and the ship could always be towed out. Plaintiff claims demurrage; the *onus* therefore of proving that claim is cast upon him, and in order to prove it he must show that he was not bound to obey the orders of the consignees. Surely it could not be said that the vessel would be unsafe if she were towed out the moment the weather became rough. Either the consignee was liable for any damage the ship might sustain at the jetty or not. If he was liable, what was the use of asking him to furnish a guarantee that he would make good any damage he was legally bound to make good; if he was not liable, where was the justice of demanding such a guarantee. Captain Beck was a disinterested witness, and his evidence goes to show that for many years the discharge of vessels at Algoa Bay had been carried on under illegal conditions. It has been contended that the clause of the charter party "always afloat" does not necessarily mean "always afloat in the same place." *McAloney v. Spilhaus* shows that this contention is perfectly sound. The case of

"*The Curfew*" (Prob. D., 1891, p. 131) is in point on this question, and this distinction strikes at the root of the argument for plaintiff founded on the cases therein cited. No evidence has been given in this case of any actual damage having accrued to a single rivet of the ship; and the regulations of July 7, 1900, were then in existence. If the custom of landing goods at a jetty at Port Elizabeth has obtained, it does not matter whether that jetty is the north or the south jetty. So again the number of ships discharging at the jetty is quite immaterial as long as we can prove the custom. Messina could only say that one ship had been damaged, and the only knowledge he had of this fact was from a photograph of the said ship. He did not know her name, the circumstances of the case, or anything about her. Again, the size of a ship is quite immaterial provided she can "lie always afloat." In 1901 a vessel drawing 18 feet went alongside the jetty, and also one of 17 feet. The *Ingrid* drew 17 feet 3 inches before she was lightened. See *Neilson v. Wait* (14 Q.B.D., 516). It was argued for plaintiff that there was no proof of any custom of lightening at Algoa Bay.

[Duchanan, A.C.J.: Not in order to enter the port, but the vessel had entered the port.]

We must interpret the words "to enter the port" so as to apply them to Algoa Bay. I admit that the word "enter" is against me; but here *enter the port* meant enter the place of anchorage, the jetty at the port. I ask to have *Algoa Bay* put on the same footing as the walls of the Buffalo River. See *Neilson v. Wait* (14 Q.B.D., 521), in which *Carrer v. Wallace* (5 Q.B.D., 166) was cited. *Carrer on Carriage of Goods by Sea* (art. 1) treats of the obligation of the ship to lighten. In the case of *The Alhan*, cited for the plaintiff, she was obliged by her charter to go into Lowestoft port, and therefore could not be compelled to lighten in Lowestoft Roads. In *Neilson v. Wait*, a ship had to lighten one-fifth of her cargo. In *Shield v. Wilkins*, another case cited (see *Carrer*, sec. 226), the charterer was bound to load a full cargo. The vessel could not load a full cargo inside the bay, hence she had to load a portion of it outside, hence this case is not in point. The case of the *General Steam Navigation Co.* (11 C.B.N.S.; see *Carrer*) lays down the converse of the principle enunciated in

Shield v. Wilkins, but this again does not affect the present case. It was argued for plaintiff that the word *demurrage* was sometimes used in a loose sense; but see *Scrutton and Schuller v. Thomson, Watson and Co.* (5 Juta, 97) as to damages for detention and demurrage. See *Myburg v. Protecteur Co.* (Buch., 1878, p. 152). With regard to the safety of the jetty, the fact speaks for itself, that out of some 240 vessels which had discharged there, only some six had been injured, and in most cases these injuries were due to the negligence of these vessels themselves.

Mr. Searle (in reply): I do not admit that lightering may be demanded by the consignees at Port Elizabeth, because it could be demanded by them at some of the other ports named in the charter party. The contract must be interpreted according to the special circumstances of each port. The real legal point is, can a vessel be compelled to move from one place to another unless such moving is proved to be in accordance with the custom of the port in question? The clause in the charter party, "where the ship can safely lie (always afloat)," refers to a fully-laden ship. *Scrutton on Charter Parties* (Art. 37, p. 88, 4th Ed.), citing *Allen v. Collart* (11 Q.B.D., 782). At pp. 89 to 91 *Scrutton* discussed the cases cited for the defendant, and holds that they are bad law. If it be urged on behalf of defendant that the only order given to us was to go to the jetty *Allen v. Collart* (11 Q.B.D., p. 782) is dead against them. As to what is customary, see *Scrutton* (pp. 247 and 248). Customary means that which is in accordance with a custom universally followed at a certain port. *Hillstrom v. Gibson* (15 Scot's L. Rep., p. 6, cited in sec. 449 of *See v. v. v.*). The case of *Neilson v. Wait* is which *Wait* is inconsistent with the decision in the case cited. "*Alhambra*," and *Scrutton* says it is not an art. law. No doubt *Neilson v. Wait* does the ship to the ambit of the port, but that *The Alhambra* is disapproved of by the latest English writers. Again, this jetty was not a safe port, see "where the ship could safely lie" *Wait* v. *Wait* see *Scrutton* (Art. 34, p. 83). The of her cargo of the "*Alhambra*" is in plaintiff's case cited, because in that case the ratio of the charterer was that the vessel could lie safely in the dock the whole time. Captain Beck's side the ship is admittedly defective, and therefore of it no argument can be founded on that point. *Wait v. Dart* (14 Q.B.D., 105) was a jury case, and there it was held that under circumstances a steamer with steam engine in

up lying at a quay might be safe, but it does not follow that a large iron sailing ship would be safe at the same place. Lastly, it is admitted that the words "as customary" govern the whole contract, and it has been abundantly shown that it is not "customary" for sailing vessels of this size to discharge at the jetty at Port Elizabeth.

Buchanan, A.C.J.: The plaintiffs in this case, the master and owners of the barque *Ingrid*, entered into a charter party at Adelaide in October of last year, by which they undertook that their ship should proceed to a South Australian port, there load a cargo of wheat, and bring the same to a South African port. The ship arrived in Algoa Bay, and reported herself on the 24th June. It is common cause between the parties that on that day the lay days referred to in the charter party began to run, and that those lay days had expired before the cargo was discharged from the ship. The question at issue is, whether or not demurrage is payable for the detention of the ship. The declaration sets forth that the defendants repudiate liability to pay plaintiff's claim for demurrage on the ground that the plaintiff refused to bring his vessel alongside the jetty in order to discharge the cargo there. The plaintiff admits that he refused to bring his vessel alongside, but justifies the refusal on the ground that it was not the customary mode of discharge at that port; and further, that the jetty was not a place where the vessel could safely lie. The defendants say that, had the vessel obeyed orders and gone to the jetty, she would have been discharged within the lay days, and that therefore they are not liable for the demurrage. There are two clauses in the charter party which need more particularly to be noticed, and in the first place the second clause. This clause contains a number of stipulations, each of which must be taken by itself. Those not material in this case I will summarise. The first is the ship is to be staunch and tight; then that she shall proceed to the specified port with all convenient speed; then to take on board a cargo of wheat or flour; and then comes this clause, "and being so loaded, the ship shall forthwith proceed as ordered by the charterer direct to Cape Town, Algoa Bay, East London, or Port Natal, one port only, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary, to allow the ship to enter at all times of high water such port, according to its

custom." The lightening here spoken of is clearly such lightening as is necessary to enable the ship to enter the port. Certain four ports were named in the charter party, at some of which there is an outer anchorage and an inner port, but at others there is not. At Algoa Bay, the port of delivery decided upon by the charterers, there is only an open roadstead where the ships lie, and where they discharge cargo. Then comes this stipulation, which is the one upon which this case turns: "And there (that is at the port) deliver the cargo agreeably to bills of lading, and as customary, from ship's tackle into any vessel, or at any wharf, dock, or pier where the ship can safely lie (always afloat), as ordered by the charterers or their agents." The first question we have to consider is what is the custom of the port of Algoa Bay, or as it often called, Port Elizabeth. There are two means by which cargo is discharged at Port Elizabeth. One is by lighterage in the open roadstead, and the other is that when cargo is carried in a certain class of vessels these vessels are sometimes brought alongside the pier, and there discharge their cargo. From the evidence, it is plain that a ship would not as a rule be allowed to go alongside the jetty drawing more than 15 feet 6 inches of water. The Ingrid, when she arrived laden, was drawing 17 feet 6 inches. Before any cargo was discharged at all, some direction or order was given to the captain by the charterers to come alongside the jetty and discharge, but from the first letter which has been put in, written by the secretary of the defendant company, it would appear that this was to be done only after the ship had been partly discharged and sufficiently lightened in the open roadstead to draw only as much water as would enable her to go alongside. As the ship was when she arrived, it is not contended for by the defendants that she could then be ordered to go to the pier. Now as to the custom of discharge at Port Elizabeth, the evidence of the first of plaintiff's witnesses, who was examined on commission, Messina, is that vessels do come alongside the jetty occasionally to discharge, but it is exceptional for them to discharge there. He says it is not customary for vessels over six or eight hundred tons to discharge at the jetty; it is the exception for them to come in. Then again Captain Palmer, who was called for the defence, says that all vessels whose draught would allow them to go to the jetty to discharge, do not go there to discharge, nor does the majority of such

vessels go there. He says that as agent for a number of vessels trading to the port, he did not send those vessels there to discharge. Then there is the evidence of Mr. Clift, who is an official of the Harbour Board at Port Elizabeth. He says that the number of vessels discharged at the jetty has increased lately in consequence of the pressure of work; it was the exception previously for vessels to come alongside, mainly because they had no accommodation at the jetty. I would not say that there was no custom at Port Elizabeth for a certain class of vessels to discharge at the jetty, for the returns show that a number of smaller craft of light draught have done so during the past ten years. If the plaintiff's vessel had been one of the class of vessels which occasionally discharged at the jetty the question of such a custom might require to be considered. But on the evidence it is not the custom at Port Elizabeth to discharge ships of the size of the plaintiff's vessel alongside the jetty. One or two such vessels may have discharged cargo there, but the general rule is to unload such vessels in the roadstead. It is said the plaintiff's vessel could have gone in after discharging a portion of her cargo, and so reduced her draught to 15 feet 6 inches. Here again it is a question whether there prevailed any such custom at that port. I am unable to find any evidence that vessels of a larger draught than could safely come alongside can be ordered to discharge so much of their cargo as would lighten them sufficiently to reduce their draught, and then to go alongside the jetty. Not one instance of such a course having been adopted has been shown. There is a great deal of force in Mr. Schreiner's argument that when you have once arrived at a port, it would be reasonable to order a ship to move from one berth to another at the expense of the consignees. But whether that is so or not need not be decided in this case. The English authorities seem at conflict on the point. The position which the plaintiff took up was this. He said, "You cannot compel me either by custom or by charter party to come alongside this jetty, but now that I have been lightened, I have no objection to do so, as I want to oblige you, but you must take the risk, because I do not consider it a safe place." Even assuming that there was a custom that vessels of this class and of this draught of water could be compelled to go alongside the jetty, the question would still remain whether it would be a safe place for a vessel of this description. The port of Algoa Bay is an open

roadstead, and this jetty is not a jetty in any dock or enclosure, but a pier running out from the shore into the open roadstead. The evidence given in this case amounts to this: that in fine or moderate weather vessels of sufficiently light draught can be taken alongside the jetty and discharge there if there is not a heavy swell or a south-east wind blowing; and it is admitted that a south-east wind is of frequent occurrence in Algoa Bay. If a south-east wind or heavy swell comes on it is not safe to allow these vessels to remain there. It is said that it is not safe for the jetty rather than for the vessels, but it follows that if it is not safe for the jetty it certainly cannot be said to be safe for the vessels moored alongside. The Harbour Board by their regulations seem to contemplate the fact that this jetty is not safe except in smooth weather, for they keep a tug with steam up all night in attendance upon any vessel moored there for the purpose of towing her out at once should a change of weather arise. The condition in the charter party that the vessel was to discharge at a place where the ship could safely lie, always afloat, must, I think, be taken to be a place where the ship can generally safely lie, and not a place where the ship could only occasionally safely lie. It is not the rule that a ship can always lie there; it is rather the exception. The conclusion I have arrived at on the question of custom is, that it has not been proved that it is the custom of the port to lighten vessels with a large draught and then to order them alongside the jetty; and on the question of fact I do not think it has been proved that this is a place where a vessel can safely lie within the meaning of the charter party. This being so, the defendants were not justified in ordering the captain to take his vessel alongside the jetty. The only question remains as to the judgment to be given in this case. The lay days are fixed by the charter party at fifty, and there is also a clause in the charter party providing that if the ship be detained ten days longer demurrage shall be payable at the rate of 4d. per ton, which amounts to £12 10s. per day. There is no provision for any demurrage beyond these ten days. The declaration in this case claims only the demurrage, and anything beyond the demurrage provided for in the charter party must in strictness be a question of damages and not a question of demurrage. Defendants' counsel has insisted that the judgment should be confined to this limited period; and the claim of detention beyond the ten days could not well be

adjudicated upon without an amendment of the pleadings. The action was instituted very shortly after the ten days expired, and that is another reason for not going beyond the ten days. In giving judgment in this case, while holding that the plaintiff is entitled to demurrage, we must limit the judgment to ten days' demurrage, viz., £125. The decision of the Court upon the dispute may have the effect of inducing the parties to come to a settlement of the damages; but the question of damages is not the question raised in this case, and cannot be decided by our judgment. The plaintiff may be able to show damages at a greater rate than 4d. or the defendants may be able to show that the damages are much smaller. In the absence of any direct evidence, the Court might be justified in taking the damages at the rate fixed for demurrage, but that is a question outside of what we have now to discuss. We must limit our decision to the demurrage claimed in the declaration, and the judgment of the Court will be for £125, as demurrage under the charter party for the ten days from the 14th to the 24th of August with costs. It must be distinctly understood that any question of damages after that date is not affected by this action.

Maasdorp, J., concurred. His lordship said that in argument in this case several questions had been raised which might have been necessary to decide, but on which, in the view he now took, it would not be necessary to give any decision. The points were whether, after a vessel had arrived in Port Elizabeth, and had commenced to discharge, it would be within the power of the consignees or the charterers to require that she should be shifted from her berth to a more convenient place for the benefit of the charterers or the consignees. That question it was not necessary to decide now, and he understood from the evidence that the master would have been prepared to go to some other place which he would have thought a proper one. Then there was the question raised as to who was to choose the berth. That also did not arise, nor did the question as to the power of the charterers to call upon the master to allow his ship to be lightened. All these points were now beside the question. The only question upon which the case turned was whether the master was prepared to discharge the cargo in the customary manner, and whether he was prepared to go to a place where he was ordered to go, and where his ship could safely lie. As to the

question of custom, it might be quite customary for a certain class of vessel to go to the jetty. The question was whether it was customary for vessels of the size and draught of the Ingrid. By established practice and looking through the evidence as to the practice, he thought that the utmost extent to which the evidence went was to show that ships below the number of six had been known to be taken to the jetty of the size and draught of the Ingrid. Under these circumstances, it would be impossible to say that custom had been proved in reference to vessels of that description; and it was impossible to establish such custom, looking at the regulations of the port, in which it appeared that vessels only of a certain draught could be taken to the jetty, and he should say that the Ingrid was beyond the limit laid down. Although the size was given as 800 tons, still the draught given was 15 feet 6 inches, and the draught of the Ingrid when she went into port exceeded 17 feet. So far as any custom was established, he considered that the vessel was absolutely excluded. As to the berth being a safe place, the evidence showed that it was safe for a vessel to lie there under certain circumstances, which he would say were exceptional circumstances. He took it that a vessel should be able to lie safely there during the normal conditions of the port, and during weather fair or foul, of an ordinary degree. The evidence amounted to this: that she might lie there safely when the weather was fine, but none of the witnesses went further than to say that she could lie there safely when the weather was fair or moderate. It was also said that the swell would make it dangerous for a vessel, and it was well known that there was frequently a swell in the Bay when the weather might even be said to be fine, and, certainly said to be moderate, and during that heavy swell vessels of this size could not safely lie. Therefore the master of this vessel was justified in refusing to take his ship to a place where it could not safely lie during the time of the contemplated discharge, which, in all probability, would have taken several days.

Buchanan, A.C.J., said that plaintiff must be allowed his expenses, but was not to have the costs of the commission so far as his evidence was concerned. Judgment would be for plaintiff for £125 demurrage, with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl and Buissinné; Defendants' Attorney, Mr. G. Trollip.]

CLARKE V. JACOBSON.

Mr. Buchanan appeared for the plaintiff, Mr. Gardiner for the defendant.

Mr. Gardiner said that his learned friend, Mr. Wilkinson, was briefed in this case, but was unwell. He (Mr. Gardiner) had only had the brief handed to him that afternoon, and applied that the matter should be allowed to stand over. Defendant would pay the costs of the day.

Mr. Buchanan said that he did not object if defendant paid the costs of the day, and if the Court could fix a day this term.

The Court ordered the case to stand over, Buchanan, A.C.J., stating that a day would be fixed for the hearing of the case subsequently.

NORBYE V. DU TOIT. (1901). (Nov. 20th.)

This was an appeal from a decision of the Resident Magistrate of Stellenbosch, before whom the appellant sued for £1 7s. 10d., the value of certain ceiling boards and rafters belonging to him, and which he alleged defendant had removed from a certain building. This building was a house which belonged to the plaintiff, and in which he left a number of ceiling boards and rafters in the custody of a woman named Daniels. Then he sold the house to a Mrs. Entress, and the latter entered into a contract with the defendant (present respondent) to do certain carpentering work. In the course of this work defendant took some of the wood belonging to the plaintiff, and used it for the carpentering work. Defendant set up the defence that he did so on instructions given him by Mrs. Entress to use this wood, Mrs. Entress saying that she would make it right with the plaintiff. Mrs. Daniels said that some of the wood was removed by defendant's son, whom she told it belonged to plaintiff. The Magistrate found on the facts that the wood was left in the house by plaintiff, and that defendant used it. He believed defendant when he said that he acted on instructions from Mrs. Entress, and therefore he held that defendant was not liable.

The summons called upon Daniel J. du Toit, of Gordon's Bay, to show cause before the Court of the Resident Magistrate of Stellenbosch why he had not paid the sum of £1 7s. 10d. to Torvald Norbye, which the plaintiff complains that he (the defendant aforesaid) owes him (the said plaintiff), being the value of certain goods, the property of the said plaintiff, removed by the said de-

defendant from the building lately belonging to Mrs. Entress in or about the month of May, 1900.

The record of evidence stated that Mrs. Entress was dead. Plaintiff stated that defendant, after he used the boards, asked him to send a specified account, and he would pay it. Afterwards he said he took only four ceiling boards.

The Magistrate gave judgment for the defendant with costs.

His reasons were as follows: "From the evidence I was satisfied that the ceiling boards and rafters were left in Mrs. Entress's house by plaintiff, and that any of the material used by defendant was used under the instruction of Mrs. Entress."

Mr. H. Jones (for the appellant): The Magistrate mistook the law. No doubt the defendant did use these boards, and plaintiff should be compensated. Mrs. Entress gave him leave to use them, but she had no authority to give such leave. He could only say that he was acting as her servant, and if so, he was a joint tort-feazer, and as such was liable *in solidum*.

Mr. Benjamin (for respondent): If the summons had clearly set out the cause of action, possibly the plaintiff might have had a good case. The summons, however, does not claim these boards at all, but damages for the wrongful removal of these boards from the building. On such a summons we were entitled to succeed. Even granting that Mrs. Entress and the defendant were the tort-feazers; if one pays, the other is released. What evidence then is there that Mrs. Entress has not purchased these boards. It is true we cannot prove that she did, because she has been dead some months. Then again the delay in this action demands some explanation. The cause of action accrued in May, 1900, and it is only now that it is brought into court. Again, the summons charges us with having removed the boards, and now they attempt to show that we did not remove them, but used them. In his reasons the Magistrate absolves the defendant because he acted under the orders of Mrs. Entress. We have been taken by surprise, inasmuch as we have been called upon by the summons to meet one case, and quite a different case has been set up against us. The amount is very trivial, and appellant has stood by till our principal witness (Mrs. Entress) died. We used only three or four ceiling boards, and no rafters. The evidence did not support plaintiff's case, and the Magistrate acted rightly in dismissing plaintiff's claim.

Buchanan, A.C.J.: The plaintiff in this case had certain boards and rafters and other property which he left in possession of a Mrs. Daniels, at a house in which Mrs. Daniels was living and which belonged to a Mrs. Entress. Defendant, who is a carpenter, was engaged by Mrs. Entress to do some alterations to the house. These he did. He supplied his own material for this work, but afterwards Mrs. Entress wanted additional work done, and, according to defendant's evidence, she paid him wages for this work, and told him that he might use the material which she informed him belonged to the plaintiff. It is not as though defendant acted in ignorance. He took the property with full notice and knowledge that it belonged to the plaintiff. When the plaintiff spoke to him about it afterwards defendant said: "If you will send me an account, I will pay." Plaintiff sent an account, but it was never paid. Unfortunately for the defendant, Mrs. Entress had since died, but it was defendant's own act which brought this action upon him. The Magistrate says that Mrs. Entress ought to have been sued. It may be that Mrs. Entress would also have been liable, but there is no doubt that defendant is liable to the plaintiff, and ought to have paid the amount. The account sued upon is for £1 7s. 10d., but in this amount is included the price of two pots to the value of 3s. 6d. each, which defendant did not take away. The appeal will be allowed with costs, and judgment will be entered in the Court below for plaintiff for £1 0s. 7d., with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys, Messrs. Findlay and Tait; Respondent's Attorneys, Messrs. Reid and Nephew.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL CASES.

KNIGHT V. WEIDNER. { 1901.
Nov. 21st.

Mr. Percy Jones applied for provisional sentence on a mortgage bond for £650, which

had become payable owing to the non-fulfilment of certain conditions. Defendant was in default.

Order granted as prayed, the property being declared executable.

PARKER V. TWINE, JUNIOR.

Mr. Russell asked that this case should be allowed to stand over until the 28th inst. Granted.

WARD V. MAESS.

Mr. Benjamin appeared for the plaintiff, and applied for a decree of civil imprisonment in respect to an unsatisfied judgment for £14 6s. 10d. and costs incurred in regard thereto.

Defendant appeared and offered to pay £1 a month.

Mr. Benjamin agreed to this, subject to leave being reserved to move for an increase.

The Court granted a decree, but suspended it on payment of £1 per month, the first payment to be made on the 1st December, and thereafter on the first of each month. Leave was reserved to plaintiff to apply again.

ADLER V. KILIAN.

Mr. Buchanan moved for provisional sentence for the sum of £647 on a mortgage bond, and for specially hypothecated property to be declared executable.

Granted.

ESTATE OF SINCLAIR V. HAYWARD.

Mr. Buchanan applied for judgment for a sum of £66, being interest on a mortgage bond, and also for £2, being insurance premiums.

The Court granted provisional sentence, subject to the production of certain receipts for insurance premiums.

BURRELL AND CO. V. BURRELL.

Mr. Buchanan moved for the final adjudication of the estate of defendant.

Granted.

FALCONER V. CARBARUS.

Mr. Solomon moved for the final adjudication of defendant's estate.

Granted.

ILLIQUID ROLL.

HOGG V. MACKLIN.

Mr. Alexander moved for judgment, under Rule 329d, for the sum of £225 10s. 5d. Judgment was granted as prayed.

FORREST V. STAGMAN.

Mr. Russell applied for judgment, under Rule 329, for the sum of £67 12s. 10d., balance of account, with interest and costs. Granted.

REHABILITATIONS.

Mr. Russell moved for the rehabilitation of Louis Charles Thomas. The estate was sequestrated on March 11, 1895.

Granted.

Mr. Percy Jones applied for the rehabilitation of Henry Helm, whose estate was sequestrated on the 12th January, 1888.

Granted.

TEITELBAUM V. KATZ. { 1901.
Nov. 21st.

Partnership—Deed—Construction.

This was an application on a notice of motion calling on the respondent to show cause why the business carried on by them at the restaurant known as the Horseshoe Cafe, St. George's-street, should not be placed under liquidation and a liquidator appointed. The affidavit of the applicant was to the effect that on the 5th September, 1900, he entered into partnership with the respondent and one Jacob Weyl, for the purpose of carrying on business at the Horseshoe Cafe. It was provided by the deed of partnership that the partnership should be for a period of twelve months, reckoning from the 6th of September, 1901. *It was agreed that the partnership should continue for another twelve months on the same terms, if there had not previously been a dissolution.* It was further provided that if any partner wished to leave the business, he had the right to do so on a month's notice. The capital was £300, payable in equal shares. It was stipulated that, in case the parties did not agree, the party wishing to leave the business should give one month's notice, and that thereafter an accountant should be appointed, to whom the books of the partnership should be handed over, and who should make up a statement, taking into considera-

tion the goodwill of the business, and determine the shares. After that, either party should have the right to take over the business, and pay the others their shares, or to draw out his share. Applicant's affidavit proceeded to state that Weyl withdrew from the business about July last, since which date respondent and petitioner have carried it on for their own benefit. Respondent has always kept the firm's cash, and conducted the financial part of the business. Till the end of March, 1901, the business was carried on at a profit, but thereafter at a loss. Early in October applicant offered to buy out respondent for £200, or in the alternative to sell his own share to respondent for that sum. Respondent would not accept either of these offers. On October 11 last applicant gave a month's notice of the dissolution of the partnership, and again offered £200 for respondent's share therein. Respondent thereupon suggested that Mr. J. E. P. Close be appointed to audit the books of the firm, and to assess the interest of each partner, and that respondent should then pay to applicant such sum as he should thus be found entitled to receive. To this course applicant objected, but expressed his willingness to have Mr. Close appointed as liquidator, and stating that he had no wish to dispose of his own share of the business. Further correspondence followed, and finally applicant attended at the office of respondent's attorneys, and made a formal tender of the £200 previously offered. This was again refused.

In his answering affidavit respondent stated that applicant's duties were confined to the management of the day-book, in which all transactions of the firm were entered. That they had also a qualified bookkeeper, and that he (respondent) supervised and managed the whole business. He admitted the loss during the last six months, and said he was unable to account for it, and had nothing to do with the books. He also admitted that applicant had offered either to pay him £200 for his share in the business or himself to retire on receipt of that sum, and that he (respondent) had declined both offers.

Mr. Schreiner (for applicant): It is a very strange circumstance that it was only after the dissolution of the partnership that these alterations and interlineations appeared in the deed of partnership. The partnership was being carried on at a loss, and we say to respondent, "You may take over the business for £200, or we will take it over for the same sum." The capital ac-

count was £370. Up to the end of March the business was carried on at a profit. If defendant does not consider £200 a fair sum for his share of the business, let him name a price. He wants to have an account stated, but that would leave out of account the value of the goodwill. No doubt the relations between the partners are unsatisfactory, and therefore we do not object to the appointment of Mr. Close as liquidator, but we do object to being bound to continue the business, as at present, for a year—possibly at a loss.

[Buchanan, A.C.J.: The interlineation in the deed of partnership provides for the continuation of the partnership over the first year.]

Yes, but the parties are not agreed. The party who wishes to leave must give a month's notice no doubt, but the deed does not provide for either a dissolution of the partnership or for arbitration. A partner cannot be compelled to continue the partnership against his wish; of course, he must not retire at an inconvenient time. Under the partnership deed a machinery for liquidation is provided, for the words "if not dissolved" impliedly give either partner the option of retiring after three months.

[There seemed to be considerable discrepancy between the copies of the deed briefed to counsel.]

On September 5 we could have terminated the partnership, and we could again have terminated it on October 11. It would be most inequitable to compel us to continue the partnership when the business is being carried on at a loss. We do not wish to be expropriated; we want to have a chance of buying in the business, and not to be compelled to take whatever the books show. The deed does not contemplate the case of both parties wishing to carry on the business, and since it does not so provide, we must in this case fall back on the principles of the common law, viz., *licitatio*. I submit that we are entitled to a liquidator, and that there is no ground for the contention that we are bound to go to arbitration.

Sir H. Juta (for respondent): The applicant cannot compel a dissolution of the partnership. We are now asked to liquidate it, but the deed provides that it should be continued one year after September, 1901. This is a partnership entered into for a definite time. Hence the applicant has no right to claim a dissolution of it, and in any case, the partner who does not wish to retire is the natural person to carry on

the business. It is provided that the partner who does wish to retire must give a month's notice of his intention, but after doing this, he cannot change his mind, and remain in the partnership.

[Maasdorp, J.: Suppose one partner out of three wants to go, can either of the other two be forced out of the business?]

Yes, one has the right to force out the other.

[Buchanan, A.C.J.: In this case they both wish to remain.]

If each party wishes to remain, neither could pay out the other, and the partnership would continue; but in this case there are only two, and not three partners. The real point is, that the partnership deed has prescribed a certain mode of procedure, viz., audit by an accountant. Applicants are now unwilling to follow this procedure. I submit that their application is at least premature.

Mr. Schreiner (in reply): It has been stated in argument for the respondent that, according to the deed of partnership, if one party goes out of the partnership, the remaining party can pay out the other, but the word in the agreement is plural, "others," not "other." I submit that on what has happened we are entitled to a dissolution of the partnership, and cannot be compelled to remain in it against our will. *Pothier on Partnership* (Sec. 149). Partnership is a matter of good faith, and if partners cannot agree, it must be dissolved; and if the deed makes no provision for doing this, the common law principle of *licitatio* must come in.

Buchanan, A.C.J.: On September 5, 1900, the applicant and respondent and a third party entered into a deed of partnership. This deed was to run for a period of twelve months certain, but by an interlineation which is not correctly copied in the copy annexed to the affidavits, but which appears from the original now produced, if at the expiration of the twelve months the partnership was not dissolved the parties agreed that it should continue for another twelve months on the same terms. As it stands now, this agreement is for twelve months certain, with a provision that by tacit consent it is to run for twelve months afterwards. The first twelve months expired, and during that time one partner retired, but the other two partners did not terminate the agreement at the end of the year, but tacitly agreed to continue a second twelve months. The second twelve months is still current, but

applicant comes into court now and says, "I gave you one month's notice of my intention to have the partnership dissolved, and I apply for an order for liquidation of the business and for the appointment of a liquidator to distribute the assets." Now the parties are bound by their contract. There may be cases in which, under certain circumstances, the Court might interfere, but in this case the parties have themselves provided as to what shall occur in certain eventualities. Notwithstanding that the contract is for a fixed period, it says that if the parties do not agree, the partner wishing to leave the business shall give one month's notice of such intention. Applicant has given this one month's notice. Then the deed goes on to say that, in such an event, not that a liquidator shall be appointed, but that an accountant shall be appointed, to whom the books of the firm shall be handed, and who shall make up a statement of account, taking into consideration the value of the goodwill. This is not the course followed by the applicant. He wants a liquidator appointed. He is not entitled to this. He is entitled to have an accountant appointed who shall draw up a statement. When the accountant has been appointed, and has drawn up a statement, a further provision of the contract comes into operation, by which either partner shall have the right to take over the business and pay out the others or to draw out his share. The Court cannot now go into this. The application for the appointment of a liquidator and for a dissolution of the partnership is not justified by the deed which the partners agreed to between themselves, and the application in this form must be refused. His lordship added that he thought the parties would be able to come to an arrangement on a satisfactory basis after the accountant had gone through the books, but the Court had not now to deal with that. The application would be refused with costs.

[Applicant's Attorney, Mr. Steer; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

BOYCE V. BOYCE.

This was an application by Joseph William Boyce for leave to sue his wife for divorce by edictal citation.

Respondent, who had formerly resided in Cape Town, had left the applicant, and had gone to Kimberley, where she had lived in adultery with one Charles Vickers, as a re-

sult of which she had subsequently been delivered of a child in Natal. The applicant had subsequently been unable to gain any information as to the whereabouts of his wife, although diligent search had been made.

Mr. Buchanan for applicant; respondent in default.

The Court granted leave to sue by edictal citation, the edict to be returnable by February 1, personal service to be effected if possible, failing which, one publication in the "Gazette," and one each in the "Cape Times" and the "Natal Mercury."

O'CONNOR V. WARREN.

Mr. Benjamin applied to have made absolute a rule nisi for leave to sue *in forma pauperis*.

The Court granted the application, and appointed Mr. Bisset as counsel, and Messrs. Reid and Nephew as attorneys.

TOWN COUNCIL OF CAPE { 1901.
TOWN V. GROMAN. { Nov. 21st.

This was an application by the Town Council for an order restraining the defendant from occupying certain premises at the corner of Longmarket-street and Primrose-street. From the affidavit of the City Engineer it appeared that the respondent's premises had not been completed in accordance with the plans submitted, that the bricks were not of the proper quality, and that the staircase was not considered safe, whilst the sink in the shop was not connected with the public sewers, and the water was carried off on to the land adjoining. In spite of these defects, however, the premises were occupied as a dwelling-house by eleven persons, and it was necessary in the public interests that the respondent should be prevented from occupying or allowing the premises to be occupied until they were in a fit state for habitation.

Mr. Schreiner, K.C., appeared for the applicants; the defendant was in default.

The Court granted the application as prayed, with costs.

TERHOVEN V. COLONIAL { 1901.
GOVERNMENT. { Nov. 21st.
STEPHAN V. COLONIAL {
GOVERNMENT. {

Jury—Act 23 of 1891—Claim under £ 00—Separate actions—Consolidation.

Where two actions had been

brought against the Government, one for £500 and one for £85, both arising out of the same set of circumstances, a railway accident, the Court allowed the actions to be consolidated and tried together before a jury.

The Court will not set down a case for trial by jury unless the application is made in time to allow fourteen days' notice of trial to be given to the other side before the end of term as directed by section 12 of the Civil Jury Act.

This was an application by the first-named applicant to have a day fixed for the hearing of this action by a jury. The second-named applicant, Stephan, in his petition, alleged that he was the plaintiff in an action against the Commissioner for the recovery of £85 damages for alleged negligence.

That the pleadings were closed on the 13th November, 1901. That on the 14th November notice demanding a trial by jury, in terms of Act 23 of 1891, was served upon the defendant's attorneys.

That the amount claimed as damages is under £100, but that in another case, *Terhoven v. Colonial Government*, arising out of the same circumstances, a trial by jury has been demanded by the plaintiff. That the evidence to be adduced in each case will be similar, and that the questions involved are questions of fact.

Under the circumstances, the applicant prayed for an order authorising the trial by jury, and fixing a day for the hearing of the suit.

Mr. Schreiner, K.C. (for the applicants): We do not particularly wish a day to be fixed in this term for Terhoven's case. As to Stephan's case, this is another case arising out of the same set of circumstances. We therefore come under section 7, and not section 5, of Act 23 of 1891. We wish to consolidate the two actions. Terhoven was driving Stephan's cart, and there is really only one issue to put before a jury.

Mr. Searle, K.C. (with him Mr. Sheil, K.C.), for the Government: Section 7 of Act 23 of 1891 does give the Court the power to grant this application, but I submit that this is a power which it will exercise only in very exceptional circumstances. I am not aware that it has ever granted a

jury trial where less than £100 was in question. In *Brook's Case* (17 S.C., 72), it was held that a day out of term could not be fixed for a jury trial, and that sections 12 and 13 of Act 23 of 1891 must be read together.

The Acting Chief Justice said that the cases were so connected one with the other, that if one was tried by jury, the other case ought also to be so disposed of. Leave would therefore be granted for a trial by jury in the second case. The Court would order the consolidation of the two actions, so that they might be heard by the same jury at the same time, and would fix Wednesday, the 5th February, 1902, for the trial of the cases, the costs of the application to be costs in the cause.

DUMINY V. MUSTERS. { 1901.
Nov. 21st.

This was an application for a postponement of trial made by the defendant, who is at present on active service, and holds the rank of captain. It was alleged that, the trial having been set down for the 27th inst., the defendant was unable, on account of his being on active service, to prepare his defence, and that, for the same reason, he was unable to obtain the attendance of material witnesses. The plaintiff, who made a claim for a sum of £1,176 6s. 4d., which was admitted, but in regard to which there was a claim in reconvention, amounting to almost the same figure, alleged that the application was not a *bona fide* application, that the defendant was realising his landed property in the Colony, and that a postponement of the case would seriously prejudice the plaintiff. He accordingly objected to the postponement of the case, and expressed his willingness to take judgment for the amount claimed, and offered to give security to refund the same, if ordered to do so by the Court. He contended that he was in danger of losing the money, unless he obtained judgment forthwith.

Mr. Benjamin (for applicant): Applicant has shown reasonable ground for postponement. The claim in reconvention nearly balances that in convention, and there are accounts and cross accounts between parties to be gone into, and the case will probably take some time. Our first claim in reconvention rests on a verbal contract, and is connected with the purchase of some mules from the Imperial Government. Quite a number of our witnesses, who are now on active military service, are indispensable. All we ask for

now is a postponement till next term, though possibly a further postponement may then be necessary.

Sir H. Juta, K.C. (for respondent): We oppose this application very strongly, because we do not admit the contentions of applicant. The fact that he has lain by for so long a time is strongly against his case. Duminy now offers security *de restituendo* if Musters will pay him. There is no liquidated claim on the other side, and therefore there can be no question of set-off. Let defendant pay what is due, under security.

Mr. Benjamin (in reply) argued that respondent's claim was capable of being set off.

Buchanan, A.C.J., in giving judgment, said that the plaintiff was quite within his rights in setting the case down for trial. The defendant stated that he was on active service, and that his witnesses were also on active service. The plaintiff alleged that the application for postponement was not a *bona fide* application. Looking at the pleadings, it would be very difficult to decide as to the *bona fides* of the application without going into the merits of the case. It was a fact that the defendant was on active service, and it seemed to be a fact that a number of his witnesses, whose names he gave, and the purport of whose evidence he also gave, were also on active service. He must, however, take the consequences of the unfortunate state in which the country was involved, but the Court considered that it would be hardly fair to say that he was bound to go to trial at once. The trial would, therefore, be postponed until the 7th of February, 1902. The application would be granted, the costs of the application to be costs in the cause.

WORDON AND PEGRAM V. { 1901.
PERKINS AND CO. { Nov. 21st.

This was an application for an order restraining respondent from using bottles bearing the name or trade-mark of the applicants.

The applicants were Thomas Henry Pegram and Wallace Guy Pegram, who applied for an order as above against A. W. Hyman (trading as G. W. Perkins and Co.), and further, calling upon respondents to deliver up such bottles as may be now in their possession, and for costs.

Mr. Schreiner, K.C., for applicants; Sir H. Juta, K.C., for respondents.

The affidavit of Lodewic Marnits stated

that he was in the employ of the applicant firm, for whom he collected bottles. On October 11 he called on one of his rounds at a shop belonging to respondent, and there saw a number of bottles bearing the name or trade-marks of several firms, and also one bottle bearing applicant's trade-mark and covered by respondent's label. He also called at a shop in Loop-street where mineral waters were sold, and there he found a great many bottles belonging to various manufacturers, including one belonging to Wordon and Pegram. All these bottles were also covered by respondent's labels. Previously he had found respondent filling other firms' bottles, and respondent admitted doing so, remarking that it was a mistake.

Sir H. Juta objected to evidence being admitted as to other firms' bottles.

Mr. Schreiner said that he mentioned the other cases as showing that this was a habit of respondent's.

The affidavit of H. R. Arderne stated that in June, 1900, notice was served upon respondent to show cause why he should not be interdicted. The respondent then signed an undertaking whereupon the motion was withdrawn; under that agreement respondent promised not to use any bottles bearing any other firm's trade-mark, and to return to applicant any bottles that might come to him with applicant's trade-mark thereon.

The affidavit of Wm. Henry Christian, secretary to the Cape Bottle Exchange Association, stated that both applicants and respondent were members of the association, which was established with a view to members having their bottles returned to them.

Respondent's affidavit stated that he filled 200 dozen mineral water bottles a day, and had about five men in his employ. He always endeavoured to sort out every bottle that did not bear his name, but sometimes customers put other firms' bottles into his cases, and so, as he had not time to sort them out, they were not discovered sometimes until they came into the hands of the washers. He had always given instructions that every effort was to be made to sort such bottles, but it might happen on occasion that a bottle would go out. He contended, however, that the applicants had not suffered any damage, as they might have done had the bottles been filled with soda water. He further pointed out that there was only one reference to his use of applicants' bottles in Marnitz' affidavit. He contended that no case had been made out for relief, and prayed that the ap-

plication be dismissed with costs. He admitted signing the undertaking referred to by Mr. Arderne, and since that time had taken the utmost care to sift out the bottles of other firms and to return them.

Mr. Schreiner, K.C. (for applicant): This is a clear case of invasion of our rights. Marnitz found bottles bearing the marks of other firms, these marks being covered by respondent's labels in respondent's possession. The evidence shows that this was not due to any isolated act or default on the part of respondent, but to a course of conduct. When former proceedings were taken against him, he undertook not to repeat this offence. Now his own affidavit shows that he had not taken sufficient care to sort the bottles, and to reject those of other firms. These bottles are our property, and respondent is himself a member of the association formed for the purpose of protecting mineral water makers in this matter. He does not, and cannot, set up the case that he has bought the bottles. He has practically no defence, and as this is not his first offence, it is a clear case for an interdict.

Sir H. Juta, K.C.: This application is not for an interdict to restrain us from interfering with applicant's trade-mark. We have not done that, for we put our own labels on the bottles. Some sixteen months ago we gave an undertaking not to use the bottles of other firms, and now, for the first time after sixteen months, applicants complain of our having used their bottles; they do not say how many—it may have been only one. They do not, and cannot, make this a question of trade-mark; it is an application for an interdict to restrain us from using their property. The essential conditions for obtaining an interdict are: (1) A clear right in the applicant; (2) some irreparable damage which would follow if the interdict were refused; (3) the absence of any other remedy. We claim no right. We have done no irreparable damage by using one of their bottles in sixteen months. There is no continuing injury, and an interdict can only force us to do what we have already undertaken to do. If applicants have suffered damage, they should have brought an action.

Mr. Schreiner (in reply): The argument for respondent amounts to this: that if a man admits he has done wrong, he may go on doing it. The evidence of a course of conduct is quite competent in a case like this. Every member of this association undertakes to sort out and return such

bottles of other firms as may come into his possession. Interdicts are granted every day to restrain a man from violating obligations he has voluntarily undertaken, and no man can excuse a wrong he has done by merely saying that he does not claim a right to do it.

The application was dismissed with costs.

Buchanan, A.C.J., said that had it not been for the previous application he did not think the Court would have listened to this application for one moment. This was not a case for an interdict. There was no asserting of a right, and as far as applicants were concerned, only an accidental use of their bottles. It seemed to him to be one of those cases in which the maxim *de minimis non curat lex* would apply. The application would be dismissed, with costs.

Maasdorp, J., concurred, adding that he did not think there was clear evidence of wilful wrong.

Judgment accordingly.

JOE V. MAHOMED.

This was an application for discharge of notice of appeal.

Mr. Currey for the applicant.

Mr. Wilkinson for the respondent.

Mr. Currey stated that this was an application to show cause why notice of appeal from a decision given in June in the Resident Magistrate's Court, Cape Town, should not be discharged by reason of respondent's failure to prosecute and bring to final termination the said appeal in reasonable time. Notice of appeal was lodged on July 19.

Respondent in his affidavit alleged that he had never abandoned the appeal, and was desirous of proceeding forthwith. The appeal had since been set down for the present term.

The application was dismissed, respondent to pay costs.

Buchanan, A.C.J., in dismissing the application, said there had been opportunities for bringing on the appeal at the July and again during the whole of the August term. Respondent did not prosecute his appeal during that time, and nothing had been done by him till half-way through the present term. Applicant was fully justified in making the present application, but as the appeal had now been set down for the present term, the Court would hear the case. While not granting the application, the respondent must, however, pay costs.

Judgment accordingly.

Ex parte ZONDAGH (BORN RAUTENBACH) EXECUTRIX TESTAMENTARY OF THE ESTATE OF THE LATE GEORGE FREDERICK ZONDAGH.

This was an application for an order authorising the Registrar of Deeds to register free and unrestricted transfer of certain property to petitioner's sons.

Mr. Schreiner, K.C., who appeared for the petitioner, said the case was mainly one of construction, and it appeared that there was no intention on the part of the testator to defer vesting.

The Court ordered the case to stand over for further argument, the Master to select a *curator ad litem* to represent the grandchildren of the testator.

IN THE MATTER OF THE CAPE OF GOOD HOPE PERMANENT BUILDING, LAND, AND INVESTMENT SOCIETY.

Mr. Schreiner presented the third report of the liquidators, and asked for the usual order.

The Court made the usual order as to publication.

VAN DER SPUY V. KETS.

This was an application for a postponement of trial, the action being one in which the defendant, who made the application, was sued for £250 on promissory notes, whilst there was also a claim in reconvention. Plaintiff expressed his willingness to agree to a postponement, but contended that the defendant should be compelled to pay the costs of the same.

Sir H. Juta, K.C., appeared for the applicant; Mr. Searle, K.C., appeared for the respondent.

The Court ordered the case to be postponed till next term, the costs of the application to be costs in the cause.

DONOVAN V. WEIL.

This was an application for postponement of trial and for a commission *de bene esse*.

Mr. Schreiner, K.C., for the applicant.

Sir H. Juta, K.C., appeared for respondent, to consent, provided that the case be taken next term, and that the commission be a joint commission.

The Court ordered the trial to be postponed, and a joint commission to be issued to take evidence in England of such witnesses as may be tendered by either party. The matter, the Acting Chief Justice added,

was in the hands of the plaintiff, and if the commission was returned he could go on with the case next term; if not, it could stand over. Mr. Advocate McClean would be appointed commissioner.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

MUSGRAVE V. MUSGRAVE. { 1901.
Nov. 22nd.

This was an action for restitution of conjugal rights, failing which for divorce, brought by the husband against his wife, who is at present in England. She had been summoned by edictal citation, personally served in Yorkshire, England.

Mr. Buchanan appeared for the plaintiff; there was no appearance for the defendant.

Reginald R. Musgrave, the plaintiff, said that he was married to the defendant in London on February 10, 1892. After that they had a good many quarrels, chiefly about her extravagance. As a result of their last quarrel, she told him to go his way and she would go hers. In 1892 witness came to the Colony, and had been here ever since, with the exception of a year he spent in visiting a brother in India. Last year, in reply to a letter from witness's solicitors, a communication was received from defendant's solicitors saying that she was not prepared to go out to South Africa. There had been no children of the marriage.

The Court granted an order for restitution of conjugal rights, the defendant to return to plaintiff on or before February 1, 1902, failing which, a rule nisi to issue, calling upon her to show cause by February 13, 1902, why a decree of divorce should not be granted. The Acting Chief Justice intimated that when the matter again came up the Court would require to be satisfied that the plaintiff had provided means to enable defendant to join him in this colony.

VERSTER V. WILLIAMS.

This was an action for payment of £417, due on account of goods supplied by the plaintiff to defendant.

The declaration alleged that the defendant carried on a butcher's business, and was from time to time supplied with meat by the plaintiff, until his total indebtedness amounted to £1,038 5s., when the plaintiff entered into an arrangement with defendant for the liquidation of this debt. Under this arrangement plaintiff alleged that he took over the defendant's business, for which he was to pay him the sum of £200, which was, however, to go in reduction of the defendant's indebtedness. Plaintiff was also to collect all the book debts he could, and the money thus received was also to go in reduction of that indebtedness. The book debts collected and the £200 were not sufficient to discharge that indebtedness, and the sum now sued for was the balance still owing.

The defendant's plea was to the effect that the plaintiff had taken over the business and book debts as a complete discharge of the indebtedness of £1,038.

Mr. Benjamin for plaintiff; defendant in default.

Mr. Benjamin called

Rynhoud Johannes Verster, the plaintiff, who said that he carried on a butchery business. The defendant was formerly in partnership with one Rees, and carried on business as butchers under the style of Rees and Williams. That partnership witness supplied with meat. The partnership continued until about August, 1900, when it was dissolved, and by mutual consent the liabilities of the firm were taken over by Williams. Witness agreed to that. There was an indebtedness to witness at that time, and afterwards he continued to supply meat to defendant up to the end of March, 1900, when defendant was indebted to witness in the sum of £1,038.

Counsel pointed out that the indebtedness was really £1,048, and if there had been any appearance for the defendant he had intended to apply for an amendment of the declaration to that effect, but of course no notice having been given, that amendment could not now be made.

Proceeding, witness said that as the result of negotiations during the last week in March defendant agreed to hand over the business to him. The arrangement was that defendant should hand over to witness the business, and the latter was to pay defendant £200 and collect the book debts. All this money was to go in reduction of the indebtedness, and defendant was to remain liable for the balance. At that time witness did not know what the book debts amounted

to, defendant only handing him the schedule of book debts some time after the arrangement had been entered into. The schedule was not correct, as it had been found that a portion of some of the debts set forth in it had been paid. After deducting the £200 and the amount of the book debts collected, the sum sued for remained as the balance of defendant's indebtedness.

Jacob Scholtz, bookkeeper to the last witness, gave evidence as to the amount sued for being still due by defendant.

The Court gave judgment for plaintiff as prayed.

RICE AND CO. V. SANDERSON. { 1901.
Nov. 22nd.

**Brokerage—Expiration of agency
—Undisclosed principal.**

Plaintiffs, a firm of brokers, had obtained from defendant authority to sell certain property for three months. They failed to effect a sale within that time, but thereafter entered into communication with one J., whose name they did not disclose to defendant. Their negotiations with J. fell through and subsequently he purchased the property direct from defendant. Plaintiffs now sued defendant for brokerage.

Held, that as a broker could not be entitled to brokerage unless it was known to the principals that they were dealing in consequence of his introduction, judgment must be given for defendant with costs. The case of Roux v. Brittain (2 Sheil, 169), distinguished.

This was an action brought by Charles Spencer Rice and George Rhodes Chambers, trading under the style or firm of Charles Spencer Rice and Co., against Thomas H. Sanderson for the payment of £87 10s., being 5 per cent. brokerage on the purchase price (£1,750) of a certain property.

The plaintiffs' declaration was as follows:

1. The plaintiffs carry on business as brokers and estate agents at Claremont under the style or firm of Charles Spencer Rice and Company. The defendant resides on the Wynberg Flats, Cape Division,

2. In or about the month of December, 1900, the defendant employed the plaintiffs in their capacity as brokers and estate agents to secure for him a purchaser of a certain house and ground situate at the corner of Station-road, Claremont, the property of the said defendant.

3. In the event of the plaintiffs finding a purchaser to the satisfaction of the defendant the defendant agreed to pay the plaintiffs commission at the rate of 5 per cent. on the purchase price.

4. In or about the month of June, 1901, the plaintiffs did secure a purchaser for the said house and ground, to wit, the Standard Bank of South Africa (Limited), and introduced the said purchaser to the defendant.

5. Thereafter on or about July 1, the defendant sold the said house and ground to the said Standard Bank for the sum of £1,750.

6. By reason of the premises the plaintiffs became and are entitled to payment of the sum of £87 10s., being 5 per cent. on the said purchase price.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle plaintiffs to payment of the said sum of £87 10s., but the defendant neglects and refuses to pay the same although called upon to do so.

Wherefore the plaintiffs claim: (1) Judgment for £87 10s.; (2) interest *a tempore morae*; (3) costs of suit.

The defendant's plea was as follows:

1. Paragraphs 1 and 5 are admitted.

2. The defendant admits the allegation in paragraph 2, save that he says that the said agreement was only for the period of three months from the said date, and the defendant on or about the said date signed a document securing the option of purchase of the said property to the plaintiffs for the said period at a purchase price of £1,500.

3. The defendant denies the allegations in paragraphs 3, 4, 6, and 7, save that he admits that he refuses to pay the said £87 10s.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

For a replication to the defendant's plea the plaintiffs said:

1. They admit that the agreement entered into between the plaintiffs and the defendant in December, 1900, was originally only for three months, but they say that the said agreement was from time to time extended, and that it was in force at the time of the aforesaid sale.

2. Save as above and save in so far as the said plea contains admissions, the plaintiffs

deny all the allegations of fact and conclusions of law therein contained, and join issue thereon, and again pray for judgment with costs.

For a rejoinder to the replication, defendant says specially that he denies that the agreement referred to in paragraph 1 thereof was extended beyond three months, the period of its original duration, and otherwise he craves leave to refer to the allegations in the plea, and again prays dismissal of the suit with costs.

Mr. Gardiner for the plaintiff; Mr. Benjamin for defendant.

Mr. Gardiner said he wished to amend his declaration, so as to have an alternative claim for the usual and customary commission, viz., 2½ per cent., which would make the claim £43 15s.

The amendment was allowed.

Mr. Gardiner called

Charles Spencer Rice, the plaintiff, who said that he carried on business with Mr. Chambers as Charles Spencer Rice and Co. at Claremont, as brokers and estate agents. In December last defendant came to see witness, and said that he had some property for sale, and mentioned one particular property in Station-road as being for sale for £1,250. He asked witness to try to find a purchaser for him. Subsequently, in the same month, he came to witness, and said that he ought to get £1,500 for the ground, and then he gave witness authority for three months to sell the property for £1,500, or any less sum which might be agreed upon, for which defendant agreed to pay the usual brokerage. This authority was given on a printed form, with the necessary particulars filled in in writing. Defendant said that if they got £1,500 for the property, he would give them 5 per cent. commission. That was at the same time he signed the document. The statement in the document that the usual brokerage was to be charged must have been an oversight on the part of their typewriter.

[Buchanan, A.C.J.: These words are put in, and we cannot go behind the document.]

Continuing, witness said that Mr. Chambers and another gentleman were present. The usual brokerage was 2½ per cent. Witness told defendant that they would advertise, and that if they effected a sale they would not charge for the advertisements; but that if they did not, they would look to him for the cost of the advertisements. The bill produced was posted up on the property in question. The bill said that the pro-

perty was for sale, and that inquiries should be made at the Claremont Auction and Estate Office. That was the office of witness's firm. After the three months were up defendant called frequently to ask if they had found a purchaser. Until as late as the middle of June, he called about three times a week. One or two offers of £1,000 were made, but that was the highest price they were offered. These offers were submitted to defendant, but he would not accept any of them. After the three months were up, defendant came to their office one day and drew attention to the fact that the bill saying the property was for sale was torn, and witness had a new bill put up. That was some time in the latter part of May. In the early part of June defendant was in their office, and asked if they had had any better offers for the property, and witness said that they had not. Defendant suggested putting the property up for sale by public auction, but when witness told him that the charges for advertisements would be rather heavy, he did not seem inclined to do so. The property was sold in June to Mr. Johnston, the manager of the Claremont branch of the Standard Bank. Mr. Johnston called at witness's office about the 9th of June, and asked if that was the Claremont Auction and Estate office. He was told that it was, and he then referred to a notice he had seen on a property in Station-road stating that it was for sale, and asked for particulars as to the size and price. Witness told him the price was £1,500. Mr. Johnston called a few days afterwards and asked if £1,500 was the lowest price, and if he could have an option on it. Witness said they would communicate with the owner. They communicated with the owner. Then Mr. Johnston called again upon the following Saturday and said that he must have a reply before next mail day. Witness promised to see the owner on the following Monday. On that day, along with Mr. Chambers, he went out to defendant's place on the Claremont Flats. Defendant, after they had mentioned that an option was wanted, told them that he could not say anything until after the following Saturday, as he had given someone else an option at £2,000 until that day, but that if the other party did not take up the option he would come in and see them on the Saturday and open negotiations. He did not come in on the Saturday, and witness heard that he had sold the property to Mr. Johnston. About the 26th June Mr. Johnston had called and asked if Mr. Sanderson was the owner of the pro-

perty, and witness said that he was. Subsequently witness heard from Mr. Johnston that he had bought the property. That was on July 1. Witness then wrote to defendant claiming commission at 5 per cent. on the sale of the property for £1,750. He got no answer to that letter, and then, after further correspondence, his solicitors sent a letter of demand.

Cross-examined: The agreement put in was on one of witness's own forms. Witness got defendant to sign that form. These were the forms they usually gave persons to sign when they were engaged as agents for the sale of property belonging to such persons, but they did not always use these forms. After the three months had expired they did not ask defendant to give them another three months. When witness saw defendant at his place on the Wynberg Flats Mr. Chambers was present. Defendant's daughter came into the room with a cup of coffee, but went out again immediately. That was shortly before the sale to the Standard Bank was effected. It was not true that on that occasion they asked for a month's extension of their right to sell the property, and that defendant refused to give that. Witness said nothing about the Standard Bank or the price. He did not disclose to defendant the name of his client.

James Johnston said he was manager of the Claremont branch of the Standard Bank. He first came to know about the sale of the property by seeing the bill produced. He went to see the agents, wishing to get particulars. He did not make an offer then. After some time witness ascertained that the price would be £1,500. Subsequently he was instructed to get an option of it for a month at this price. Witness told Rice this, and the latter went to see the owner at Wynberg. When he returned he seemed disappointed. He said he could not get the option, and that he was not now empowered to sell for £1,500. He said the whole thing had fallen through, and that his power had lapsed. Later on—on the Saturday preceding the 1st July—witness was instructed to see the proprietor and to endeavour to get the property direct. Witness did not know the owner. He ascertained that Sanderson was the owner from Rice's office. He was not sure when he ascertained the address, but he got it from Chambers and Rice. Witness wrote to Mr. Sanderson, and a sale of the property was agreed upon at £1,750. On the following day Chambers and Rice complained that witness had gone behind their backs, and they asked him to write

telling them what had occurred. He wrote.

By the Court: After Rice came back from Wynberg he told witness his power of attorney had lapsed, and witness then considered that the thing was done as far as they were concerned.

George Rhodes Chambers, partner with Mr. Rice, confirmed what Rice had said with regard to what occurred in September. They agreed upon 5 per cent. Afterwards Sanderson often inquired as to whether the sale was proceeding, and said he was anxious to sell to save a mortgage bond. After the three months expired, Sanderson wanted them to sell the property. The poster was kept up on the property. Sanderson asked them to keep it up. Witness corroborated Rice's evidence as to the interviews with Sanderson. After Johnston asked for an option witness went with Rice to see Sanderson, and asked him for an option for £1,500. Sanderson said he had given an option which would expire on the Saturday. He said he would call upon them. He did not then withdraw the property. This was the first intimation witness had that Sanderson was dealing with anyone else. They returned and told Johnston that Sanderson had promised to come in on the following Saturday, and would acquaint them with what he had done. They also told Johnston that Sanderson had jumped from £1,500 to £2,000. Sanderson did not call on the Saturday, as he had promised.

Cross-examined by Mr. Benjamin: Sanderson said he had given an option to someone in Reid and Nephew's. Defendant's daughter walked through the room during the interview.

Alexander Ferdinand Arnold, clerk to Messrs. Chambers and Rice, said he drew up the document produced, and heard 5 per cent. commission mentioned. Sanderson often called at the office and tried to get them to hurry on and get a buyer for the property. On about the 31st May witness put the poster on the board, it having been blown off. The last time Sanderson called at the office prior to the sale was about the middle of June. He then mentioned the property. On about the 26th or 27th June, Johnston called and asked for Sanderson's address. Witness gave it to him. Besides the posters, sale cards were kept outside the office right up to the date of the sale.

Cross-examined by Mr. Benjamin: Sanderson said the wind had blown the poster off, and it was then that witness renewed it. This was on May 31, when witness paid certain rates. It was a few days previously

that Sanderson told him the poster was torn.

By the Court: It was about May 26 when witness gave Johnston Sanderson's address.

Mr. Gardiner closed his case.

Mr. Benjamin called

Thomas Hodge Sanderson, the defendant, who said he signed an agreement in December authorising plaintiffs to sell the property. The agreement was for three months, and he never renewed it. Witness told the last witness to put up a fresh poster about a week or a fortnight after the first was put up. Witness did not subsequently give them fresh authority to sell. He understood he was finished with them. Witness remembered plaintiffs coming to his place in about the last week in June. Witness's daughter was present during the conversation. They asked for the refusal until they cabled to England, witness said he could not give it. They mentioned no name. Subsequently witness received a letter from Johnston, with whom he understood he was dealing direct. He asked Johnston if Holmes had been trying to buy for them, and Johnston said, "No; we do our own business."

Cross-examined by Mr. Gardiner: Witness called at the plaintiffs' office after the three months. He used to call in as a friend. He went to the office perhaps once a fortnight. He did not call for the purpose of ascertaining if they had sold the property. After the 23rd May, plaintiffs had nothing to do with witness's property. When plaintiffs called about the option they asked him to call the following Saturday. He could not say whether he promised to call. He did not remember having made such a promise. He did not intend to have anything to do with them afterwards. Witness never mentioned 5 per cent. commission. Witness would not answer their letters, as he would not have anything to do with them. He thought it an imposition.

By the Court: Chambers and Rice were never mentioned in the transaction with Johnston. Witness did not know that Johnston had seen them.

Margaret Sanderson, wife of the defendant, said that shortly after her husband gave the power to sell the property, witness heard her husband say in the plaintiffs' office that the poster was off. Witness was outside in a cart at the time.

Mr. Benjamin said that the defendant's daughter had been sent for, but had not yet come. He closed his case.

Mr. Gardiner (for plaintiff): At the time

Johnson came to us, we were not authorised to act as brokers.

[Buchanan, A.C.J.: It is rather a question of introduction. How did Johnson get his introduction?]

Defendant authorised us to put up posters regarding the sale of the property. He had treated us as brokers. In May he asked us to put up a fresh poster. The date is fixed by plaintiff Arnold and others. He discussed the question of the sale with us up to the early part of June. Johnson came to us in consequence of our handbill, and got full particulars of the property. The leading case on this point with us is *Roux v. Brittain* (2 Sheil, 169). In the case of *McConnachie's Executrix v. Bidwell-Edwards* (2 Sheil, 155), the buyer had seen the advertisement inserted by the vendor, and yet it was held that the agent was entitled to commission. In the present case the advertisement was put in by the broker, and nothing was done by the vendor to induce the purchaser to buy. *O'Brien v. Simpson* (12 E.D.C., 77) is strongly in our favour. My strongest case, however, is *Roux v. Brittain*. In all these cases the real test is: "Would the sale have taken place had it not been for the broker?" In this case, had it not been for plaintiff's efforts, it would not.

[Buchanan, A.C.J.: But see *Addison on Contracts* (p. 494, 9th Edition). The principal must know that he is dealing through a broker.]

Sanderson ought to have known that Johnson was dealing through a broker. All was done that could have been done to bring parties together. Johnson was not likely to have known that the property was for sale unless he was introduced through a broker, seeing that Sanderson's address was not on the poster. Johnson made exactly the same offer that Chambers and Rice's client made. If defendant had no previous suspicion that Johnson had been sent by a broker, this coincidence should have struck him at once. The real question is: "Would this property have been sold save for the broker's introduction?"

Mr. Benjamin (for defendant): The purchaser thought he was dealing with the vendor direct. In *Roux v. Brittain* (2 Sheil, 169) the agency had not been withdrawn. Here, the evidence of Johnson shows that it had. When the sale took place, the purchaser did not know that there was any agent to claim commission. As to the fresh posters, it has only been shown that there was an agreement of

brokerage for three months, and that, after the three months had expired, defendant asked the agent to put up a new poster. The evidence on this point is very unsatisfactory.

Mr. Gardiner (in reply): Sanderson must have had a very good idea as to who the agent was in the matter.

Buchanan, A.C.J.: This is a claim for the sum of £87 10s., being commission at the rate of 5 per cent. on the sum of £1,750. for which amount the defendant sold certain property belonging to him to the Standard Bank. The plaintiffs, who are brokers, in the month of December last obtained from the defendant a written authority to the following effect: "I, the undersigned, hereby authorise Rice and Co. to sell my property in Station-road, Claremont, adjoining the Municipal Hall, for a period of three months, for the sum of £1,500, or any less sum which may be agreed upon, and for which I agree to pay them the usual brokerage." In the first place, by this written agreement the defendant contracted to pay the usual brokerage upon a sale being effected. The usual brokerage is $2\frac{1}{2}$ per cent., but the plaintiffs say that there was a verbal undertaking given at the time that, instead of the usual brokerage of $2\frac{1}{2}$ per cent., they should be paid a brokerage commission of 5 per cent. Even if the plaintiffs succeeded in showing that they were entitled to commission, they would, under the circumstances disclosed, be entitled only to $2\frac{1}{2}$ per cent. This authority to sell was for three months, and as nothing was done within that time, the authority to sell terminated. Defendant, however, still wished to sell. After the expiration of the three months, he was still open to an offer from the plaintiffs, but he also took matters in his own hands, and attempted to sell the property himself. In July Mr. Johnston, the manager of a branch of the Standard Bank, obtained information as to the property from plaintiffs, and authorised them to make an offer. The brokers went to the defendant, and asked him to give an unnamed principal an option for one month to buy the property for £1,500. Defendant said, "No, I can't give an option to you. I have already offered the property, and have given an option to another person at Reid and Nephew's for the sum of £2,000, and that option has not yet expired." The brokers having failed to get an option, the negotiations were broken off. Mr. Johnston

said that when this broker, Rice, came back to him he seemed very much disappointed, and that Rice told him (Johnston) that he could not obtain an option, and that his power to sell had come to an end. In answer to a question I put to Johnston, he said that Rice told him, speaking of his interview with Sanderson, that his power of attorney had dropped, and that the price was raised to £2,000. Here we have the negotiations, as far as the plaintiffs are concerned, terminated. Afterwards Johnston opened negotiations directly with defendant. Now there is no doubt that a broker is entitled to his commission, even if he does not himself complete the sale, in cases where his exertions have brought the parties together and a contract of sale has resulted. The case of *Rour v. Brittain* shows this. There it was held that where the broker having been employed to sell the property, and having offered it to the purchaser, in consequence of such offer the seller and purchaser met, and a sale was effected between them, was entitled to his commission. In that case there was a sale in consequence of the exertions of the broker, and at a time when the authority of the broker was not withdrawn. That is not this case. The case of *Machonochie's Executors v. Bidwell-Edwards* is more in point. The head-note to this case says that the fact that the broker who was employed to sell a certain property introduced an intending purchaser to the seller is not sufficient to entitle the agent to commission upon the subsequent completion of the sale where the negotiations consequent upon such introduction had been broken off and another agent had been employed, in consequence of whose exertions the sale was effected. Here, in this case, there was an authority limited to three months. That time expired. It cannot be said therefore that plaintiffs were still authorised to sell the property. They did not communicate who their client was, and when their client afterwards came to the seller in person, the seller had no knowledge that he was not dealing with the principal directly, and had no intimation that he was dealing with a principal introduced by the brokers. The case of *Burnett v. Brooke* (9 Car. and P., p. 620) seems to me to bear on this point. That was the case of a ship broker, but the principle seems to me to be applicable, and seems to be sound. There the broker approached a shipowner and approached a merchant, and stated terms. He did not complete the

work himself, but afterwards these persons were introduced to each other by another broker, and it was held that the second broker, and not the first broker, was entitled to the commission. The ground upon which that decision was given was that the first broker not having mentioned the names of the parties, so as to identify the transaction, was not to get his commission, and Lord Abinger, Chief Baron, in giving judgment, said: "If the broker had named either of the parties or the vessel to either party, he might have said, when the second broker came on the scene, 'We are negotiating already.' I think this case fully indicates the necessity of mentioning names." The principle seems to be that it shall be known to the principals that they are dealing in consequence of the introduction of the broker. In this case Sanderson was utterly ignorant of the fact that the bank had had any communication with the brokers. The brokers did not give him this information, nor did they give him any notice that he was dealing with a client they had introduced. The property was not then in plaintiffs' hands for sale; their authority had lapsed. The case differs in this respect from the case of *Roux v. Brittain*, in which the sale resulted from the introduction by the broker. I have no doubt that in this case the brokers did a great deal of work, but that is one of the risks of a broker. Unless a transaction is completed by a broker, or is completed through his action, he cannot claim commission. The case is very near the line, but I think, in the absence of any mention being made by the brokers to the seller, that the purchaser was introduced by them, they cannot recover. Judgment must be given for the defendant, with costs.

Maasdorp, J., concurred.

[Plaintiffs' Attorney, Mr. Harsant; Defendant's Attorney, Mr. D. Tennant, jun.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

SACKS, CHIAT AND CO. V. TROTT } 1901.
BROS. } Nov. 25th

This was an action brought by plaintiffs, who were produce merchants, carrying on

business at Cape Town, against defendants, who were fish dealers and general commission agents, of Cape Town, for the recovery of an amount due as balance of account. The declaration set forth that on the 10th May, 1901, plaintiffs entered into an agreement with defendants whereby they agreed to procure 20 tons of potatoes, and defendants undertook to reimburse the plaintiffs all costs in connection therewith, and to pay a remuneration of 20 per cent. upon such charges. The agreement specified that the potatoes should be delivered from the first and second consignments received by plaintiffs after the date of the agreement, and the defendants undertook to pay the costs if the goods were rejected on landing by the Customs authorities. Plaintiffs said that they had duly performed their part of the agreement, and that the defendants had refused to pay the costs and remuneration agreed upon. There was a claim for goods other than these potatoes, but this was not in dispute. In their plea, defendants admitted the agreement referred to, but said that in or about the month of June plaintiffs received the first consignment, but failed to deliver the quantity agreed upon, only delivering 9 tons, and they had refused to deliver the balance. Thereafter, in July, they delivered a further quantity of 9½ tons. Defendants alleged that a new agreement was entered into, by which the plaintiffs agreed to deliver the potatoes at an all-round price of £9 per ton. Plaintiffs, they alleged, had only delivered 18½ tons. Defendants tendered £45 14s. 3d., of which £9 4s. 3d. was in respect to an item for onions.

In their replication, plaintiffs said that defendants were satisfied with the deliveries in June and July. They denied that there was any new agreement, and said that after delivery they were informed that 4 bags were required to make up the 20 tons, and these they delivered. Plaintiffs claimed £100 5s. 8d., including the item of £9 4s. 3d. The claim in respect to the potatoes amounted to £91 1s. 5d., and of this defendants tendered £36 10s. There was thus a difference of £54 11s. 5d.

Mr. Schreiner, K.C. (with him Mr. C. W. de Villiers), for plaintiff; Sir H. Juta, K.C. (with him Mr. Buchanan), for defendant.

Bernard Kuhns, one of the partners in the firm of Sacks, Chiat and Co., said he remembered entering into the agreement (produced) of May 10. Witness was the partner who negotiated with Mr. Robert

Trott. Mr. Sacks was then in Lisbon. Witness ordered the first consignment in Lisbon through him. Witness ordered a larger consignment than Trott's 10 tons. The second consignment was sent from Las Palmas. The whole of the first lot came through Las Palmas, where it was shipped on the Goth. The second lot came from Las Palmas by the Warrigal, part being sent from Lisbon through Las Palmas by the Admiral. Witness delivered the first consignment in June, and had no complaint. He made no agreement to charge £9 all round. The account put in charged the cost price of the potatoes, plus freight and primage. Witness charged 20 per cent. commission. There were 132 lb. in a box, and 150 boxes were delivered as the first consignment. There were not 120 lb. in a box, as alleged by defendant. The 150 boxes were not quite 10 tons; it was considerably over 9 tons. The potatoes evaporated 4 or 5 lb. per box. Witness bought the boxes as containing 132 lb. The next lot arrived per the Warrigal. Part of the consignment was in barrels and part in boxes. One hundred barrels and 65 boxes were delivered to the defendants, who said they only received 50 cases and 7 bags. There was 150 lb. in a bag. Some of the potatoes were put in bags, owing to cases being broken. Witness had received payments on account of the potatoes delivered in June and July.

Cross-examined by Sir Henry Juta: Witness's firm had to land the potatoes. Defendants did the lightering in respect to the first consignments. Witness never weighed the potatoes. The firm did not, as far as witness knew, have several communications from defendants telling them to come and have the potatoes weighed. Witness did not know that a number of broken cases, with contents short, were delivered.

Re-examined: No charge was made for lighterage on the first lot. Witness left the accounts to the manager, Mr. Solomon.

Abraham Myers Solomon, bookkeeper in the employ of the plaintiffs, said that this transaction had been in his hands since the agreement was made. Witness had never heard of an arrangement for £9 per ton until it was mentioned in the letter of tender. Witness produced vouchers in connection with the transaction. The cost of the potatoes was 6s. per box. There were 250 boxes, 150 of which were delivered to defendants. Other charges were £21 17s. 7d., for freight from Lisbon to Las Palmas per Kaiser, and £16 9s. 3d. paid to Divine,

Gates and Co., the agents here, and in respect of dock dues, etc. Two-thirds of these expenses were charged to the defendants. The boxes contained 132 lb. per box. Witness was certain that defendants were incorrect in saying the boxes only contained 120 lb. Potatoes evaporated or lost weight to the extent of, at the utmost, 5 lb. per box. Witness produced vouchers in connection with the second consignment. The figures in the account were correct. In the second lot potatoes were put in bags, some boxes being broken. Seven bags were equal to eight boxes. According to the paper weights shown, more than 20 tons had been delivered. No commission was charged on the agents' charges. Commission was charged on the expenses down to the port. Defendants lightered the first lot, the separation being made on board. Witness never heard a complaint about the first consignment, and £70 was paid on account. Witness produced bills of lading which, he said, supported the statement concerning the weight. The account was fairly and rightly made out. An error was made in an account previously submitted, but this was amended. Witness had asked them to come and inspect the vouchers.

Cross-examined by Sir Henry Juta: When the 150 boxes were delivered, Trott did not protest against his not having the full quantity. He did not tell witness that if he could not get the balance of the 10 tons he would not go on with the contract. In July the market was much higher than in June; it was nearly double. The market had not fallen very much. Chiat never consulted witness about going down to Trott's and making another arrangement when the Warrigal came with the second lot. Witness did not weigh the potatoes. Witness sent four bags down to make up the second lot. He did this on finding out in the Docks that Trott had not had the full number of boxes. On seeing Divine, Gates and Co.'s delivery books, witness sent four more bags, with the object of making up the difference. He was not in a position to explain how he came to make a mistake.

Re-examined: The boxes in the second consignment were bought cheaper than the first, and subsequently a letter was written amending the account.

Harris Chiat stated that he was a partner in the plaintiff firm. He did not know anything about the agreement, which was made by his partner and the bookkeeper. He had never made any agreement to

charge Trott £9 all round for the potatoes. Mr. Trott paid a cheque for £60 on account on the second consignment, but he made no condition. He did not present a full account, because he had not got the documents. The defendants wrote and said they would not accept delivery, but they did not send the goods back.

Cross-examined by Sir H. Juta: He did not know himself that Trott Bros. wrote.

By the Court: He knew nothing about the price of potatoes; he had nothing to do with that part of the business.

Re-examined: He was quite certain that he never agreed to £9 a ton.

Bernard Evans stated that he was a dealer in potatoes, carrying on business at Wynberg. In last June and July he purchased potatoes from the plaintiffs in boxes and in barrels. He found the weight to be from 125½ lb. to 128 lb. of potatoes in boxes.

Cross-examined by Sir Henry Juta: He weighed the potatoes at the Wynberg goods station. He opened the boxes, put the potatoes in bags, and then weighed them. He weighed 13 boxes in all out of the 30. He bought some more on August 31, but he did not weigh them. He bought some in September in barrels, and weighed them. They weighed 140 lb. each barrel.

Moses Nathan Abrahamson stated that he was a fish dealer, carrying on business in Chapel-street, and was formerly in the employ of the plaintiff's firm. He recollected taking down a wagon-load of potatoes to Trott Brothers. Two boxes fell off the wagon, and were broken in falling. There were 23 boxes in all. Subsequently he went down to the Warrigal and found some of the boxes of potatoes broken. The boxes were filled in with potatoes and were then mended.

Cross-examined by Sir H. Juta: He did not look at the receipt when he handed over the potatoes to the defendants; he handed it over to the bookkeeper.

This closed the case for the plaintiffs.

For the defence,

Robert Trott stated that he was a partner in the defendant firm, who carried on business as butchers, shipping, and produce merchants. The first ship to arrive with the potatoes was the Goth, and witness got delivery notes from Mr. Solomon at the Clock Tower. Four days later he saw Solomon in Sir Lowry-road, and notified him that they required a ton of potatoes which was missing. On three occasions he went to the plaintiffs' office, but did not find them in. Subsequently he met Mr. Chiat

and gave him to understand that they would consider their contract to be null and void, and that they wanted settlement at once. Mr. Chiat said he would see Mr. Solomon in regard to the matter. Subsequently the defendants agreed to deliver a number of tons of potatoes, which were in barrels, and were taken out and weighed in sacks. The barrels weighed from 100 lb. up to 150 lb. In the second consignment the weights were short in several instances, and witness notified the plaintiffs accordingly. The first cheque, for £70, was paid to Mr. Solomon, and the second cheque, for £60, was paid to Mr. Chiat.

Mr. Schreiner mentioned that a calculation had been made, which showed the potatoes to have cost plaintiffs £9 10s. 10d. a ton, without reckoning the commission. This was the actual out-of-pocket cost to the plaintiffs.

The witness, cross-examined by Mr. Schreiner, said that for the first consignment Solomon gave witness the delivery order at the Clock Tower. Witness had to take the delivery note, or refuse the whole thing. Witness demanded the whole. The market was then from 20s. to 25s. per 150 lb. Witness intimated that he would "cry off" the contract, because the first consignment was short delivered one ton. Witness never had any negotiations with Mr. Kuhns. Mr. Kuhns may have been present when the agreement was drawn up, but Mr. Solomon conducted the negotiations. Witness never recognised Mr. Kuhns as a member of the firm. The only persons witness recognised were Chiat and Solomon. The invoice witness was shown by Solomon did not bear out the statement that the potatoes cost plaintiffs £9 10s. 10d. a ton. This was the invoice that witness said showed the potatoes to cost 5s. 6d. per box. Witness was told that the boxes contained 120 lb. This invoice was in bad English. Solomon had been to witness's store on several occasions. He came in once when they were weighing the potatoes out of the barrels. If the contract stood, the potatoes were shipped at witness's risk, and witness would have had to take what was delivered, so long as the proper quantity was shipped. Witness did not think the shrinkage could have been anything.

Re-examined by Sir Henry Juta: Witness asked for the documents, but was told they did not have them. Without having the documents, plaintiffs could not legally have got them past the Customs.

The letter witness received in May was in Solomon's handwriting. At the time of the arrival of the Warrigal the market was down very much lower than in June on this class of goods.

Charles Trott, member of the firm of Trott Brothers, said he was present when the first consignment was weighed. The boxes averaged 120 lb. The new agreement was made in witness's store at about the time of the arrival of the Warrigal. The market was then down. Witness, his brother, and Chiat were present. Witness's brother said he considered the contract null and void, and after some conversation Chiat left to get Solomon's assent to a price of £9. He returned half an hour later, and said the agreement would be satisfactory. Witness sent for Solomon when they were weighing the potatoes, in order that Solomon should see the potatoes weighed. There was an argument as to the weight. Some of the cases contained less than a bushel. The account witness sent in showing the weight of the potatoes was correct. Witness's father-in-law was at the store when the last four bags were delivered. Witness and his brother were out at the time. Two or three days later witness discovered the bags, and he thereupon wrote to plaintiffs refusing to take delivery.

Cross-examined by Mr. Schreiner: Witness understood there would be 11 tons from the Warrigal to make up the 20 tons. Chiat understood that the £9 was to apply to the 9 tons delivered per the Goth in June.

[Buchanan, A.C.J.: The onus lies on you, Sir Henry, to prove the second contract.]

Sir H. Juta, K.C. (for defendant): As to the second contract there is a direct conflict of evidence. Sacks and Chiat both know nothing about it. Sacks was not present when it was entered into; but the two defendants both say the contract was made. Kuhns wished to convey that he alone entered into negotiations and that Sacks was only a bookkeeper, and yet the contract was in Sacks's handwriting. Again, in his evidence, Chiat twice made statements which he afterwards had to contradict. It may be said that these statements did not relate to important matters, but these small matters all bear on the question of the trustworthiness of a witness. Chiat denied he was ever at Clark's office, and if he was right, Clark Bros. had fabricated a whole conversation. Then, how could the Customs entries have been passed if they had no bill of lading from Lisbon to Las Palmas? Either they had the bill and have kept it back, or they

passed entries on something that was not the bill of lading. I submit that there was a conversation between Chiat and Clark as to keeping back some of the potatoes, and that Chiat is clearly not a reliable witness. Solomon contradicts the defendants as to the additional ton, and says that they were glad to get 9 tons and said nothing about the other ton. Solomon pretended not to know that there was any shortage, and yet the wagoner gave him defendants' receipts which showed a shortage and also broken boxes. The whole question is purely one of a conflict of evidence.

Mr. Schreiner, K.C. (for plaintiffs) was not called upon.

Buchanan, A.C.J.: The declaration in this case is founded on a contract dated May 10, 1901. This contract is in writing, and is admitted by the defendants. It is contained in a letter addressed to the plaintiffs in the following terms: "Please order 20 tons of potatoes, for which I will pay 20 per cent. over all your costs, the potatoes to be delivered in quantities of not less than 10 tons." There is a second clause, which is not material to this dispute. It is not grammatically worded or very clear in meaning, and that is explained by the fact that it is written by the plaintiff's bookkeeper, who is not very conversant with English. By it the defendants undertook and agreed that the potatoes should be shipped at their risk, and they promised to accept the goods even if they were rejected by the Customs' authorities on landing. The potatoes arrived and they were not rejected, and a quantity of them was delivered to defendants. After such delivery the dispute between the parties arose. The defendants allege that after the contract had been in part performed, there was a second agreement entered into between the parties. This second agreement was never reduced to writing, but it is alleged that the parties verbally agreed to set aside the written contract, and in lieu of it the plaintiffs agreed to supply the 20 tons of potatoes at £9 a ton all round. In ordinary business contracts, if the parties had reduced their first contract to writing, it would have been expected that there would have been some writing to evidence the second contract, but in this case there is no writing at all. The defendants say that when the first contract was partly performed, as only 9 instead of 10 tons had been delivered, there had been such a breach of contract that they were entitled to set it aside altogether. One of the de-

defendants' firm said he gave the plaintiffs to understand that they had cancelled the contract. This statement is not sufficiently distinct and authoritative to induce the Court to say that it was agreed between the parties that the contract should come to an end. It is suggested that a misunderstanding took place in the matter. It is quite possible that a conversation took place between the parties, but whether such conversation did take place or not, it is positively denied that any such contract was entered into. In the face of such direct contradiction the Court can only support the document which is in writing. Assuming, therefore, that no new contract has been proved, the only question is what amount is payable to the plaintiffs. The contract is for 20 tons, and the defendants were to pay the cost and a commission of 20 per cent. to the plaintiffs. The potatoes were imported from the Continent, and the documents were made out in kilos and reis. Whatever the weight of the cases was the cases were delivered as received, and it is deposed to that the cost per kilo is the exact cost charged by the plaintiffs to the defendants. It is not as though the plaintiffs had charged and had attempted to recover for so much more than they had themselves paid. It may be that there is a trifling benefit gained by the plaintiffs in their calculations on kilos in reducing it to pounds, and also that there is a fraction on every thousand reis in favour of the plaintiffs, but these are matters which it is not necessary to take notice of. As far as the sworn testimony is concerned, there was only one contract. The account put in by the plaintiffs is not very satisfactory, but there is no contradiction of their evidence that they have worked it out correctly, and that there is a balance due to them of £100 5s. 8d. The defendants tendered £44 on the supposition that they were entitled to set aside the first contract, but, from the figures put in, the actual cost amounted to considerably over £9 a ton. Judgment must be for the sum of £100 5s. 8d. for the plaintiffs. I will just point out to business men the desirability of having everything in black and white in entering into negotiations like this.

Maasdorp, J., concurred.

[Plaintiff's Attorney, Mr. J. J. Michau; Defendants' Attorneys, Messrs. Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice), and the Hon. Mr. Justice MAASDORP.]

GRIFFITHS V. GRIFFITHS. } 1901.
Nov. 26th.

This was an action for restitution of conjugal rights, failing which for divorce, brought by the husband against his wife.

Mr. Benjamin appeared for the plaintiff; the defendant was in default.

Mr. Benjamin called

Francis Henry le Sueur, clerk in charge of the marriage registers in the Colonial Office, who certified to the correctness of the copy (put in) of the marriage register of the plaintiff and defendant.

John Joseph Keefe Griffiths, the plaintiff, said that he was married to the defendant on July 5, 1887. There had been four children of the marriage, the eldest being born in 1888, and the youngest in 1892. The eldest child was a boy and the other three were girls. At the end of 1895, while they were living at Oudtshoorn, the defendant, with witness's consent, went to visit her mother in the Mossel Bay district, intending to stay a few weeks. She remained there until about April, 1896, when witness went and tried to persuade her to return to him, but she refused to do so. In April, 1896, witness got an appointment at Port Elizabeth as traveller, and his wife refused to go with him to Port Elizabeth.

By the Court: Defendant gave no reason for leaving witness. Up to the time she left they had always lived very well and comfortably together.

Examination continued: Witness wrote from time to time asking his wife to come back, and she had replied refusing to do so. These letters were burnt in a recent fire at witness's home at Port Elizabeth. In reply to a letter from witness's attorneys saying that if she did not return proceedings for the restitution of conjugal rights would be taken, defendant replied saying that she did not intend to return to her husband, and further said that she wished to have the custody of the two youngest children of the marriage, who had been living with her ever since the separation, and also that she should have access at all reasonable times to the other children.

By the Court: Witness was willing to allow her to have the custody of the two youngest children on condition that she had them educated.

Examination continued: Witness had no property, but his wife had a legacy coming to her. He did not wish to share in that, and did not ask for the division of the property. If she had the custody of the two youngest children, he wished to have access to them at all reasonable times.

By the Court: Defendant never gave witness any reason for leaving him. The two eldest children were living with witness, with his mother, who had always lived with him. Defendant and witness had never quarrelled about his mother living with them.

The Court granted a decree of restitution of conjugal rights, defendant to return to or receive plaintiff on or before January 15, 1902, failing which a rule nisi to issue calling upon defendant to show cause why a decree of divorce should not be granted, plaintiff to have the custody of the two eldest children of the marriage, the plaintiff and defendant to have mutually all reasonable access to the children of the marriage. The Acting Chief Justice also pointed out that in case a decree of divorce was granted, and the defendant, while having the custody of the two youngest children, did not educate them properly, the plaintiff could again apply to the Court.

DAY V. DAY.

This was an action for restitution of conjugal rights, failing which for divorce, brought by the wife against her husband.

Mr. Wilkinson appeared for the plaintiff; the defendant was in default.

The declaration set forth that the parties were married at Sea Point in community of property on February 6, 1899. There were no children of the marriage. About May, 1900, the defendant left plaintiff, and had not returned to her since, and he had failed and neglected to maintain her or contribute anything towards her support.

[Buchanan, A.C.J.: The direction was that there should be personal service, if possible. The affidavit of service says that after diligent inquiry the whereabouts of the defendant could not be ascertained, and consequently that personal service could not be effected. The rule of Court requires reasonable and proper efforts to be made to effect personal service, and I think the Court should be furnished with more details as to what exertions were made to find defendant. It is a very bald affidavit of service in this case.]

Counsel mentioned that this was the case where the defendant left plaintiff on the platform at the Railway-station. A few days afterwards it was found that he had resided at a hotel, but since then he had never been heard of.

[Buchanan, A.C.J.: As this is only an action for restitution of conjugal rights the case can go on, but if the matter again comes up a better and fuller affidavit should be put in.]

Mr. Wilkinson then called

Francis Henry le Sueur, clerk in charge of the marriage registers in the Colonial Office, who certified to the correctness of the copy of plaintiff's and defendant's marriage register (put in).

Louisa Emma Day, the plaintiff, said she was married on the 6th February, 1899, and resided after marriage for six months at Cape Town with her husband. They then went to Ceres and remained there for nine months. In May, 1900, they returned to Cape Town. They came out of the railway compartment at the Cape Town Station with the baggage. Her husband went, telling her to wait, but he did not return, and she had never heard of him since. Her husband had said something once about a young boy whom he knew coming out with a regiment, and there seemed to be something on his mind. He used to drink heavily, and at times was very desperate.

By the Court: She knew her husband six months before the marriage. He was formerly manager of the Harrington Bar in Darling-street, and had, she believed, been in the Cape Mounted Rifles. She had made every effort to find him. Witness believed that something he had done caused him to abscond, but what this was she had no idea of. Her husband had ill-treated her at Ceres.

The Court granted a decree ordering restitution before the 15th January, failing which a rule nisi would be issued as prayed, returnable on the 1st February.

DU PREEZ V. DU PREEZ. { 1901.
Nov. 26th.

Judicial separation—Evidence.

The Court will not grant a judicial separation at the mere instance of parties. Some evidence must be produced of the facts which render such separation necessary or expedient.

This was an action for judicial separation, brought by Maria Magdalena du

Press against her husband, Stefanus Petrus du Preez.

The plaintiff's declaration was as follows:

1. The plaintiff is Maria Magdalena du Preez (born Venter), of Burghersdorp, Cape Colony, and was formerly married to or a late Carl David Aucamp.

2. The parties were married in community of property on June 11, 1901, which marriage still subsists.

3. There are no children born of the marriage, but at the time of the marriage plaintiff had three children, all minors, being issue of her previous marriage with the late Carl David Aucamp, now deceased.

4. Since the marriage certain unhappy differences arose between the plaintiff and defendant, rendering cohabitation intolerable and impossible, and thereupon, on or about October 8, 1901, the parties entered into a notarial deed of separation, a copy whereof is annexed.

5. In consequence of the above, and in terms of the said deed, the plaintiff claims:

- (a) A judicial separation *a mensa et thoro*.
- (b) A division of the joint estate, in terms of the said deed.
- (c) Custody of the minor children above referred to.
- (d) Alternative relief.

And further prays that the costs of this suit may be borne by the joint estate.

The essential provisions of the notarial deed above referred to were: The division of the joint estate was to be made by certain arbitrators; community of property was dissolved; debts past and future were to be paid by the contracting party; the plaintiff was to have custody of her children, and either party was to be at full liberty to institute proceedings in the Supreme Court against the other for a judicial separation *a mensa et thoro et a communio bonorum*, on the grounds that it was impossible for the said parties to live together any longer on account of differences which had arisen between them. The said proceedings were to be instituted on the terms and conditions agreed upon in the said deed, the said parties hereby appointing for the purpose of such proceedings two practitioners, the one to pray and the other to consent to a decree for judicial separation, according to law.

Defendant's plea was as follows:

The defendant says he admits all the allegations contained in plaintiff's declaration, save that he contends that the costs of this suit should not be borne by the joint estate, and prays that this Hon. Court will

order each party to bear his or her own costs.

Mr. Jones (for the plaintiff) called

Francis Henry le Sueur, a clerk in charge of the marriage registers in the Colonial Office, who deposed that the copy of the marriage register put in was correct.

Mr. Jones said that was all the evidence he intended to call.

Mr. Gardiner said he simply appeared to consent to judgment in terms of the prayer of the agreement entered into, but he asked that each party pay their own costs.

Buchanan, A.C.J., said that in these cases the Court wanted to hear the grounds for granting a separation.

Mr. Jones referred to the case of *Coetzee v. Coetzee* (1 Sheil, 31, Feb. 5, 1891), which he said was exactly similar to the present, and where the agreement drawn up was by the same attorney and in the same terms. There, according to the record, no evidence was called.

Buchanan, A.C.J., said that he believed that in that case an affidavit was read. The matter came forward on motion, and the facts were brought before the Court in some way.

Maasdorp, J., said the Court would not grant the separation, unless there were some grounds; but there seemed to be some grounds stated in the plea.

Buchanan, A.C.J.: We must lay it down as a rule that in future a decree of judicial separation will not be granted unless there is some evidence before the Court to satisfy them that there are grounds for the separation. It might be that in a clear case affidavits would be sufficient. However, in this case no harm would be done to the parties, and there seemed from the plea to be facts to justify the separation. A decree of judicial separation will therefore be granted, in terms of the consent, but no order will be made as to costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne and Lawton; Defendant's Attorney, J. G. Harsant.]

SCOTT V. SANDELS AND CO. { 1901.
Nov. 26th.
" 27th.
" 28th.

This was an action to recover the sum of £612 0s. 4d., which the plaintiff alleged was due to him by defendants for goods supplied and work done.

The plaintiff's declaration was as follows:

1. The plaintiff is George Adie Scott,

trading in Cape Town as timber merchants under the style or firm of W. and G. Scott. The defendants are William King Sanders and Francis Maylon, trading together under the style or firm of Sanders and Co.; the defendants manufacture and sell carriages, wagons, etc.

2. In or about the month of April, 1901, the plaintiff sold and delivered to the defendants certain timber, being oak and ash, worked up by the plaintiff as directed by the defendants into "long wagons," "brake bars," and other pieces suitable for the construction of carriages, wagons, and the like. The value of the said goods was the sum of £612 0s. 4d., as will more fully appear from a detailed statement which has been rendered to defendants.

3. The defendants neglected and refused to pay the said accounts, but offered to pay the sum of £473 8s. in full settlement, but the plaintiff refused to accept the same in full settlement.

The plaintiff claims (a) the sum of £612 0s. 4d., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

The defendants' plea was as follows:

1. The defendants admit paragraphs 1 and 3 of the declaration.

2. Defendants admit paragraph 2, save that they deny that the value of the goods sold and delivered to defendants by plaintiff is £612 0s. 4d., though they admit that they have received an account purporting to set forth this amount as the correct value.

3. Defendants say they were in the habit of purchasing rough timber from the plaintiff and other merchants in Cape Town, and that they used to send all such rough timber to plaintiff to be cut and worked for use as "manufactured" timber in the defendants' business. On all stocks purchased from the plaintiff the defendants are entitled by custom and agreement between the parties hereto to deduct discount at the rate of 5 per cent. on the price charged.

4. And the defendants deny that they received from plaintiff timber for which the items £91 16s. 6d. and £28 1s. 2d. appear on the account rendered, which is referred to in paragraph 2 of the declaration, and they say further that they are entitled to deduct £18 14s. 7d. as discount at 5 per cent. on the sum of £374 11s. 3d., being the total value of the rough timber actually purchased from the plaintiff.

5. The total sum which the defendants are entitled to deduct from the amount of £612 0s. 4d. claimed by the plaintiff is £138 12s. 3d., as and for timber not sup-

plied by plaintiff to defendants, as alleged, and as for discount as aforesaid.

6. The balance left after such deduction is £473 8s. 1d., which the defendants hereby tender to pay, as they repeatedly have tendered to pay to plaintiff, as being the amount which they truly and justly owe plaintiff.

Wherefore, subject to the above, the defendants pray that plaintiff's claim may be dismissed with costs.

In his replication plaintiff said, with regard to paragraph 3 of the defendants' plea, that the terms of payment for rough timber as between plaintiff and defendants were that 5 per cent. discount is deducted from the purchase price, provided that payment is made within thirty days, but such payment was not made in this instance.

In their rejoinder, defendants admitted that the arrangements as to discount between the parties to the suit were as stated in the replication. The defendants further said the cheque for £473 8s. was formally sent to the plaintiff after the thirty days' period had elapsed, but said that this was due to the fact that the parties were constantly negotiating within the said period for a settlement of the dispute, and the cheque was held over pending such settlement, though at interviews during the said period the defendants repeatedly offered to send a cheque in the usual course for the said amount, which offer the plaintiff repeatedly refused.

Mr. Searle, K.C. (with him Mr. S. Solomon), for plaintiff; Sir H. Juta, K.C. (with him Mr. P. T. Jones), for defendant.

Mr. Searle called

Neil McKechnie, who said he was the sawmill foreman at W. and G. Scott's, Cape Town. He had held that position for the last four years. Messrs. Sanders and Co., carriage manufacturers, had had dealings with the firm since November, 1900. They sent rough timber from time to time to be worked up. The plaintiff had special machinery for cutting timber into all sizes. The wood worked up for defendants was what was called hard wood—always oak and ash. In March or April, 1900, a lot of oak and ash was bought by Sanders from Scott. That was Scott's own timber, which had arrived shortly before. It was placed alongside the works in Buitengracht-street. At that time there was no wood sent by Sanders to be worked up in witness's department (the sawmill). The arrangement was that the wood which was bought had to be worked up by Scott into three different sizes, viz., "long wagons," 12 feet long,

"brake bars," 6 feet long, and "wagon pieces," 7 feet long. On the 11th April witness, along with Sanders's representative (Mr. Wilson) and another man named Price, commenced to measure the wood, and they finished the work on the Saturday. Wilson was at the place all the time. He called out the measurements to witness, who took them down on slips of paper. Price held one end and Wilson the other end of the tape-line. When they finished on the Saturday witness took the slips with the measurements for that day to the office, and offered them to the bookkeeper, but the latter would not have them, saying that they must go through the usual form, and put them in the delivery book first. This delivery book was in triplicate. One of the copies remained in the book, while the other two were torn out, one being retained by Sanders and the other afterwards pasted in the book, along with the one which remained there. The one which was pasted in the book had to be signed by Sanders.

Mr. Searle said that the whole case arose through two of these notes not being signed, as they should have been.

Continuing, witness said the practice was for him to copy the original slips into the delivery book, and he then gave the original slips to Sanders. With regard to the slips which the bookkeeper refused to receive on the Saturday, witness entered them into the delivery book on the Monday, and the bookkeeper (Mr. Freedman) checked them over with witness. After passing through the delivery book, they were copied into the day book. After copying them into the delivery book, witness took the slips to Mr. Wilson. Witness did not know until some time afterwards that the two slips in question were not signed.

By the Court: Witness took about eight or ten slips away on the Monday, and all were signed except these two. He did not notice until afterwards that these two were not signed. It would be about a month afterwards before he knew. He could not account for these not being signed.

Examination continued: On the Monday after the measuring was completed they began working up the timber. The timber in question was all worked up under witness's supervision, but the "long wagons" portions went to the machine shop, which was under the control of Mr. George Scott. The working-up was finished about the second week of May. There was no other hard wood in witness's department at that time, so that it could not get mixed up. As the work was

worked up and finished it was from time to time taken away by Sanders and Co., and wagon tickets were given every time. Witness made out these wagon tickets, and Mr. Wilson signed them. That was for the manufactured stuff. The timber that was useless for the particular pieces was called off-cuts. These off-cuts were taken away by Sanders's men. Before it went into the machine, Wilson and his men cross-cut the whole of the wood into the lengths as required. Sanders was in a hurry for this wood as it was required for some military contracts. There was bound to be more waste than usual, and consequently there would be a larger reduction than usual in the amount of manufactured timber. Sanders, however, had all the off-cuts, and wagon loads were taken away. Shortly before the work was finished, Mr. Sanders came to the mill and inquired when they would be finished. Then Mr. Alexander Scott, a brother of the plaintiff, came into the mill, and he and Mr. Sanders talked together. They were talking about some of Scott's men having been taken away by Sanders. Neither of them was pleased, and Mr. Alexander said that if Sanders wanted orders put in they must go through the office; that Sanders must not go to the mill to put orders in, but that they must go through the office. Mr. Alexander then went away, and Sanders said, "Scott thinks he is smart, but I have had some oak and ash which has not been signed for, and I will put them to some trouble before they get their money." At that time witness knew nothing about these tickets not being signed. He did not know what Sanders was driving at at all. Witness remembered an interview on June 27, when there were present George Scott, Freedman, Sanders, Wilson, and witness. Freedman said something to the effect that he did not think he had got the stuff, and Sanders in reply said something to the effect that he did not mis-doubt getting the stuff, but it was Mr. Wilson he had to deal with, and that if they could convince Wilson that he got the stuff it would be all right. Witness then thought the matter was going to be settled, but it was not. If the whole of the wood had not been delivered witness could not have got out of it all the manufactured wood he did get. It would not have been possible to get so much manufactured wood if the wood in dispute had not been used.

Cross-examined: The long wagons came from the other shop. Wilson was a few weeks in Sanders's employ. In April Wilson was put in witness's place. He was

there to check the wood. If manufactured wood came from witness's place, Wilson would check it with the delivery ticket. There would be two tickets. The one to Sanders would be signed. Witness would keep the unsigned one.

Sir Henry Juta handed the witness some slips given by him to Wilson on the 13th April.

Witness said those produced were not all the slips for the 13th April. They were in witness's handwriting.

Sir Henry Juta asked the witness to show what items in the delivery book were not accounted for in the slips.

Witness said he would do so after completing his evidence. He was sure that the slips produced were not all the slips given on the 13th April. The delivery tickets were signed by Wilson. They were made up from the slips. Thursday's were made up on Thursday and Friday's on Friday, and they were signed there and then. The slips were made out as the timber was measured, and the items were taken from the slips and put on the book. When the dispute arose, Mr. Scott and Mr. Perry, on behalf of Mr. Sanders, went through the measurements. No one else was getting oak and ash in quantities in which defendant got the wood from the 13th to the 15th April. Witness put in a summary from the books showing the manufactured wood delivered after the 15th April.

Re-examined: There were two delivery books. One was given to the bookkeeper, and they were used alternately. Consequently Thursday's lot appeared in one book and Friday's in the other.

Elijah Freedman, invoice clerk to plaintiff said that from April on he had been acting as bookkeeper. Witness kept a day book, and in this he entered up the items which appeared in the delivery book from day to day. In March defendant came to him to ask if they had any hard wood. Witness sold it, and went to Mr. Scott to confirm the sale. They had a consignment by the Clan Farquharson. The wood was measured up by the last witness and Wilson. On the Monday after the 13th witness wanted the delivery book, and went to the last witness, whom he found entering up the delivery book from the slips. Witness checked the slips with the book, and they tallied. For the whole of the goods entered on the delivery book there were slips. The slips were from 9,889. On the same day witness entered the items from the delivery book in

the day book (produced). The day book entries were a repeat of what appeared in the delivery book. The delivery tickets, after they came back, were filed and afterwards pasted in the book by the office boy. In May there was a letter stating about tickets being missing, and witness tore out the two tickets from the book and sent them to Sanders, in order to try and enable Sanders to trace his tickets. Sanders kept these tickets about a month. Witness was quite sure he tore the tickets out of the book. They had been pasted in before this letter was received. Witness wrote stating the amount of timber supplied. The cubical contents of rough oak and ash timber delivered in April and May was correctly stated in this letter to be 1,291 feet. The amount represented on the two unsigned delivery tickets would be about 280 cubic feet. Witness was present at an interview on June 24. Mr. Sanders, Mr. Wilson, Mr. George Scott, the last witness, and witness were present. Five per cent. discount was allowed on rough timber, according to practice, for thirty days. Stuff brought ex-ship was always payable in thirty days, and not, as was the case with other goods, at the end of the following month. No actual tender was made.

Cross-examined by Sir Henry Juta: Defendant was willing to pay the account if a credit note was given him for the £120. Witness commenced the entries in the day book on page 133. After completing that page, he found there was just room enough on the previous page for another lot, and so he turned to page 132, and finished the entry there. This was the first time in the two years he had been in plaintiff's employ that he had compared the slips with the delivery slips. It was not usual to have slips. When witness went to the shop on this occasion, the last witness was just about finishing writing the entries on the slips into the delivery book. There had been hardly any hard timber dealt with in the works from firms other than Sanders.

Re-examined by Mr. Searle: There was no other person at that time who received such an amount of hard wood. Sanders bought four-fifths of the shipment by the Clan Farquharson.

By Sir H. Juta: After April 15 the plaintiff did not deliver any timber of that kind to other people. They made up some dissel-booms for another firm at the end of May. They were for the military. Without going through the books, he could not say that

any other firm had had oak or ash from the plaintiff after April 15.

George Scott deposed that he carried on business as W. and G. Scott, timber merchants, Cape Town. The whole shipment by the Clan Farquharson was about 2,079 cubic feet. He sold to Sanders about 1,291 feet, out of that particular parcel. There was a quantity of figured oak for furniture purposes. He told Sanders of this. Sanders bought at the rate of 8s. 6d. per cubic foot. He saw the wood being worked in the mill. The lengths of timber were in many cases not suitable for the sizes that were being used. The off-cuts were larger than usual. The waste was in some cases 60 per cent., 30 per cent., and 25 per cent. It could have been cut to better advantage, but it was all cross-cut for them beforehand. The off-cut would be 10 to 15 per cent. in ash. In oak and stinkwood it would be 25 to 30 per cent. Thirty per cent. would not be too high a percentage in the present case. If the rough wood represented 1,223, the manufactured timber would be 864. That was taking the actual wood after it was planed and sawn. The amount of wood in dispute would be about 280 feet. He did not hear until a month afterwards about the tickets in dispute. At that time he was not supplying hard wood to anyone else, and he did not supply any large quantity until some time afterwards.

Cross-examined by Sir Henry Juta: The complaint did not come to his knowledge until a month after. The complaint might have reached one of his clerks earlier than that. He could not say if Sanders's man was always at the works. Sanders certainly put a man there to cross-cut the wood, and show how it had to be sawn. The only dispute was about these two slips. Witness had no complaint against Wilson, Sanders's man, but he had against Sanders. The waste in some cases was 60 per cent. Sanders sent witness wood from other people. Witness gave no receipt for wood so sent. He did not control it, and was not responsible. It was stacked in the street on each side of the mill, and he charged for the manufactured article which he delivered from such timber.

Oliver Price deposed that he was a sawyer in the employ of W. and G. Scott. He had been there for three years. He remembered the oak and ash belonging to Sanders. He helped to measure it. It took them until the Saturday. He had no uncut wood on hand when they began on the shipment of ash and oak. This wood was separate.

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as there was no other wood of that size or description in the mill at the time. The work was finished before the end of May. There was a good deal in the way of off-cuts. The wood was cross-cut by Sanders's men. Witness sawed most of the wood himself. No other wood was mixed up with it at the time. It was stacked up by the saw.

Cross-examined by Sir Henry Juta: The wood was not kept in the mill. It was in Buitengracht-street. It was mixed oak and ash. It was cut to various sizes. He would not know for whom he was cutting unless he got a written order. Otherwise he simply carried out the instructions of the foreman, but he knew which was Sanders's wood because he was told. He cleared up everything before this batch for Sanders was begun.

By the Acting Chief Justice: There was a good deal of waste in cutting up.

George Topp, foreman of the machine department for plaintiffs, said that the machine department adjoined the sawing department. Witness finished the long wagons after they had been cut. Witness made out the delivery tickets for the long wagons. The quantity shown on the document put in—218—was about the quantity which went out. There was a great deal of waste for imported timber in the Clan Farquharson material. It was not very well adapted for cutting up, as they had to cut it.

Cross-examined by Sir Henry Juta: The invariable rule was for Wilson to sign the delivery tickets. Witness had nothing to do with the cutting. Witness saw, however, that there was a great deal of waste. Witness did not think there was any oak supplied to other people in April.

William Couch, draughtsman at W. and G. Scott's, said he made the diagrams which had been put in. In regard to off-cuts, witness had had special experience. The usual percentage of waste in hard wood was 20; 15 per cent. was low. In his opinion, this wood was cut up indiscreetly. He meant that the wood was not adapted for cutting up in the way it had been. The waste was at least 40 per cent. None of the off-cuts from the wood brought by the Clan Farquharson were worked up by Scott's for spokes. It was not suitable for that; native woods were best for this use. Witness had on several occasions seen Sanders's wagons take away off-cuts. Witness had caused some figured oak required for another party to be taken out of Sanders's lot, with which it had become mixed.

Cross-examined by Sir Henry Juta: Witness was not aware that in the first account Sanders was charged with the figured oak taken out. If a man knew his work he would choose the lengths suitable for brake-bars and the lengths adapted for cutting for planks. A man who knew his work, having to deal with a 12-foot piece, would cut it up for 6-foot brake-bars, and a 14-foot piece he would make into 7-foot planks.

Re-examined by Mr. Searle: They had to get a certain thickness for brake-bars, which were things in which there was a good deal of waste.

Mr. Searle closed his case.

Sir Henry Juta called

Joseph Makepeace Wilson, who said he had had considerable experience in wood, and held a certificate as mining engineer. In April he was employed by defendant to go to Scott's. His duty was to receive all woods, and to give receipts to Scott's for all manufactured wood delivered. When wood was purchased from Scott's, witness measured it with McKechnie, and on two occasions with Mr. Alex. Scott. On this measuring slips were made, and from these slips delivery tickets were made out and signed by witness. One was kept by witness, and the other by Sanders. When witness went to the mills there were about 300 planks in the mill, in Chiappini-street, and by the side of the mill. There were not less than 300 planks lying there ready for manufacture on the 1st April. There were not less than 250 planks of oak and ash, and about 100 of stinkwood. Witness had given a receipt for everything measured. He was there for that purpose. On the 11th April witness measured 12 planks, and on the 12th, 15 planks. On the 13th witness measured up 99 oak planks and 58 ash planks. This was on the Saturday, on which day the people at Scott's worked up to noon. The slips produced were the slips upon which McKechnie made out the measurements as they were called out. They finished the slips at about 11.50. McKechnie said he could not then make out the delivery notes. Witness said he (McKechnie) could take the slips and that he knew how many were there. On the Monday afternoon witness compared the delivery notes with the slips produced, and afterwards signed his delivery notes and gave them to McKechnie. He also signed the duplicate for Sanders. The slips he retained for purposes of reference. He would swear that the slips were the same that McKechnie gave

him, and that none of them were missing. He had also gone through the duplicates in the defendants' office. There were a number of marks on those slips, and Mr. Gallie Scott, one of the partners, checked them off with the delivery notes. Witness took the slips and compared them and then returned them signed. He had had 25 years' practical experience in the cutting of timber into various lengths; there was a waste of about one-twelfth, taking it all round; that was to say, about 8 per cent. as near as he could reckon. During the month of April he received wood from other merchants, and sent the delivery tickets to Messrs. Sanders. The wood consisted of oak, ash, hickory, and stinkwood, and a note was kept of everything. There would be about three loads of off-cuts after April 13 and during May. There were something like fifteen to eighteen butt-ends of planks, which were selected for spokes and taken away. The wood which he received from Steytler's, Thesen's, and Danvers was all manufactured by Scott. None of the wood was taken away. He had on more than one occasion had to complain of wood being removed which had been measured. On the first occasion there were four planks lying outside the mill when he went to dinner, and when he came back the four planks were missing. He mentioned the matter to Mr. Scott, and after search had been made, three of the planks were found in McKechnie's mill with a lot of other timber piled over them. The other plank had been carted away to the stores, a distance of a hundred yards. By Mr. Scott's orders, the planks were taken out and put back. On a second occasion a plank was taken away into the mill and cut up.

By the Court: Mr. Scott did his best to find the planks; he did not charge Mr. Scott with having purloined the planks.

Cross-examined by Mr. Searle: He saw McKechnie making out the slips in the mill, but he did not see him finish them. He never saw Mr. Freeman in the mill that day, but he might have been there. He had not got the book with him in which he made the entries on the Thursday, Friday, and Saturday.

By the Court: He was never asked to show the notes in his pocket-book to the other side.

Geo. Perry, a clerk in the employ of Messrs. Sanders, stated that he kept the books of the defendants, and whenever anything was received or delivered the tickets were always sent to witness. He produced the delivery notes of timber received from Messrs. Steyt-

ler, Thesen, and Danvers in April. In May they also purchased some timber from Isaacs and Co. and from Scott's as well. Wilson handed over the delivery tickets in connection with the wood which was in question, but he did not get Scott's statement until May. He found that there were two items for which there were no delivery tickets. On the first occasion when he went to see Scott's they did not produce the two unsigned notes. Previous to checking the tickets witness met McKechnie, and the latter said they (defendants) must have lost the tickets. Witness said that if this was the case they (plaintiffs) must also have lost theirs, as they were in duplicate. Mr. Scott said, "That's right." That was before they went into the office. After they entered the office witness found they had no delivery tickets for the two invoices in dispute. They did not show him the day-book. They showed him nothing whatever in connection with the invoices in dispute. Subsequently Mr. Freedman handed him the two tickets and he took them away. Witness made the remark that they were not signed for. He went down for the purpose of trying to trace the delivery of the two invoices. Witness took the tickets in order to go over all the papers and ascertain for certain. In the account sent certain fifteen planks had not been charged against Sanders and Co., although they held delivery tickets for the amounts, and witness pointed this out to Mr. Scott, to show that they (Sanders and Co.) had not been debited for the quantity of wood. Scott and Co. then debited them with sixteen planks, and witness then pointed out to them that it should only be fifteen. They were afterwards given a credit note for one plank on April 12. The amount of cubic feet defendants bought from other merchants in the month of April was 996. According to witness's calculation they received from Scott's, in the rough, 730 cubic feet, including the 70 feet returned and the two lots which were in dispute. The total amount invoiced was 1,021 cubic feet. The amount of the disputed items was 221 cubic feet. The total amount of manufactured wood received from Scott's during April and May was 1,474 cubic feet. Excluding the two disputed items, the rough material bought including that from Scott's was 1,860 cubic feet. Witness remembered Scott's collector coming up at the end of May. Mr. Manning offered to pay the account, barring the two disputed items, leaving these open. Discount had been frequently allowed after 30 days. They paid the March account on May 14.

Cross-examined by Mr. Searle: Witness did not get the detailed invoice dated November 15 until early in May. He had an invoice at once, but not a detailed statement. Witness had no receipt or signatures. The invoices sent corresponded with the detailed statement sent later. Witness's firm had four oak planks from other firms during April. Witness did not know whether the disputed ones were oak planks.

Mr. Searle said that the account showed that the disputed planks were oak.

Further cross-examined, witness said he had been through the invoices to see the amount of manufactured wood. Witness was quite satisfied that the quantity was received which was shown on the invoices. Some of the wood was manufactured in May, according to Mr. Wilson. When witness got the delivery tickets he filed them. When witness received the total he compared the delivery tickets with the invoices.

Re-examined by Sir Henry Juta: Witness was perfectly sure that he did not have a statement on which they were charged with the disputed timber before May. The delivery tickets did not show whether the wood was oak or ash. Defendants bought other oak and ash in March; they bought a considerable amount of timber.

Will King Sanders said he was one of the defendants, and carried on a carriage works. They dealt with Scott's at the beginning of the year. Before sending Wilson they had two other men to cross-cut and check. Witness sent Wilson there in April. Witness had bought various wood in March, and when Wilson went there there was a great amount of wood there. In May witness started works of his own at Observatory. He had had 15 years' experience in the trade. The lengths were usual, and it was an everyday thing for them to cut these lengths from oak and ash. The ordinary loss from off-cuts would not be more than 10 per cent. when cut by a man who understood his business. From what witness saw of Wilson, the latter had the planks cut with the least possible waste. It was absolutely absurd to say there was a loss of 60 per cent. on off-cuts. The result of a loss such as this would be bankruptcy. Witness could not get enough waste from his works to light the fire with. When witness went down to Scott's he took the invoices. They tried to show him he had had the wood according to the figures. According to witness's calculation, the timber shown on all the invoices—including the amount in dispute—was 1,021 cubic feet. The

amount in dispute was, witness believed, 221 cubic feet. Nothing was said about witness taking four-fifths of the wood bought by the Clan Farquharson, nor was he told that the whole amount was 2,079. Witness asked for as much as he could get. They said they would let him have £400 or £500 worth. Witness thought he was buying this amount. He asked for as much as they could give him.

Cross-examined by Mr. Searle: He contended that there was practically no waste with the planks at all.

Re-examined: He inspected the timber as it was being cut by Wilson, and went there frequently to see that it was being properly cut.

William de Jongh, in the employ of the defendants, said that he worked under Wilson at Scott's place in April. There were four piles of timber belonging to Sanders lying there, of various descriptions, some 300 planks in all. The whole of the timber went through Scott's mill, and was manufactured into long wagons, brake bars, and cross-pieces, 7 feet in length.

Cross-examined by Mr. Searle: He was present when the timber was measured up, but had nothing to do with the other timber except help to put it on the wagon.

Johannes Franzen, formerly in the employ of Messrs. Danvers and Co., said that a quantity of wood was sent by that firm to Scott's mills on behalf of Messrs. Sanders. The amount would be about £400 worth in March, and a similar quantity in April. He estimated that the average loss of wood which could not be turned into spokes and felloes would be about 8 or 10 per cent.

Cross-examined: The loss would be more or less according to the parcel.

James Henry Smithers, manager in Cape Town for Messrs. Steytler and Co., said that in March and April last he delivered timber at Messrs. Scott's on behalf of the defendants. In March about 80 cubic feet was delivered, consisting of oak, ash, hickory, and ironwood. In April he delivered 4 oak planks and 400 or 500 cubic feet of ash. In all, he delivered over 1,000 cubic feet of timber in April on behalf of Sanders, of which more than half was delivered at Scott's. One lot of planks Mr. Sanders took away himself, but he did not know where they went to.

Cross-examined: His drivers had instructions to take all the timber to Scott's, but he only knew Sanders in the matter.

Taga Lalein, in the employ of Messrs. Thesen and Co., stated that in March and April a quantity of timber was supplied to

the defendant by his firm, and delivered at Scott's.

Joseph Marks, in the employ of Messrs. Isaacs and Co., gave evidence as to supplying the defendants with a large amount of timber in the month of March. The amount was, roughly, 400 or 500 planks of birch. Some of this was delivered to Sanders, and the rest his firm kept; but none was delivered to Scott's.

Francis Maylon, a partner in the defendant firm, stated that when the plaintiff's collector called, he offered to settle the major portion of the account, and leave the two disputed items over. Mr. Freedman subsequently called upon him, and at the latter's request he went to see Mr. Scott. He could not find Mr. Scott, nor did he ever go into the matter with Mr. Freedman. When the collector called on witness, he telephoned down to W. and G. Scott, asking whether they would accept a cheque, less the two disputed items. Mr. Freedman replied on the telephone in the negative. He offered to pay the full amount if they would produce the tickets signed by Wilson.

By the Court: If the plaintiffs had accepted the offer, he should have considered the account settled. If the defendants produced the receipts, he was ready to pay, but not otherwise.

Sir Henry Juta closed his case.

After argument by counsel, on the facts of the case,

Buchanan, A.C.J.: The plaintiffs in this case are a firm of timber merchants carrying on business in Cape Town, and besides dealing in timber, they saw and manufacture timber for their customers. The defendants carry on business as carriage builders in Cape Town, and had been dealing with the plaintiffs for some months before this cause of action arose. The course of business followed between the parties was to render monthly accounts, which, after being discussed, were settled every month. In April last a question arose about the account for that month. The amount of that account was £612 0s. 4d. The defendants admitted every item in the account except those contained in two invoices, one for the sum of £91 16s. 6d., and the other for the sum of £28 1s. 3d. These items were for the purchase price of certain timber. The plaintiffs, Messrs. Scott Bros., imported timber by the Clan Farquharson, and having had this at their yards, they sold a quantity of this shipment to the defendants. There was no specific quantity purchased or number of

planks decided upon between the parties. The defendant Sanders said they wished to buy £400 or £500 worth of oak and ash timber, and having large contracts on hand, they were willing to take as much oak and ash as they could get. Sanders and Co., the defendants, kept a man at the plaintiffs' sawmills to receive and look after their timber while being cut or manufactured. Besides the plaintiffs, Sanders and Co. were in the habit of buying timber from other people as well, and this timber was also sent to the plaintiffs' mills to be cut up and manufactured. The timber belonging to the defendants sent to Scott's yard remained there at the risk of Sanders. No receipts were given by Scott Bros. for the timber received at the yard, the only receipts we have put in being receipts for quantities of manufactured timber when they were sent away. Messrs. Sanders and Co. having bought timber from Messrs. Scott Bros., employed a man named Wilson in their service to measure up the timber on their behalf. Wilson, on the one side, and McKechnie, on the other side, measured this timber, assisted by a workman in Scott's employ named Price. The timber was measured on the Thursday, the Friday, and the Saturday. The timber measured on the Thursday was put down on a delivery note made out on that day, and the timber measured on the Friday was put down in the delivery note for that day, but the timber measured on the Saturday, which was much the greater quantity of the timber, was not entered in the delivery notes on that day. McKechnie and Wilson, in measuring the timber, entered the quantity on slips of paper, which McKechnie kept. They finished their work shortly before the time for closing on the Saturday, and had not time to finish the transaction by entering the measurement on the delivery note. It was therefore agreed between Wilson and McKechnie that McKechnie should keep the slips upon which the measurements were taken, and enter them up on the Monday, and that then receipts should be given. In their business, Scott Bros. kept a book of delivery notes in triplicate. The entries were made on the original, and by means of manifold writing the duplicate and triplicate were copied at the same time. The duplicate and triplicate were torn out of the book and handed to the customer who bought the goods. The customer signed the duplicate and returned it, but kept the triplicate as a check. It is clear from the book that on the Monday morning a large quantity of timber

measured on the Saturday was entered up. Altogether on the Thursday, the Friday, and the Saturday there were ten delivery tickets filled up for the timber measured off. It now transpired that eight of these were signed by Wilson and two were not signed. And it is the contents of these two unsigned delivery tickets that are now in dispute. The measurements for Thursday's and Friday's timber are not in dispute, but with regard to Saturday's timber, Wilson says that 157 planks or logs of timber were measured, while the books show that there were 56 more, or 213 in all. It is the price of these 56 that is now in dispute. Defendants have offered to pay the whole of the rest of the price except the price of these 56 planks. Had the plaintiffs been more careful in their business the fact that Wilson had not signed these tickets would have been at once discovered. All the duplicate delivery tickets found their way into the possession of Scott Brothers, and in accordance with the usual custom, these duplicates were pasted into the original book. There certainly was a certain amount of carelessness on the part of both McKechnie and the bookkeeper in not observing at the time that two of these tickets were not signed by Wilson. Had the bookkeeper noticed this, he would, no doubt, have at once called for an explanation, and the matter would have been rectified, and this dispute would never have arisen. He did not do so, and hence this action. Defendants did not take away the timber from Scott's yard, but left it there to be cut up, and they only received the manufactured timber, the cubical contents of which was considerably less in quantity than the timber in the rough. They also removed the waste and the off-cuts. There is no record of the amount of the waste and off-cuts taken away. We have only the record of the manufactured timber delivered to defendants. According to plaintiffs, the total measure of the total amount of timber bought by the defendants was 1,223 cubic feet; while the amount of manufactured timber delivered was 864 cubic feet. That leaves something like 30 per cent. of timber unaccounted for. Evidence has been given in this case as to the amount of waste that customarily arises from the cutting of timber for the purposes of manufacture, and these estimates vary in a most extraordinary manner. According to some of the witnesses for the defence, the waste would amount to 8 or 10 per cent., while some of the plaintiff's witnesses say

that it would amount to 30 or 40 per cent. If the plaintiffs' figures are correct, the actual amount in this case is something under 30 per cent. of shortage of waste and off-cuts. One of the witnesses for the defence, De Jongh, a very intelligent man, says that as a rule the waste is about 10 per cent., but that in this case the shortage arising from the quantity of off-cuts, which would be still useful for other purposes, would be something like 25 per cent. If the amount of timber now in dispute is deducted from the account, that is, if plaintiff did not sell the 56 logs, the percentage for off-cuts would be something under 11 per cent. Sitting here as juror, I would not on these figures alone decide the case, as they are to a great extent only theoretical, but they are an item in the case. I agree with Sir H. Juta that, under the peculiar circumstances of the case, the onus is thrown on the plaintiffs to prove delivery of the timber. After weighing the evidence carefully, and considering the custom of the parties, I am forced to the conclusion that Scott Brothers have discharged this onus, and proved that the timber was sold, and that delivery was taken, including the 56 planks in dispute. My ground for coming to that conclusion is founded not only on the direct and positive evidence given by the plaintiffs' witnesses, but also upon the fact that, unless there was deliberate fraud on the part of Scott Brothers, these entries could not have been made in the books in the way they were, whereas, without attributing fraud to the other side, a mere omission to sign the two tickets would account for this mistake. Mr. Mailen, one of the parties, very fairly said to plaintiffs, "You prove to me that you have delivered this timber and I will pay for it, but as I have only received so much manufactured timber, which is considerably less in cubic measurement than what I have bought, I am not satisfied that you delivered this timber for which our representative gave no receipt." Now, in addition to the entries in the books, there is also the fact that at the time invoices were sent by Scott Bros. to the defendants of the identical timber now in dispute. It might be said that the defendants were being charged instead of some other customer, but it hardly seems likely, because at the time when the matter was fresh in mind invoices were sent to the defendants, and not to anybody else. About that time it does not appear that any other customer of Scott Bros. was in the habit of buying large quantities

of timber like this. There is also the deduction to be drawn from the percentage of off-cuts. Although the invoices were sent, it was not until it was discovered that the receipts had not been signed that the dispute arose. As already said, if the plaintiffs' clerks had not been negligent there could have been no dispute, but having been careless, and not having kept their receipts in order, the question has now come into court; and the question for decision is, have the plaintiffs satisfied the Court that there was delivery? Looking at all the circumstances of the case, I must say that unless there has been deliberate fraud on the part of Scott Bros., which seems to me most improbable, I can come to no other conclusion than that the timber was measured up on the Saturday and received by Wilson. Therefore, having come to that conclusion, judgment must be for the plaintiffs. There is yet the question of the 5 per cent. discount. In the course of dealing between the parties it was customary for parties to allow 5 per cent. on the monthly accounts. This month's account would have been paid but for this dispute, and, I understand from Mr. Searle, the plaintiffs are still willing to allow the discount. On the rest of the account this would amount to some £18. The timber which is in dispute amounts to within a few shillings of £120, and therefore the sum of £6 more must be added as discount on the amount in dispute, so that the account stands at £612 0s. 4d., less £24 14s. 7d. discount, which leaves £587 5s. 9d., for which judgment will be given. A question was raised as to whether the cubic contents of the timber measured was the same as that in the account, and it is said that it comes to something less. There is no direct evidence on this point, and the details given by the plaintiffs were not disputed during the progress of the case, although during the argument it has been said that they were incorrect. In the absence of any dispute the account put in will be taken as correct, but if the parties in checking the account find any mistake, no doubt Scott Bros. will allow a rectification to be made. On the whole case, therefore, I am of opinion that judgment must be given for plaintiffs for the amount claimed, less the discount, with costs.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. Reid and Nephew; Defendants' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

CAMP V. CAMP. { 1901.
Nov. 27th.

This was an action brought by the wife for restitution of conjugal rights, failing which, for a decree of divorce.

Mr. Benjamin, who appeared for the petitioner, said that the parties were married at London on the 9th October, 1875. The wife now resided at Hampstead, London, and the defendant at East London. There were three children of the marriage.

The evidence of the plaintiff was taken on commission. She deposed that her husband became insolvent in 1880, and did nothing to support her. He went to South Africa in 1890, and last wrote to her in 1898. Since 1897, when he sent her £30, he had contributed nothing towards her support. Last year she found that he was still living in East London.

Buchanan, A.C.J., that that there was a letter from the defendant addressed to the Registrar of the Court. Therein he said that he could not put up any defence, having no means to engage a solicitor and counsel, or to pay his fare to Cape Town. He asked if there were no means for him to defend *in forma pauperis*. For some time he had been laid up with dysentery, and had been twice in hospital. He left his wife some eleven years ago with her full consent and approval, and up to three years ago had supported the family to the best of his ability. During these seven years he had sent home £450. He had written asking his wife for her photograph, but she had put it off, and he had written to say that until she sent it he would not communicate with her. He asked that the case should be put off for a few months in order that he should have an opportunity to get a few pounds.

Herman Vintcent, a retired policeman, said that he served the papers in this suit on the defendant, who was working as a mason—a day labourer—and earning 15s. a day.

The Court ordered that the case should stand over until the 17th February. An intimation would be given to the defendant to defend if he choose.

MANN V. MANN.

Mr. Upington applied on behalf of Frederick Edward Mann for an order for restitution of conjugal rights, failing which, divorce. Counsel said that the defendant, Mabel Annie Mann, at present resided at Gordon's Bay, and the plaintiff at Rondebosch. The parties were married on the 11th April, 1898, at S. George's Cathedral, Cape Town, and plaintiff alleged that his wife deserted him on the 1st November, 1901, and refused to return.

Plaintiff said he was a manufacturers' agent. Shortly after the marriage his wife showed a coolness and indifference towards him. When she left him she said she would never return. In reply to a letter written by his attorneys, she said that she absolutely refused to return to him.

An order was made calling on the defendant to return on or before the 31st December next, failing which a rule *nisi* would be issued calling on her to show cause on the 12th January w' y a decree of divorce should not be made.

BASTIAAN V. BASTIAAN.

Mr. Upington appeared for the plaintiff, and applied for a decree of divorce. Defendant, the wife, was in default. The custody of the children was also prayed for.

Defendant had written a letter in which she stated that she was not well, and was consequently unable to appear. She admitted the charge of adultery, and said that her husband had told her to go and get another husband. She asked the custody of one child.

Daniel Petrus Bastiaan, the plaintiff, an off-coloured man, said he was married to the defendant at the Paarl on the 20th April, 1886. They afterwards went to the Transvaal and the Orange Free State.

Evidence was called to show that the defendant had lived for the last five years with a man named Africa Arendse, by whom it was alleged that she had had three children.

A decree of divorce was granted, as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon
Mr. Justice MAASDORP.]

ADMISSIONS. { 1901.
Nov. 28th.

On the motion of Mr. Solomon, Clifford Meyer van Coller was admitted as an attorney and notary, the oaths to be taken before the Resident Magistrate of Cathcart.

Mr. Alexander moved for the admission of Frederick van de Sandt Centlivres as an attorney and notary.

Granted, applicant taking the usual oaths.

Mr. Benjamin applied for the admission as an attorney of Wm. Erskine Gill.

Granted, the oaths to be taken before the Resident Magistrate of Port Elizabeth.

PROVISIONAL ROLL.

ABT V. HEINTJES.

Mr. Solomon applied for provisional sentence for £149 5s. 3d. on a promissory note for interest on a sum of £836, and for provisional sentence on another promissory note for £45.

Granted.

PARKER V. TWINE, JUNIOR.

Mr. Russell moved for provisional sentence on a judgment of the Resident Magistrate of Wynberg for £24 16s. A sum of £21 had been paid on account. Counsel asked that certain property should be declared executable.

Granted.

NOCHAMSON V. GUEST.

Mr. Percy Jones applied for an order for the final adjudication of the defendant's estate. Counsel said that no copy of the summons had been fixed on the door of the Supreme Court, but he had an affidavit which showed that the matter had been brought directly to the notice of the defendant.

Buchanan, A.C.J., said that whether or not the old rule should be abolished as being now obsolete was another question, but it must be complied with as long as it existed. As, however, the matter had in this case been brought to the notice of the defendant, the Court would overlook the omission, and grant the order as prayed.

DREYER AND CO. V. BURSLEM { 1901.
Nov. 28th.

Costs—Jurisdiction—Section 35 of Act 20, 1856.

Where plaintiff sued defendant in the Supreme Court for provisional sentence on a promissory note for £20, and the said parties resided within the jurisdiction of different R.M. Courts,

Held, following A. v. B. (Buch. 1868—240), that by section 35 of Act 20 of 1856 the Court was bound to give costs on the Supreme Court scale.

This was an application for provisional sentence on a promissory note for £20, bearing date 18th September, 1901, made and signed by defendant in favour of B. T. Bladwell or order, and endorsed in blank by the said Bladwell; the said note had been presented and dishonoured.

Defendant's affidavit stated that on September 17, 1901, he had bought a horse from White and Bladwell, of Newlands, for £37 10s., and that of that amount he had paid £17 10s., and had soon after signed the note now sued on for £20. That on September 17 aforesaid he delivered a horse belonging to him to the said White and Bladwell for the purpose of its being turned out to graze on their farm. They were to receive 10s. a month for grazing the horse, but it was not to be worked. On September 27 defendant delivered another horse to White and Bladwell on the same conditions. On October 22 he discovered that his horses had been used, ill-treated, neglected, injured, and damaged by the said White and Bladwell. He took his horses away on October 22, and his attorneys wrote to White and Bladwell, claiming £20 damages for injury to his horses. He now claimed the right to set off this sum as against the £20 they claimed from defendant, together with other £20 for damages on the same grounds. That immediately after service of summons his attorney had tendered to plaintiff's attorney the amount of the said promissory note, with interest and Magistrate's Court costs to date, but that the tender was refused. That deponent did not know where plaintiff resided, but that he carried on business as a co-partner with one J. L. Irvine, at 4, Jute's Buildings, in Cape Town.

Plaintiff's affidavit stated that defendant had said he would not pay the amount of the note in question until he should have received payment of certain damages alleged to have been sustained by him through the neglect or ill-treatment of one White. That subsequently on the same day plaintiff's attorney told plaintiff that if defendant disputed the matter in the Resident Magistrate's Court, he (plaintiff) would not get judgment till about Christmas time, but that he had a right to issue summons in the Supreme Court, which was accordingly done. Plaintiff denied that he carried on business with J. L. Irvine or any other person; and said that he had become the legal holder of the note about six weeks before it became due, in good faith and for value.

Mr. Gardiner: Plaintiff is justified in coming to the Supreme Court. See section 13 of Act 20, 1856.

[Buchanan, A.C.J.: Could not the defendant have been served in Cape Town?]

No, *Scott v. Clark and Co.* (13 S.C.R., 15). There Clark was carrying on business as Clark and Co., and here Dreyer sues as Dreyer and Co. The case of *The Trustees of Finningly and Co. v. Breda, Halket and Co.* (3 Juta, 401) is also in point.

[Buchanan, A.C.J.: No doubt defendant could have been sued in the Magistrate's Court in Cape Town.]

As to that, see *A. v. B.* (Buch., 1868, 240) and *Sluiter and Another v. Medcalf* (1 Sheil, 146). We are entitled, at all events technically, to costs on the Supreme Court scale.

Mr. Currey (for defendant): This case is not on all fours with *Scott v. Clark and Co.* There one person called himself Clark and Co.; here two persons are carrying on business as Dreyer and Co. This is shown by their letter of November 18.

[The letter read: "We beg to remind you, etc. . . . and was signed Dreyer and Co.]"

This is a *bona fide* partnership between Dreyer and Irving.

[Buchanan, A.C.J.: The summons does not show that there is a partner.]

[Mr. Currey put in the original letter of November 18, above referred to.]

[Mr. Gardiner proposed to produce further affidavits to disprove a partnership.]

Beedle v. Bowley (12 S.C.R., 402) and its interpretation of section 8 of Act 20, 1856, is quite applicable to this case. "Residence," strictly speaking, can apply only to an individual, but if it be shown that the

holders of a bill are a firm, we must look to their place of business. I ask for the costs of this application, which ought never to have been brought into this Court.

Buchanan, A.C.J.: By the 35th section of Act 20 of 1856, the plaintiff was entitled to take advantage of his residence being out of Cape Town. The existence of the present provisions in the Statute authorised what was in many cases an abuse of the process of the Court. The Act put the discretion out of the Court's hand, and the Court is bound to give judgment as prayed, with costs.

[Plaintiff's Attorney, Mr. J. T. E. Bernard; Defendant's Attorney, Mr. J. J. Michau.]

FINCHAM V. STYLES.

Mr. Solomon applied for provisional sentence on a promissory note for £71 10s.

Granted.

BELL AND ANOTHER V. KRUGER.

Mr. De Waal moved for provisional sentence for £10 10s., being interest on a mortgage bond; also for £7 10s., being interest on another mortgage bond, and costs.

Granted.

ILLIQUID ROLL.

MENDELSON V. SINDLER.

Mr. Alexander moved for judgment, under Rule 329d, for £38 3s. 8d., for goods sold and delivered, together with interest and costs.

Granted.

REHABILITATIONS. } 1901. { Nov. 28th.

Mr. De Villiers moved for the rehabilitation of the insolvent estate of Jan Hendrik van der Walt. The estate was compulsorily sequestrated on January 15, 1896. There were certain passages in the trustee's report unfavourable to the insolvent, the trustee alleging that there appeared to have been collusion between the insolvent and his son to keep possession of certain live-stock, but no further action had been taken. In addition, the trustee had been given notice of the present application, and had consented to the rehabilitation.

The Court granted an order as prayed.

Mr. Buchanan moved for the rehabilitation

of the insolvent estate of Wilberforce Forbes, whose estate was sequestrated in 1886. There was nothing unfavourable in the trustee's report.

The Court granted an order as prayed.

GENERAL MOTIONS.

Ex parte ROOS.

Sir Henry Juta, K.C., said this petition was in connection with the special case of Stephan v. the Estate of Stephan set down for Saturday, the petitioner saying that he had been advised that a *curator ad litem* should be appointed to look after the interest of the minor children interested. The parties to the suit had consented to an order for the appointment of such a *curator ad litem* being obtained.

An order was granted as prayed, Sir Henry Juta being appointed *curator ad litem*.

Ex parte OLIVIER.

Mr. P. T. Jones moved for an order for the discharge of the petitioner from curatorship. Petitioner had been put under curatorship in July last year, on certificates that he was of unsound mind. He now stated that he had entirely recovered, and was of sound mind again. Certificates to that effect were annexed to the petition. The curator also consented to the petitioner's prayer being granted.

Order granted as prayed.

Ex parte GREENBERG.

This was an application for leave to mortgage certain property standing in the name of the applicant without the assistance of her husband. It appeared that the parties were married in the United States, which they left some seven years ago, and came to this colony. Petitioner carried on business as a hawker in her own name, and thereafter, when she and her husband had separated, the husband put a notice in the newspapers saying that he would not be responsible for the debts she might contract. Afterwards petitioner carried on a business in Wynberg successfully, but on her own behalf, although her husband had returned to her, and she lent him money in connection with his business. Some time afterwards the husband showed signs of mental derangement, and was declared insane, Mr. E. Ball being appointed the curator of his property, and Dr. Dodds the cura-

tor of his person. As his affairs were found to be involved, his estate was sequestrated, and Mr. E. Ball appointed trustee of the insolvent estate. The trustee was to sell some landed property in the estate by public auction, and the petitioner being desirous of purchasing the same, approached the trustee, and obtained his consent to her doing so. She purchased the land, and raised a mortgage on the same, but the Registrar of Deeds refused to register the mortgage without her husband's assistance, except by order of the Court. She now prayed that she might be allowed, without the assistance of her husband, to have the mortgage for £700 registered. Notice had been given to Mr. Ball, as trustee in her husband's insolvent estate.

Mr. Gardiner moved.

In reply to the Court, counsel said that notice had not been served upon Dr. Dodds as curator of the husband's person.

Buchanan, A.C.J., said that notice of the petition must be given to Dr. Dodds. They might have an affidavit from Dr. Dodds as to the state of the man, and if Dr. Dodds said that the man was able to look after his own business, then they could serve notice on the man himself.

The case was ordered to stand over, so that notice might be given as suggested by the Acting Chief Justice.

Ex parte FRIEND.

Mr. Buchanan moved in the matter of the petition of Harry Friend, as father and natural guardian of his minor son, for leave to sell certain property belonging to the said minor. The price originally paid for the property was £104, and the price now obtainable was £700. Affidavits from a sworn appraiser were read showing that that was a fair valuation for the ground. The Master reported that if leave were given to sell the property it should be directed that the money should, as usual, be paid into the Guardians' Fund.

An order was granted in terms of the Master's report.

DA COSTA V. DA COSTA.

Mr. Searle, K.C., on behalf of the plaintiff in this action, moved for an extension of the return day of citation, and also for substituted service on the ground that personal service could not be effected as the respondent objected to service upon her. From the affidavits read, it appeared that the defendant is now residing in London, and every

effort was made to effect service at the house where she resided in Russell Terrace, Enfield, but without success. Three different persons had endeavoured to enter the house to effect service, but without success. They had watched the house to catch defendant leaving it, but she never came out. They stated that the only persons seen to be admitted gained admission by whistling.

The Court granted an order as prayed, extending the return day of the citation to February 1, personal service to be effected if possible, failing which service to be effected by the publication in the "Government Gazette" and in the "Daily Telegraph," London; and also directed that a registered letter should be sent to the defendant's last known place of residence.

Ex parte LINDENBERG.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to register a mortgage bond on property belonging to the petitioner without the assistance of petitioner's husband. The husband and wife had separated, a notarial deed to that effect having been executed, and there was no probability of their living together again.

In reply to the Court, counsel said that notice of the petition had not been served upon the husband. Counsel, however, asked that a rule *nisi* be granted calling upon the husband to show cause why the mortgage bond should not be registered without his assistance.

Buchanan, A.C.J., said that the best way was to serve notice of the petition upon the husband, and the case was accordingly allowed to stand over to permit of such notice being given.

NEL V. OLIVER.

Mr. Schreiner, K.C., applied for the appointment of a *curator ad litem* to look after the interests of certain minors interested in the above case.

The Court granted an order as prayed, and appointed Mr. Buchanan *curator ad litem*.

VAN DER SPUY V. KEES.

Mr. Searle, K.C., moved for a commission *de bene esse*, to take the evidence of a witness in the above matter. The witness in question was attached to the Western Province Mounted Rifles, and was at present stationed at Malmesbury, but might be ordered to proceed elsewhere.

The Court granted the order, and appointed Mr. Buchanan commissioner in case the evidence was taken in Cape Town, with the alternative order that the Resident Magistrate of Malmesbury be the commissioner if the evidence had to be taken there.

TOWN COUNCIL OF CAPE TOWN V. SASS. } 1901.
Nov. 26th.

Mr. Schreiner, K.C., moved for an order restraining the respondents from occupying certain premises until a certificate of occupation had been granted. It appeared from the affidavit of Mr. W. O. Wynne-Roberts, City Engineer, that the houses in question were occupied, although the certificate required by the building regulations, giving leave to occupy, had not been granted. It appeared that this certificate was withheld owing to the building not being completed according to the plans approved by the Council, particularly in regard to carrying the party walls a certain distance above the roof, so as to minimise the danger of fire spreading, in case of an outbreak of fire in any of the houses.

There was no appearance for the respondent, and the Court granted an interdict as prayed.

TOWN COUNCIL OF CAPE TOWN V. TABLE BAY HARBOUR BOARD AND ANOTHER. } 1901.
Nov. 28th.

Mr. Schreiner, K.C., mentioned the above matter, in which he said he appeared for the respondents. He had now to ask that the matter, which is an application for an interdict restraining the respondents from trespassing on the Dock-road, should stand over until Thursday next. There was, he said, some prospect of this dispute being settled in the meanwhile. The application dealt with the question of the traffic from the Docks to the railway.

Mr. Searle, K.C., who appeared for the applicants, said the matter was one of very great importance, and, if not settled, it would be necessary that there should be a decision of the Court on it. It was not a matter that really could stand over for any great time, and it was necessary that the legal rights of the parties should be settled as soon as possible, unless they came to an amicable settlement.

The Court agreed to postpone the application till Thursday next.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice) and the Hon.
Mr. Justice MAASDORP.]

WALD V. WALD. { 1901.
Nov. 29th.

This was an action for divorce instituted by Morris Wald against his wife Fanny Wald (born Nagelberg), on the ground of adultery.

Mr. Wilkinson appeared for the plaintiff; the defendant was in default.

Morris Wald, the plaintiff, deposed that he was married to the defendant in New York in 1894. His wife had since torn up the certificate of the marriage. After they had lived together for two years his wife left him, going away with a man named Ike Siegel. Witness only discovered last year that they were in Cape Town, and followed them to that place, arriving in June last. He found defendant and Siegel living at 25, Keerom-street as man and wife. He asked her to come back. She refused, saying she had got a better man.

Morris Unloft deposed to witnessing the marriage in New York, also stating that defendant and Siegel were living in Cape Town as Mr. and Mrs. Siegel.

Charles Purlstein corroborated the latter statement.

The Court granted a decree of divorce.

LINWOOD V. LINWOOD.

This was an action instituted by Jane Bell Linwood (born Welsh) against her husband, Ernest James Linwood, for restitution of conjugal rights, and failing that, for divorce.

Mr. Wilkinson for plaintiff; defendant in default.

Francis Henry le Sueur, clerk in the Colonial Office in charge of the marriage register, produced the certificate of marriage between the parties. The ceremony took place at St. James's Church, Sea Point, on July 22, 1880.

Jane Bell Linwood, the plaintiff, deposed that for some time after the marriage her husband failed to support her. On one or two occasions she had to sleep in the open without a home at all. This was owing to the husband's drunken habits, and his consequently losing his situation from time to time. Three years after the marriage she went to live with her father with defendant's consent. That was in April, 1883. In June

of the same year she went to England with defendant's consent to live with his people. He corresponded with her until 1884, and after that she had no communication with him either by letter or personally. He had not supported her in any way. There was one child of the marriage, a daughter, aged 20. She was married. She was willing to return to defendant if he could promise a home for her.

The Court granted an order on defendant to restore plaintiff to conjugal rights before December 31, and failing that, to show cause on January 13 why a decree of divorce should not be granted.

GOODALL V. GOODALL.

This was an action for divorce instituted by Martin Charles Goodall against his wife Lily Goodall (born Cooke) on the ground of her alleged adultery.

Mr. Schreiner, K.C., appeared for the applicant; the respondent was in default.

The Court granted a decree as prayed.

BRUMM V. TAPPE AND CO. { 1901.
Nov. 29th.

Employer and employee—Justifiable dismissal—Martial Law.

Plaintiff, a salesman in the employ of defendants, had used threatening language respecting a certain sergeant of the Town Guard, who was a customer of defendants. He was thereupon ordered by the Military authorities to leave the district forthwith. His employers paid him his wages up to date, and dismissed him. He now sued for salary in lieu of notice and for damages for wrongful dismissal.

Held, that as under the circumstances, plaintiff's conduct was calculated to do serious injury to defendants' business, and as plaintiff had by his own act rendered himself unable to carry out his contract of service, his dismissal was justifiable.

This was an action to recover salary and damages on the ground of wrongful dismissal. The plaintiff was one Martin

Brumm, who had been employed by the defendants Tappe and Co. as a salesman in their store at Darling. On September 9, 1901, defendants dismissed plaintiff from their employ, paying him for his services up to that date. He now sued to recover £7, salary due to the end of September, and £10 in lieu of the notice as from October 1, 1901, and £50, as and for wrongful dismissal. The defendants admitted in their plea that on September 9, 1901, they did dismiss plaintiff from their employ without his consent, but denied that they did so wrongfully and unlawfully. They alleged that plaintiff had so misconducted himself as to prejudice their business, in that on or about September 9, 1901, and previous thereto, he used violent and threatening language to one Geeringh, a customer of defendants, and a sergeant in the Town Guard, and that in or about the month of August, 1901, he contravened the martial law regulations in force in the town of Darling by burning lights during prohibited hours. Defendants further pleaded that the said misconduct of plaintiff tended to endanger their business, and to bring it into disrepute with the military authorities, who were administering the town of Darling under martial law, and who were customers of the defendants, and tended to deprive defendants of the custom of Geeringh, the military authorities, and others, and that by reason of the said misconduct they were justified in dismissing the plaintiff. They denied that the plaintiff had suffered damages, and prayed that his claim might be dismissed with costs.

Plaintiff's replication was general.

Mr. B. Upington for the plaintiff.

Mr. Gardiner for the defendants.

The Court held that it was for Mr. Gardiner to justify the dismissal.

Mr. Gardiner called

George Tappe, the defendant, who deposed that he carried on a general dealer's business in Darling. The plaintiff was a clerk in his employ. On witness returning to Darling from Cape Town, in August, he found that plaintiff had got into trouble with the military for burning his light and walking about the streets after hours. He remonstrated with him. On September 9 witness had all ready to again visit Cape Town. In saying good-bye to Brumm and the bookkeeper he expressed a hope that they would behave themselves better while he was away on this occasion than they did before. Brumm assumed a threatening attitude, and expressed his in-

tention to "have it out" with the sergeant of the Town Guard, a certain Geeringh, whom he considered responsible for his previous trouble with the military. Witness thereupon discharged plaintiff and the bookkeeper and another from his service, and had to delay his Cape Town trip for five days. Witness dismissed his bookkeeper, another man, and the plaintiff on the spot. Witness told plaintiff he could not leave the store in charge of the plaintiff. Witness told the bookkeeper to keep an eye on him. Plaintiff was convicted on witness's instance, and ordered to leave Darling. Witness had no complaint to make against plaintiff as regarded his business capacity. He was a good enough salesman. Witness acted as he had because plaintiff had said he would take it out of Geeringh, and because of previous things. Geeringh was a sergeant. About a week before this happened Geeringh said he would not deal with witness unless he took steps to have those young men behave properly. He complained then that they were threatening to thrash him.

Peter Rabie said he was in the service of defendant. At the end of August Brumm had to go before the Commandant. Brumm told witness it was true that he had threatened to give Geeringh a beating.

Sidney Geeringh, postmaster at Darling, and sergeant in the Town Guard, said he reported Brumm for burning lights after hours and for being out in the streets at night. Brumm was summoned before the Commandant. Witness heard of a certain statement, and he told defendant, with whom he had been dealing for about two years, that unless he took immediate steps about the men he could not continue his custom. Witness would never have gone to the store unless Mr. Tappe had been there.

Gustav Muller gave evidence as to the dismissal of Brumm. Tappe was going to town, and he said to Brumm that he hoped nothing would occur again, as had occurred previously. Brumm got angry, and said he would thrash Geeringh. He was dismissed, and Tappe did not go to Cape Town.

Mr. Gardiner closed his case.

Mr. Upington called

Martin Brumm, the plaintiff, who said he was employed by defendant as a salesman. When Geeringh came to him in the hotel and told him to put out the light, he spoke in a rude manner. That was the first day of the regulations. A lady was with witness. Witness put out the light and proceeded home. Geeringh and his patrol were

drawn up in front of his house, and Geeringh spoke in a rude manner. Witness did not say anything. Witness had used hot language, but he had never seriously meditated committing an assault on Geeringh. Witness was brought up before the Commandant for burning a light after hours, and was discharged with a caution. Witness's was the first case. Subsequently he was charged with having used threatening language respecting Geeringh to Tappe. He had since served Geeringh in the shop.

Cross-examined by Mr. Gardiner: Witness intended giving Geeringh a hiding when he had the opportunity. If an opportunity had arisen when Tappe was away he would have thrashed Geeringh.

Re-examined by Mr. Upington: Witness meant that he would thrash Geeringh if anything of this sort occurred again, and not that he would wait for Geeringh in some dark lane and then thrash him.

This concluded the evidence.

In argument, Mr. Upington urged that the plaintiff was not guilty of such misconduct in relation to the business as would justify the defendant's action in dismissing him at a moment's notice. It could not be said, he contended, that the plaintiff's expression would prejudice the business.

Buchanan, A.C.J.: The plaintiff was engaged on the 15th of June last by the defendants as a salesman in their business at Darling, at a salary of £5 per month, with board and lodging. Afterwards, on the 1st August, it was agreed between the parties that the remuneration should be paid on the last day of each month. On the 9th of September the defendants dismissed the plaintiff from their employment, and paid him his wages up to date. There are several grounds upon which an employer of a servant is justified in dismissing his servant without notice and paying him up to date, but the ground nearest and most applicable to this case is that where a servant is guilty of conduct calculated seriously to injure his master's business. It is a question of fact whether the plaintiff conducted himself in such a manner as would be injurious to the interests of his employers. Darling had been placed under martial law, and a part of the Town Guard, under one Sergeant Geeringh, had, in carrying out a regulation which requires all lights to be put out at a certain time, required certain lights to be put out, which had given offence to the plaintiff in this case. Plaintiff committed a breach of the regulation, and was summoned to appear

before the Commandant, and through the exertions of his employer (the defendant), he was let off with a reprimand. Tappe was in Cape Town at the time this offence occurred, and having subsequently to again go to Cape Town, he told the plaintiff that he hoped there would be no further breach of military regulations, and that a disturbance would not occur again during his absence. Thereupon the plaintiff, knowing the circumstances, knowing that Darling was under martial law, and that it was necessary to keep peaceable, threatened to punish Sergeant Geeringh when he got the chance. Instead of promising to behave peaceably in the district while his employer was away, he again uttered threats, which he admitted he intended to carry out, and which were so serious as to make his employer give up the idea of going away and remain in the place. The military authorities again prosecuted the plaintiff, and he was convicted, and ordered to forthwith leave the district. The statement that he was ordered to leave is not contradicted in any way by the plaintiff. Considering the circumstances of the country, considering that martial law prevailed, considering that an offence against the military regulations had been committed, I am of opinion, sitting as a juror, that the plaintiff's conduct was calculated to do serious injury to his master's business. It was calculated to injure the business, by making it liable to be put under restraint by the military authorities, and it was also calculated to injure the business because the person threatened was one of the customers of the business, who, having heard of these threats, told the defendant that unless he dismissed this man he would no longer deal with him. I think the circumstances such as to justify an employer in dismissing a person behaving in that way in connection with the business. Plaintiff was unable to carry on his contract through his own act, and even if he had not been dismissed he would now have had to leave his employment. Under these circumstances, the dismissal having taken place for good cause, I think judgment ought to be given for defendants, with costs.

Maasdorp, J., concurred.

On the application of Mr. Gardiner, defendant was allowed his witness's expenses.

[Plaintiff's Attorneys, Messrs. Faure and Zietsman; Defendants' Attorney, Mr. J. F. E. Bernard.]

BALLANCE AND CO. V. GLASS. { 1901.
Nov. 29th.

This was an action to recover remuneration for work and labour done. Plaintiff: were advertising agents and contractors, carrying on business in Durban, and the defendant carried on business under the style of the South African Advertising Company at Cape Town. The declaration set forth that in March, 1898, plaintiffs undertook, with defendant, to exhibit in Natal certain advertising plates at a remuneration of 3s. 1d. per annum for each plate for a year certain; the contract being terminable on three months' notice being given after the first year. The plates had been posted, and plaintiff claimed payment. Defendant alleged that the contract was only for one year. He had paid certain sums on account, and tendered £16 7s. 3d., which he said was the balance for the amount at the rate agreed upon for the first year. Plaintiffs alleged that the contract was not for a year, but for an indefinite period, terminable at three months' notice. They claimed £64 13s. 1d., which they said was still owing.

Mr. C. W. de Villiers for plaintiff, and Mr. Benjamin for defendant.

John D. Ballance said he was one of the partners in the firm of J. D. Ballance and Co. Witness never saw the defendant. He received a letter from him on March 28, 1898. Defendant therein stated that he was sending 200 plates for Maconochie Bros., 150 to be exhibited in Durban, and 50 in Natal. The letter set forth the terms stated in the declaration, and said that the contract was terminable after the first 12 months on three clear months' notice being given in writing on either side. This was accepted. When the plates arrived witness cleared them, and put up in Durban 151 plates, and 25 of the rest were put up later in Maritzburg. They were large enamelled plates advertising Maconochie's goods. Witness subsequently sent a list of stations and the number of plates fixed at each station. The payments were to be made quarterly. The first account was rendered on the 30th July, and no reply was received so far as witness remembered. They got no remittance. Mr. Smith, witness's partner, collected £9 16s. in September, 1898. On the 21st December the second quarter's account was sent. Letters were sent thereafter until the 12th of May, but no replies were received. On the 12th May another quarter's account was sent. In April, 1900, witness's

firm wrote a letter saying they were informed that if defendant gave them an order on Maconochie Bros. for the two years the latter would settle. They offered defendant a discount of 20 per cent. if they sent an order on Maconochies for payment. Up to this period witness had not received a single letter from defendant. Witness advised defendant that he would apply to Maconochie. Witness applied to Maconochie, but got no remittance. In the letter of the 24th April witness informed defendant that Maconochies had written to them stating that if he (defendant) would send an order on Maconochies to pay, they (Maconochies) would recognise such order. Maconochies would not pay without Glass's order. Witness had not had any order to cease exhibiting the plates.

Cross-examined: Mr. Smith, witness's partner, saw defendant when on his way through Cape Town to England in connection with this transaction. Mr. Smith was not here for this case. He could not get away. Witness did not know what occurred between Smith and Glass. Witness believed they received a letter from defendant on the 9th March, 1898, asking for terms for fixing two hundred plates in Durban and Maritzburg—100 in each town—for a twelve months' contract. Witness thought the arrangement was made with Smith subsequent to that. In the preliminary negotiations witness stated his terms as 5s. per plate per annum. On the 23rd September, 1898, Mr. Smith returned from England through Cape Town, and effected a settlement with defendant for the first quarter—May to July. Witness did not know that defendant was claiming from witness in connection with Maypole advertisements. A man named Clarabut represented witness in Cape Town, and interviewed defendant. Witness did not know what occurred between Clarabut and Glass. In August, 1898, witness claimed payment up to April. In November they sent the account up to April. Nothing was said in the letter about any period subsequent to the first twelve months. In December they sent a demand for £16 7s. 3d., but no other period than the first year was mentioned. No demand was made against defendant for a second year until the summons. Witness understood there was a *per contra* account as against the second year. He wanted to get the first year settled, and would then take his chance with the second year's amount, in respect to which he understood there was a *per contra* account.

Mr. De Villiers put in certain correspondence and closed his case.

Mr. Benjamin called

Ernest George Glass, the defendant, who said he had a contract with Maconochie Brothers in respect to the exhibition of certain plates in South Africa. After the letter of the 9th March, 1898, and the reply thereto in regard to a twelve months' contract, witness saw Smith in Cape Town. Witness's contract with Ballance was for twelve months. This was arranged with Mr. Smith. The reference in the letter to a contract terminable after the first twelve months by three months' notice was a quotation from Maconochie's letter. He showed Maconochie's letter to Smith. His contract with Maconochies for Durban did not continue after the twelve months.

Buchanan, A.C.J., said defendant could not set up a verbal agreement in place of the written contract contained in the letter.]

Mr. Benjamin said their contention was that the matter was arranged with Smith in Cape Town.

Witness (continuing) said the letter was written after the arrangement with Mr. Smith. Before the issue of summons, there was never any demand made in writing for payment. Witness had withdrawn a counter-claim in connection with the advertising of Maypole Soap, for which Smith gave witness to understand he would be responsible, because he had now made a claim upon the Maypole people direct.

By the Court: Witness had not received three months' notice from Maconochie, and he had not given three months' notice to Ballance.

Cross-examined: His contract with Maconochie still ran so far as concerned Durban, Maritzburg, Johannesburg, and Pretoria. That was the original 1898 contract.

By the Court: Witness went there and tried to establish a branch, but it was broken up.

After hearing Mr. Benjamin in argument, the Court gave judgment for the plaintiffs for the amount claimed, with costs.

Buchanan, A.C.J.: Defendant entered into contracts with Maconochies, of England, to post a certain advertisement, to be placed in different towns in South Africa. One of the plaintiffs' firm was down in Cape Town, and negotiated with defendant personally with regard to a contract. This contract was put in writing, and sent to the headquarters of the plaintiffs in Durban, under letter

dated the 29th March, 1898. Mr. Glass, the defendant, in the box, states that this letter correctly represents the contract. In this letter he says: "The contract is terminable after the first twelve months by either party giving a clear three months' notice in writing of their intention so to do. We have arranged with Mr. Smith that you accept this." The plaintiffs replied, accepting this contract. Here, therefore, is a distinct contract entered into in writing. Mr. Glass says that the contract with Maconochies is correctly represented here, and the correspondence with Maconochies shows that they are quite willing to pay for services rendered. After twelve months these plates were left up, and they are still up, and Maconochies had the benefit. Maconochie's never gave three months' notice, nor had Glass given three months' notice. Mr. Glass now goes into the box and says, "I intended this contract to be only for twelve months." In his letter, the defendant stated terms, and the plaintiff company, in their letter in reply, accepted those terms, and defendant cannot set up a verbal undertaking between himself and Mr. Smith in the face of his own letter. Glass never gave three months' notice, and the plaintiffs had continued the advertisements. The advertisements are still up, and Maconochies are still getting the benefit from these advertisements. On the face of this contract, and in the absence of any notice terminating it, Glass is responsible for payment to the plaintiffs. Judgment must be given for them as prayed, with costs.

On the application of Mr. De Villiers, plaintiff was allowed his expenses as a witness.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon.
Mr. Justice MAASDORP.]

ADMISSION.

{ 1901.
Nov. 30th.

Mr. Buchanan applied for the admission of Frank Becker Wessels as an attorney and notary.

The application was granted.

REHABILITATION.

Mr. De Waal applied for the rehabilitation of Michael Cornelis van Niekerk. The application was granted.

GENERAL MOTIONS.

Ex parte DEMPERS, N.O.

This was an application for a rule *nisi*, granted under the Derelict Lands Act, to be made absolute.

The petitioner was Herman Johan Dempers of Cape Town, in his capacity of chairman of the Roodebloem Estates, Limited.

The matter was before the Court on the 29th October last, when it appeared from the affidavit of the said petitioner, that, after the petitioner's company had purchased the place "Roodebloem," they discovered that their title did not cover certain six lots thereof, which were still registered in the name of the late A. C. Deney, under transfer dated March 7, 1828, who had been long deceased and whose estate was unrepresented. The vendor to the said company, and his predecessors in title had, however, held exclusive occupation of the said ground and paid taxes thereon for a period of over 30 years. The estate of the said A. C. Deney, being unrepresented, application was made to the Court under the Titles and Derelict Lands Act, on the 29th of October aforesaid. The Court then granted a rule *nisi*, returnable on this day in the usual terms.

On the motion of Mr. De Waal the rule was now made absolute.

Ex parte SMIT AND ANOTHER. } 1901. Nov. 30th.

This was an application for an order authorising the Messenger of Court, in terms of section 13 of Act 20 of 1856, to attach certain money now in the hands of the High Sheriff.

The applicants were Catherine Smit (widow), of Dordrecht, and Henry J. Hofmeyr, of Burghersdorp, in his capacity as attorney of Louw A. M. Kruger, of Burghersdorp.

Their petition showed that on April 23, 1901, the first-named petitioner had obtained judgment in the R.M. Court for the district of Albert against one Coetzee, of Burghersdorp, for £20 and costs. That a writ of execution was issued out of the said Court for the £20 aforesaid, together with £1 18s. 3d., taxed costs. The movable property of

the said Coetzee, on being publicly sold, realised only £13 3s. 9d., which sum was paid over to the said petitioner. The said Coetzee is, therefore, still indebted to the first petitioner in the sum of £8 14s. 6d. He is also indebted to L. A. M. Kruger in the sum of £10 12s., capital; £1 3s. 9d., interest; and £1 5s. 3d., costs of suit under a judgment of the said R.M. Court for the district of Albert. On December 11, 1900, the said Kruger sued out a writ of execution to which a return of *nulla bona* was made. On May 10, 1900, a certain erf, the property of the said Coetzee, was sold by the Deputy Sheriff in execution of a judgment of the Supreme Court bearing date May 10, 1900, in the suit of *Paul v. Coetzee*. £33 8s. 11d., part of the proceeds of this sale, are still in the hands of the High Sheriff. Petitioners asked for an order authorising the attachment of this money, or of so much thereof as might be necessary to satisfy the exigency of the writs they respectively had issued against the said Coetzee.

A rule *nisi* had been granted on November 1, and now, on the motion of Mr. S. Solomon, the rule was made absolute.

ROGERS V. ROGERS.

Mr. Upington applied for an order for a removal of trial to the Eastern Districts Court.

The Court ordered the case to be removed to the next ensuing Circuit Court at East London.

Ex parte VAN DER BYL.

This was an application for an order relieving petitioner from his trust under a certain ante-nuptial contract.

The petitioner was one Adriaan van der Byl, of Cape Town, who, in conjunction with one John Hofmeyr, had been appointed a trustee of certain funds settled on one Johanna Myburgh, under an ante-nuptial contract entered into between petitioner's brother, Pieter Gerhard van der Byl, and the said J. Myburgh. John Hofmeyr died in or about 1892. P. G. van der Byl died in or about March, 1891. Johanna van der Byl is still living, and resides in England. The funds under petitioner's administration are, however, invested in South Africa, and he now asked to be relieved from this said trust as he was desirous of leaving this country for some considerable time. The aforesaid J. van der Byl had consented to his so doing, and desired that the Honour-

able Mr. Justice Hopley and Vincent A. van der Byl should be appointed trustees in his room. They have consented to accept the said trust.

On the motion of Mr. C. W. de Villiers, the Court granted the order as prayed.

Ex parte CLOETE.

This was an application for leave to mortgage certain properties.

The applicant was Annie Jane S. Cloete, whose petition stated that by the last will and testament of her late mother she had been appointed usufructuary of certain specified properties and buildings situate at Plumstead, in the Cape Division. That the buildings were in a very bad state, one having been condemned by the Municipal Council of Wynberg as unfit for human habitation, and that she was, therefore, anxious to renovate these old buildings. Further, the petitioner wished to erect buildings on a portion of the land of which she was the usufructuary, and which was lying useless and unproductive. She, therefore, asked for leave to raise a sum not exceeding £2,500 on the property, out of which sum she proposed to pay off the existing bonds of £600 and £125 respectively on the said property.

The Master's report was favourable, and he considered that the terms of the will showed that it was the wish of the testatrix that she (petitioner) should derive the greatest possible benefit from the property willed to her.

On the motion of Mr. Russell, the Court granted an order as prayed.

MILLER V. MILLER.

Mr. Buchanan applied on behalf of Mrs. Laura Frances Miller for leave to sue her husband, George Frederick Miller, for restitution of conjugal rights by edictal citation. The parties to the suit, it appeared, were married in Birmingham in September, 1883, and subsequently came to Cape Town. The respondent went to King William's Town to take up a situation, and left his wife in Cape Town, and from time to time sent her small sums of money. Subsequently he left for England, and petitioner had been unable to ascertain his whereabouts.

The Court granted leave to sue by edictal citation, returnable on February 15; personal service to be effected, if possible, failing which, the notice to be published in the "Government Gazette," the "Cape Mercury," and the "Birmingham Post."

Ex parte SUTTNER.

This was an application to amend a certain deed of transfer.

The applicant (one Isidore Suttner) stated in his petition that on January 11, 1898, he had purchased certain immovable property at Graaff-Reinet, and that in the deed of transfer he had been wrongly described as Israel Suttner. As the Registrar of Deeds refused to rectify this error without an order of Court, petitioner now asked for an order authorising the Registrar to rectify the error in the deed of transfer aforesaid, and to make such other necessary rectification of entries in the Deeds Registry Office as might be required.

On the motion of Mr. Gardiner, the Court granted a rule *nisi*, calling upon all persons interested to show cause why the prayer of the petitioner should not be granted to the amendment of the deed of transfer and of all mortgage bonds registered against him; publication of the notice to be made in the "Government Gazette" and the "Cape Times."

TOWN COUNCIL V. EXECUTORS ESTATE HUDSON.

Mr. Schreiner, K.C., applied on behalf of the petitioners for an order restraining the respondent from occupying certain premises in Waterkant-street which had been condemned as unfit for habitation.

Mr. Jones appeared on behalf of the respondents to consent.

The Court granted the application, with costs.

Re AROOMOOGAN.

This was an application for the amendment of an order of Court granted August 1, 1901.

The petitioners were Haynes, Mathew and Co., who stated that they had purchased from Saba Aroomoogan a certain property known as 124, Sir Lowry-road, and were desirous of obtaining transfer from him. A portion of this property consists of a certain strip of land granted to Aroomoogan under a rule *nisi* of the aforesaid date, under the Derelict Lands Act. The estimate of the extent of this land represented it to be twice its actual size, and this erroneous estimate was incorporated into the rule *nisi* aforesaid. Aroomoogan, who has since gone to Natal (from whence he is not likely to return), left with his attorneys an affidavit which has been presented to a judge in Chambers, asking for a correction of the extent mentioned in the

rule *nisi*. As, however, petitioners have been credibly informed that such application could not be granted in Chambers they now asked for an order of Court amending the extent as set forth in the rule *nisi* aforesaid.

On the motion of Mr. Benjamin, the Court granted an order as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice) and the Hon.
Mr. Justice MAASDOEP.]

ARMSTRONG V. ARMSTRONG. { 1901.
Dec. 2nd.

This was an action instituted by the wife for an order for restitution of conjugal rights, failing which, for a decree of divorce, with custody of the one child of the marriage.

Mr. Rubie, who appeared for the petitioner, said that the plaintiff was a school-teacher of Wynberg and the defendant a jockey residing at Cape Town. The parties were married in community of property on the 1st September, 1899, by the Resident Magistrate, and there was one child of the marriage. The plaintiff alleged that in the month of January, 1900, the defendant deserted her, and had since refused, and still refused, to return to or receive her.

Francis Henry le Sueur, clerk in the Colonial Office in charge of the marriage register, produced the register of the marriage.

Clara May Armstrong, the plaintiff, was called. She deposed that she was a school-teacher, and lived at Wynberg. Her husband George Armstrong, was a jockey. After the marriage they lived together with their relatives until January, 1900, when her husband left her, saying he was going to seek another situation. He went to Kalk Bay, and never came back to her. She had since seen him occasionally, and had spoken to him. She had asked him to make a home for her. He had promised to do so, but had not kept his promises.

By Buchanan, A.C.J.: Witness could not say what was the cause of the separation. Defendant always said he had not enough money to support her. The child—a girl—was born in February, 1900. Witness had sued her husband for main-

tenance in the Magistrate's Court, and had obtained two orders against him. He had only contributed £2 to her support. He had been to the front, but she believed he was now back; he was living in town.

An order was granted calling on the defendant to return to or to receive the plaintiff on or before the 12th January, failing which a rule would be issued calling on him to show cause on the 1st February why a decree of divorce, with custody of the minor child, should not be granted, with costs.

FORREST AND CO. V. STAGMAN.

Mr. Russell moved for leave to attach the balance, if any, of the proceeds of a certain sale.

Granted.

MABERLY V. WOODSTOCK { 1901.
MUNICIPALITY. { Dec. 2nd.

Municipal Council—Water scheme—
Borrowing powers—Acts 29 of
1897, sections 18 and 45 of 1882,
section 145.

In order to raise money for the purchase of certain land outside the municipal boundary the Municipality of Woodstock had issued certain debentures. It was not denied that this land was purchased with a view to a municipal water scheme for which no plans or estimates had been prepared. No meeting of ratepayers was convened to express their approval or disapproval of the raising of this loan, nor was the consent of the Governor obtained. Applicant, himself a Municipal Councillor, now called upon the said Council to show cause why they should not be restrained from paying interest purporting to fall due on January 1, 1902, on the debentures aforesaid.

Held, that as applicant had made out a prima facie case why the said Council should not have raised the loan in question, and as he was acting as a ratepayer in the public interest a rule nisi must

be granted, to operate as an interdict, restraining the payment of interest on the said debentures.

This was an application on motion calling on the Woodstock Council to show cause why an order should not be granted restraining them from paying to any person or persons the interest purporting to fall due on the 1st January, 1902, upon certain debentures each for the sum of £250, to the total value of £20,000, in connection with the Oliphant's Hoek water scheme, issued by them in August, on the ground that the issue of such debentures was *ultra vires* and illegal.

The affidavit of John Maberly was as follows:

1. That I am a resident, ratepayer, and Councillor of the Woodstock Municipality.

2. That in or about the month of November, 1899, a discussion took place in the Council with reference to what is now known as the Oliphant's Hoek water scheme, under which it was proposed that certain farms situate in the Paarl district should be acquired, and the water arising or flowing thereon be utilised for supplying the Municipality.

3. That thereafter negotiations were carried on with one Cornelis Mostert, presumably the owner or representative of the owners of the farms referred to (known as Oliphant's Hoek and La Roche).

4. That in addition to acquiring the said farms it was considered necessary by the Council that certain rights should be acquired over certain other farms, which were either supposed to possess rights in and to the water on the farms to be acquired, or over which it was supposed to be necessary a pipe track or furrow should run to the Municipality.

5. That on the 21st March, 1900, the Council resolved to buy the farm Oliphant's Hoek for the sum of £5,000, and all and any water rights belonging thereto, including the riparian rights of the owners of the farms below as far as the Berg River to the water rising on Oliphant's Hoek farm, with liberty to lay pipes and keep in repair on farms below Oliphant's Hoek farm for conveyance of water from the said farm for the sum of £20,000.

6. And on the 18th June, 1900, the Mayor reported to the Council that he had bought the adjoining farm La Roche for £1,000.

7. The £20,000 above referred to was not

to be paid in cash, but in Municipal debentures bearing interest at 4 per cent.

8. That although I as Councillor approved of the purchase of the two farms above referred to, I always emphatically opposed and protested against the acquirement of the subsidiary rights referred to as being unnecessary, and the price required for same (£20,000) being exorbitant, and also because I considered the expenditure of such a sum for such a purpose by the Council to be *ultra vires*.

9. That I have since ascertained from the present Municipal Engineer that the subsidiary rights, in so far as a pipe track is concerned, are practically valueless to the Municipality, as a Divisional Council road can be utilised for the purpose of laying pipes from Oliphant's Hoek to the Municipality after the formal consent of the Divisional Council to that effect shall have been obtained.

10. That the debentures referred to above were issued in the form of debentures each for £250, a copy of one of which furnished to me by the Municipal Clerk I annex hereto marked A.

11. That on the 26th August, 1901, Messrs. Moore and Son, the Council's solicitors, were authorised to hand over to Mr. Mostert all the debentures except one, which was retained for a certain purpose, and I understand that the debentures have been so dealt with.

12. That I am unable to say in whose hands the said debentures are at the present time; I presume the same or portion thereof have passed into other hands, as it has now been pointed out to me that on the 25th September, 1901, an advertisement appeared in the "Cape Times" calling for tenders for the said debentures to be addressed to Mr. C. Mostert.

13. That the interest on the said debentures will fall due on the 1st day of January next, payable at the Municipal Office, Woodstock, and will amount to a considerable sum of money.

14. That neither the consent of the Minister nor the majority of ratepayers (under Act 28 of 1897) has been obtained to the above expenditure in connection with the said water scheme, nor any sanction of the Governor under section 70 of the above Act.

15. That in view of section 18, sub-section (a), of the said Act No. 28 of 1897, I have ascertained that the amount of the preceding year's revenue derived from rates by the Municipality was £12,884.

16. That if it be contended that the Coun-

cil acted under Act 45 of 1882, it did not comply with paragraphs 145 and 146 thereof. I have no knowledge of any plans or specifications or estimate of the cost thereof having been prepared or exhibited to the ratepayers, nor was there to my knowledge any notice inserted in the "Government Gazette" or local circulating paper of the fact of any such plans, specifications, estimate, or statement being open for inspection.

[Buchanan, A.C.J.: You approve of part, but don't approve of another part. The part you approve of is *intra vires*; the part you don't approve of is *ultra vires*?

Sir Henry Juta: Yes.

The affidavit made by George Conrad Behr was as follows:

1. I have been for twenty years a Councillor of the Municipality of Woodstock. I have been four years Mayor of Woodstock, and I was Mayor at the date of the purchase hereinafter referred to.

2. The town of Woodstock has greatly developed in recent years. It has become not only a thickly populated residential suburb, but an important industrial centre. In 1897 a large area of land lying between Salt River-road and Observatory-road, and which up to that time had been included in the village area of Maitland, was added to the Municipality, and it is estimated that the population of the town is now about 30,000.

3. More than two years ago the inadequacy of the water supply to the town became manifest. The town is entirely dependent for its water upon the undertaking formerly owned by the Suburban Water Company, and which has since been acquired by the Municipalities of Claremont, Rosebank, Mowbray, and Woodstock. The whole of the supply available from this source has to be shared between the whole area included within these municipalities. The supply was during the summer months wholly inadequate to the needs of the town, and a water famine was only averted by the action of the Corporation of Cape Town in supplying to Woodstock as a temporary measure such water as could be spared from the Corporation reservoirs. The Corporation would, however, not enter into any agreement for a regular supply, as its own resources are limited.

4. I may say, further, that recently the water question has become even more acute, in consequence of the Suburban Water Board having notified that it is unable to supply water for building purposes, and hav-

ing cut off the supply to gardens. There have been several estates subdivided in the Municipality, and another large estate, that of Roodebloem, lately the property of Mr. Van der Byl, is to be sold shortly in lots. Upon all these properties buildings will be erected, and at the present time there is a large number of houses with the erection of which the owners are unable to proceed because of the want of water. In this connection I may mention that recently a large deputation of the builders of Woodstock waited upon the Mayor and myself, who are the representatives of Woodstock upon the Suburban Water Board, in order to represent to us the serious consequences to them of the Board's decision as to the stoppage of water, but we were compelled to inform them that we were unable to hold out any hopes of relief, since the existing supply was virtually no more than sufficient for the needs of the existing houses. I may further say that in consequence of the lack of water it is impossible for the Council to take any effective steps for the extinction of fires in the said Municipality, and that in consequence there has been an increase in the rates of insurance premiums.

5. So far back as 1899 it had become evident that in the near future the lack of water would not merely retard, but would absolutely stop the progress of the town, and the Municipal Council began seriously to consider the necessity of augmenting the supply.

6. In May, 1899, I was approached by one Cornelis Mostert, who was then the owner or virtual owner of the farm Oliphant's Hoek, situate near Klapmuts. Mr. Mostert stated that there arose upon the farm a stream of water which would serve for the supply of Woodstock. I visited the farm in company with the then Municipal Engineer, and I came to the conclusion that it would be for the benefit of the town that the supply should be secured.

7. At the meeting of the Council held on the 8th day of May, 1899, I reported to the Council the offer which had been made to me, and the result of my visit and negotiations for the purchase of the farm and water supply were thereafter commenced.

8. These negotiations continued from the month of May, 1899, to the month of March, 1900, the Council's object in protracting them being to gain time in which to gauge the flow of water, and to make such preliminary investigations as would be required to enable the Council to decide whether a scheme would be workable.

9. In the month of March, 1900, Mr. Mostert became restive, and declined to let the negotiations be further protracted, and, finally, he, on or about the 20th March, gave me notice that unless the Council decided within 48 hours to purchase the farm and supply he would withdraw his offer.

10. In consequence of this intimation a meeting of the Council was convened, and at that meeting the resolution set out in paragraph 5 of applicant's affidavit was adopted. Whether the Council was or was not legally bound to call a meeting of rate-payers to sanction the purchase, it would certainly have done so had the circumstances permitted, but the attitude adopted by Mr. Mostert made it imperative that the Council should at once take action.

11. The applicant was at the time a member of the Municipal Council of Woodstock, and he alone dissented from the said resolution.

12. At a subsequent meeting of the said Council held on the 4th day of April, 1900, the applicant, pursuant to notice given, moved to review and rescind the resolution above mentioned. His motion was seconded and discussed, and he thereafter withdrew it, stating that "he did not wish to vote against any motion for the welfare of Woodstock, and as the matter was now explained he withdrew his motion." I annex hereto marked A a certified extract of the minutes of the said meeting. Copies of the minutes of each meeting are before the next meeting sent to each Councillor.

13. I would respectfully crave leave to refer this honourable Court to the terms of the resolution quoted in the fifth paragraph of the applicant's affidavit, and to point out that the sum of £5,000 mentioned in the said resolution was for the purchase of the farm only without any of the water rights pertaining thereto, and that the sum of £20,000 mentioned therein was for the purchase of the water rights pertaining and belonging, not only to the said farm, but also the properties below it, and of the rights to lay pipes over such lower properties.

14. In explanation I say that the stream which rises in the farm Oliphant's Hoek flows down to the Berg River, passing in its course through eleven other farms. The owners of all these farms had rights to the said water, and it was necessary to secure these rights, as well as the right to lay pipes. It was moreover necessary to purchase the farm itself in order to provide for the construction of a storage reservoir and other necessary works. All these water rights as

well as the rights to lay pipes are what are termed "subsidiary rights" by the applicant in the ninth paragraph of his affidavit.

15. The Council is proceeding with the necessary surveys for a water scheme, and is having prepared full plans and specifications and an estimate of cost, but it has not up to the present time constructed or undertaken any work in connection therewith.

16. The said Council thereafter caused to be inserted in the "Government Gazette" and in two issues of the "Cape Times" a notice of its intention to issue the aforementioned debentures. No objections were received to such issue, and the said debentures were actually issued.

17. At the date of the said purchase the said liabilities of the said Municipality, inclusive of the said sum of £20,000, did not exceed ten times its then annual income.

18. I have made inquiry of the said Mostert, and I find from him that the acquisition of the rights of the properties of the eleven farms above referred to cost him in actual-cash, and apart from the expenditure of his time and trouble, the sum of £6,900.

19. I say that the said farm and the said rights are fully worth the sum of £25,000, and as proof of this statement I would say that I can without the slightest difficulty form in Woodstock a syndicate to take them over at that price, one member of the present Council being prepared himself to put £10,000 in such a purchase.

20. I say further, that if the said purchase and the said debentures be set aside the result will be most disastrous to the town, since it will not again have an opportunity of purchasing the said rights, and there is not to my knowledge any other water supply available which can be compared with this.

21. I say finally that the applicant has intimated his intention of taking action to have the Councillors who were concerned in the said purchase declared personally liable for the aforementioned sum of £20,000, and I submit that it is not equitable that in this proceeding, to which the said Councillors are not parties, he should be allowed to raise the same issues which will be raised in such action.

The following replying affidavit by Dr. Maberly was put in:

1. That I have perused the affidavit of George Conrad Behr.

2. That in making my original affidavit in this matter I endeavoured to confine myself to relevant questions of fact, and avoid mere expressions of opinion, but I submit that

the affidavit of the said George Conrad Behr, in so far as it deals with the advisability or necessity (apart from the legality) of the Oliphant's Hoek water scheme, is irrelevant.

3. I, personally, am only a type of many of the Woodstock ratepayers, who cannot see the scheme in the same rosy light as Mr. Fehr, and in the first place, even if the bargain be a good one, we are not satisfied that it could not have been obtained at a very much lower price, and that impression receives emphatic justification in the terms of paragraph 18 of the affidavit of the said Behr, showing that Mostert only alleges that he gave £6,900 for what the respondents gave him £25,000.

4. By far the most serious doubt in the minds of the ratepayers is as to whether the scheme will enable any addition whatever to be made to the Municipal water supply. Water rights are supposed to have been acquired as far as the Berg River, but inasmuch as the Oliphant's Hoek water is one of the chief sources of supply of the Berg River, and, at any rate, the most permanent or regular of such sources, the respondents will have to fight the riparian proprietors of the Berg River before any works can be constructed.

5. The Paarl Divisional Council and some of the said riparian proprietors have already communicated with the respondents on the subject, the latter through an attorney, and I am informed, and verily believe, that an interdict will be applied for the moment the respondents endeavour to interfere with the Oliphant's Hoek water.

6. I have also been informed, and verily believe, that the Malmesbury Divisional Council are acting in concert with the Paarl Divisional Council, and at a recent meeting the secretary was instructed to inform the Paarl Divisional Council that "this Council protest against the water being conveyed to Woodstock, and will send their protest to the Government, together with copies of petitions received objecting to this proceeding."

7. It is therefore by no means clear that the scheme will ultimately be of any advantage to the respondents.

8. With regard to the allegations contained in paragraphs 6, 7, 8, and 9 of the affidavit of the said Behr, I submit that, during the time the respondents protracted the negotiations, there was ample opportunity of obtaining any necessary authority of ratepayers.

9. Lastly, I would crave the indulgence ✓

this Hon. Court in allowing me to rebut the somewhat irrelevant personal allegation contained in paragraph 12 of the said affidavit. The minutes therein quoted are incorrect. I only withdrew the motion because the Councillor who had seconded it withdrew, and I saw it was hopeless to continue. At the next meeting of Council I objected to the confirmation of the minutes, on the ground of their incorrectness and incompleteness, and after some discussion I said I would be satisfied if a copy of the "Cape Times" containing a report of the meeting was filed with the minutes. The "Cape Times" report referred to I annex hereto.

Sir H. Juta, K.C. (for applicant): It is clear from the affidavits that the Woodstock Municipal Council has a water scheme in view, and that in order to carry out that scheme, it will be necessary to construct works in the Paarl district. There is no Act (as far as I know) under which that can be done. It certainly cannot be done under section 156 of Act 45 of 1882. That limits them to works within the Municipality. No Act gives them power to go outside the Municipality.

[Buchanan, A.C.J.: They can purchase land outside the Municipality.]

Not for a water scheme, because a water scheme cannot be dealt with piece-meal. Hence every municipal water scheme has necessitated the passing of a private Act, e.g., at Mossel Bay, East London, Port Elizabeth, etc. The Act 23 of 1897 does give general power to carry out a water scheme (sections 18 and 19), but only on condition (1) that the Municipality must satisfy the Minister that the scheme is the best practicable one; (2) that if the cost is to exceed one-quarter of the previous year's revenue, the ratepayers must give their consent. Again, section 70 authorises the raising of loans for the purpose, but only with the consent of the Governor. Section 71 refers to sections 145 to 155 of Act 45 of 1882, which sections must therefore be considered as incorporated into the Act of 1897. As to the interpretation of the term "Minister," see Act 5 of 1883.

[Maasdorp, J.: What about section 155 of Act 45 of 1882?]

That does not affect this case, and has regard only to the relations between the Council and its creditors.

[Buchanan, A.C.J.: You ought to have prevented the Council from borrowing this money, and not to have lain by so long.]

Our having done so does not legalise their

act; besides we did not know who the debenture-holders were.

[Maasdorp, J.: If you had taken action sooner, might not the ratepayers have ratified the action of the Council?]

[Buchanan, A.C.J.: We cannot give an order to prevent the bondholders from suing the Municipality.]

We should then intervene. In this case not a single thing prescribed by the Act of 1897 has been done, and even if they had done everything, they could not borrow money without the Governor's consent. Again, before raising a loan for a water scheme, plans, specifications, and estimates must be prepared. *Cairncross v. Oudtshoorn Municipality* (7 Sheil, 286). This is a precisely similar case, and in that case the Municipality had at last to get a private Act.

[Buchanan, A.C.J.: That case was before the passing of the Public Health Act.]

Yes, but the whole point is that this is not a mere purchase of land. To carry out a water scheme you must proceed either under the Public Health Act or by a Private Act. If it is proposed to proceed by a Private Act, all parties interested can be heard by the House. If it is proposed to proceed under the Public Health Act, the provisions of section 18 of that Act must be complied with. In the present instance that has not been done. Then again under section 70 money can be borrowed only with the consent of the Governor. If the action of the Town Council was *ultra vires* and the Court saw fit to restrain the payment of of bonds the bondholders could sue the Councillors individually.

[Buchanan, A.C.J.: It is quite possible that there may be a bond on property which has been transferred to the Municipality. If we grant this interdict, we may deprive a bondholder of his rights. We cannot prejudice the bondholder if he is not before us.]

The Court can make an order giving the bondholders a certain time within which to set the interdict aside. They could, for instance, be heard on January 12.

[Buchanan, A.C.J.: Even then they would at last have to institute an action.]

If the Court will now grant a rule nisi restraining the payment of interest to the bondholders on January 1, the Court can determine on the 12th whether an action will be necessary or not.

Mr. Searle, K.C. (for the respondent Municipality): This is a clear case of estoppel by conduct. Applicant was a party to

all the proceedings of the Municipal Council, and now he wants to get quit of his responsibilities. The Court will not grant an interdict at the instance of anyone who admits that he has been a party to an illegality with reference to the matter in question. Possibly if somebody else came into court, the Court might grant an interdict. After having opposed this water scheme, the applicant withdrew his opposition, and the scheme was passed by the Council. He had as much to do with it as anybody else.

[Maasdorp, J.: He says that he acted illegally, but asks us to prevent a further illegality.]

There is no precedent for doing so unless the debenture-holders are before the Court. The Municipality can issue debentures, and can buy land outside its limits. Section 152 of Act 45 of 1882 limits them not to incur any debt, the total of which, with other unpaid debts, exceeds ten times their annual revenue. In this case that limit has not been exceeded. There has been no secrecy about this matter. Notice of the publication of £20,000 debentures was given in the local papers more than a year ago. The questions the Court is now asked to determine are: (1) Whether section 18 of the Public Health Act limits the borrowing powers of the Municipality; and (2) whether on a motion the Municipality can be excused from payment of interest on their debentures? If they can be excused at all, it can only be done by action. They cannot take the farm and then refuse to pay for it. No debenture-holder was bound to ascertain whether the Municipality was legally entitled to borrow the money before accepting his debentures. My main point, however, is that the Court will not interfere to exonerate the Municipality from fulfilling an obligation to which the applicant himself was a party. The debentures would first of all have to be set aside.

[Maasdorp, J.: Suppose that the act of the Council was illegal, can it be ratified?]

Yes, at any time by a meeting of ratepayers under sections 146 to 148 of Act 45 of 1882, since it must not be supposed that the framers of that Act intended to put water and drainage upon a different footing from everything else. If before buying property a Municipality had to prepare plans, and go to the Governor for his sanction because such property may at some future time be required for a water scheme, no town would ever have a water scheme. In *Cairncross v. Oudtshoorn Municipality*

(7 Sheil, 286) the Town Council were interdicted from borrowing avowedly for a water scheme: but we have not borrowed for the purpose of acquiring water but land. We have borrowed no money for construction works; we have merely acquired the right to lay pipes. In any case the bondholders cannot be deprived of their rights if they are not before the Court, and we have no evidence as to what their rights against the individual members of the Council are worth. Suppose they were all on the verge of insolvency?

Sir H. Juta (in reply): We do not know who the bondholders are, and therefore we cannot bring an action against them. I submit, the Court should grant a rule *nisi* calling upon any persons interested to show cause why the Council should not be restrained from paying interest on these debentures. That would meet the equity of the case. If the contract is illegal the Municipality is not justified in paying this interest, and we therefore ask for a rule *nisi* to operate as an interdict.

Buchanan, A.C.J.: The Woodstock Municipal Council, who are the respondents here, have a scheme before them for improving the water supply within their Municipality. For the carrying out of this scheme they wished to purchase certain land and water rights, and to purchase this land and water rights they required to raise money. The Public Health Amendment Act, No. 29, 1897, section 18, provides that such a scheme as this may be undertaken by the Municipality, provided that they satisfy the Minister that their intended scheme is suitable and the best practicable, and if the scheme involves an expenditure exceeding a quarter of the amount of the preceding year's revenue, it shall not be undertaken without the consent of a majority of the ratepayers of such Municipality present at a meeting duly convened in manner provided by law. The Municipal Act, No. 45, 1882, section 145, requires that when a loan is to be raised for works of this nature, there shall be open to the inspection of the ratepayers proper plans and specifications and estimates showing the proposed expenditure of the money proposed to be borrowed. As pointed out in the case of *Cairncross v. Municipality of Oudtshoorn* (14 S.C. Rep., p. 272), the object of this is to enable the ratepayers to give an intelligent vote on the question proposed to be submitted to them. In this case the Municipal Commissioners have not, as far as the affidavits show, at present, obtained the consent of the

Minister, nor have they the ratification of their action by the ratepayers, and *prima facie*, therefore, on the authority of the case of *Cairncross v. the Oudtshoorn Municipality*, they could have been interdicted from raising any loan for the purpose of carrying out these works. The applicant is a ratepayer in Woodstock Municipality, and also, curiously enough, he as a Councillor himself agreed to the purchase of this property, although he was unwilling to go the full extent of the resolution adopted by the Council as to the purchase of subsidiary water-rights. In other words, he seeks now to have this contract entered into by the Council declared *ultra vires*, but he himself in his affidavit says that he is quite willing to have it considered *intra vires*, as far as he approves of the scheme. However, his approval as a Councillor is not sufficient; there must be the approval of the ratepayers. So far as can be gathered, the applicant was a Councillor of the Municipality when the advertisements appeared in December last year with reference to the proposed raising of a loan for this purpose, and presumably he authorised the issuing of the debentures. At any rate it does not appear that he raised any objection. Subsequently debentures were issued to the value of £20,000 by the Woodstock Municipality. These debentures are now in circulation, and the first interest on them falls due in January next, and to prevent that being paid the applicant now comes into court to get an interdict against the payment of this amount. Had the applicant been moving in a matter in which he alone was interested I think the Court would have at once said he was estopped by his action. But this is a public matter in which the ratepayers in the district are interested equally with himself, and therefore it is not a case where the Court can apply the principle of estoppel on account of the applicant's action as a Councillor. He has made out a *prima facie* case why the Municipal Council should not have raised this loan, and why he himself as a Councillor should not have sanctioned it, and therefore *prima facie* an interdict should be granted. But in consequence of his lying by and in consequence of his not having at once had the Municipal Council interdicted from raising the loan, the debentures have been issued and have been in circulation for a considerable time, and they have probably changed hands, and the Court cannot without hearing the debenture-holders give any judgment which would prejudice them in

their rights against the Municipality. It may be that the Municipality might have been interdicted against raising this loan. But it may be now the debenture-holders have a good claim against the Municipality, and they may have the right to recover from the Municipality any money which the Council has received on the debentures. We have not heard them, and we cannot give any order which will interfere with their rights, except temporarily, without giving them an opportunity of being heard. I myself must confess that I cannot see how the complicated question of the rights of all the parties now interested can be settled on motion. I think it must be settled by action. But in the meantime we have only to deal with the question of the interdict, which is urgent, as the interest is payable in January next. The Court will, therefore grant a rule *nisi*, returnable on the 1st of February next, to operate as an interim interdict restraining the payment of interest on the debentures, and meanwhile calling upon any persons interested to show cause why the interdict should not be granted. On the return day that temporary interdict may be made absolute, or it may be made absolute permanently, but this has not now to be decided. This order will be published once in the "Cape Times," once in the "Cape Argus," and once in the "Government Gazette." That will give notice to everybody interested in these proceedings now before the Court.

Maasdorp, J., concurred, and said that it seemed to him quite possible that the Councillors on reconsidering this matter might come to the conclusion that they had landed themselves in a difficulty, and it was also probable that they might find that they could get out of the difficulty by holding a ratepayers' meeting; but as to how it could be done it was not necessary for him to go into detail. However, he thought it might be possible to obviate any further difficulty by this meeting of ratepayers. He merely threw that out as a suggestion, as it might obviate any further litigation.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondents' Attorneys, Messrs. W. E. Moore and Son.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice) and the Hon. Mr.
Justice MAASDORP.]

CLARK V. JACOBSON. { 1901.
Dec. 3rd.
Partnership—Dissolution.

This was an action brought by Elizabeth Frances Clark against Joseph Jacobson for the recovery of a sum of £118 9s. 7d., being the balance due to her on the dissolution of a partnership existing between them. There was a counter-claim for £94 2s. 10½d.

Mr. Buchanan appeared for the plaintiff, and Mr. Wilkinson for the defendant.

The plaintiff's declaration was as follows:

1. The parties to this suit reside in Cape Town, where previous to and during the month of July, 1901, they carried on business in co-partnership as dealers in second-hand goods and jewellery.

2. On or about the 29th July, 1901, the partnership was dissolved by mutual consent, a due and proper deed of dissolution being drawn up and signed.

3. It was provided *inter alia* by this deed that the defendant should take over at cost price the existing stock of the firm, and that, after deducting the just liabilities of the firm from such total cost price, he should pay out to plaintiff, in cash, her moiety of the remainder of such total cost price.

4. Thereafter the defendant, in terms of the deed of dissolution, framed and submitted to plaintiff, who approved of it, an account showing a sum of £118 9s. 7d. as being due to plaintiff.

5. Plaintiff is legally entitled to claim and to be paid the said sum of £118 9s. 7d., but defendant wrongfully refuses to pay the same.

Wherefore the plaintiff claims: (a) Payment of the sum of £118 9s. 7d., together with interest thereon *a tempore morae*; (b) alternative relief; (c) costs of suit.

The defendant's plea and claim in reconvention were as follows:

1. Defendant admits paragraphs 1 and 2 of the declaration.

2. As to paragraph 3, defendant admits that under the deed of dissolution he had to take over the remainder of the stock contained in the business premises on the date of the execution of the said deed at cost price, and also the stolen stock, or any part

thereof, when recovered, but he says: (a) He denies that in terms of the deed aforesaid the plaintiff is entitled to a moiety of the cost price of the goods taken over by him as aforesaid after the liabilities of the firm have been deducted. (b) That according to the true intent and meaning of the conditions and stipulations under which the partnership was dissolved, as set forth in the said deed of dissolution, to which, for greater accuracy, he begs to refer this Hon. Court, the plaintiff is only entitled to half the net profits, if any, and is obliged to bear half the losses sustained. (c) That according to the accounts and balance-sheet framed by a public accountant a loss of £818 5s. 9d. is shown to have been sustained by the partnership, half of which has been debited to each of the partners, and after crediting the plaintiff with the amount of capital (£315) paid by her into the firm, there is a sum of £94 2s. 10½d. standing to her debit, and due to the defendant, as will more fully appear from the said accounts and balance-sheet which the defendant prays may be considered as inserted herein, reference being thereunto had.

3. The defendant denies the several allegations in paragraphs 4 and 5, but says that certain draft accounts were prepared before the employment of the public accountant as aforesaid, but were rejected by the parties respectively.

Wherefore defendant prays that plaintiff's claim may be dismissed, with costs.

And for a claim in reconvention, the defendant (now plaintiff in reconvention) repeats and begs to refer to the averments made in his pleas in convention, and says that there is due from plaintiff (now defendant in reconvention) to him the sum of £94 2s. 10½d.

Defendant claims: (a) Payment of the sum of £94 2s. 10½d., with interest *a tempore morae*; (b) alternative relief; (c) costs of suit.

For a plea in reconvention, plaintiff (now defendant) denied that she owed the defendant (now plaintiff) the sum of £94 2s. 10½d., or any sum whatever, and said that the accounts and balance-sheet referred to in paragraph 2 (c) of the plea in convention correctly show the position of the parties.

Wherefore she prayed that the claim in reconvention be dismissed, with costs.

In reply to the Court, counsel stated that the point in the case was whether under the deed of dissolution the plaintiff was entitled to one-half of the value of the assets or to one-fourth, the defendant contending that

as he had put in three-fourths of the capital in the shape of jewellery to the value of £900, as against the £300 in cash contributed by the plaintiff, it was intended under agreement that the plaintiff should receive only one-fourth of the value of the stock, after the deduction of liabilities, on the dissolution of the partnership.

Mr. Buchanan called

Edward Clark, the father of the plaintiff, who said that the plaintiff had gone to the Transvaal to take up an appointment, but witness knew about this partnership with Mr. Jacobson. Witness arranged a meeting between plaintiff and Mr. Jacobson. His other daughter was present at the time. A partnership was entered into, the agreement being that his daughter should put in the money and Jacobson the jewellery, and they were to share equally.

Cross-examined: Jacobson said he would put in jewellery to the value of £400. They were to share equally in everything; that was a great point. Witness heard nothing about £900 worth of jewellery until after the robbery. It was about three weeks or a month after the partnership was arranged that they began business. Several times after the first conversation Jacobson referred to the matter, and said they should share equally in everything.

By the Court: The agreement of partnership was entered into some time in December, 1900. The dissolution of partnership was entered into in July, and the robbery had taken place in June.

Sarah Clark, a sister of the plaintiff, said she was present at an interview between defendant and her sister with regard to entering into a partnership. Her father was also present. The proposal of a partnership came from defendant. The agreement was to put in £300 in money and he should put in jewellery, which he valued at from £400 to £600. Defendant said he had no money, but he wanted money to start the business. Defendant said they would share equally in everything.

Cross-examined: Witness knew nothing about the jewellery being put in at cost price. Nothing was said about the jewellery being of the value of £900. Witness was present at the whole conversation when the final agreement was made. That was in January, about a month before the business was commenced. They said that would be the final agreement, and defendant said that when he heard of anything good he would tell plaintiff, and she would give him the money.

Re-examined: The jewellery was in witness's house. She had charge of it. She did not value the jewellery at £400. Jacobson had interviews afterwards. He used to take his meals with them.

By the Court: At the time the partnership was spoken about Jacobson had the jewellery and witness's sister had the money.

Johannes Jacobus Wicht, a conveyancer and clerk to Mr. Paul de Villiers, said the plaintiff consulted him in this matter and he saw defendant several times, particularly on June 14. Before the robbery and dissolution was talked about, plaintiff had some objections to Mr. Jacobson's conduct. Jacobson then said she could leave, and she said she would do so if she got her £300 back. Jacobson first agreed to give her a general bond for her £300, but afterwards would not do so. Witness asked what the conditions of partnership were, and defendant said plaintiff was to get one-half of everything. Witness then suggested that plaintiff should be allowed to take her £300 out in stock, which she could sell if she liked. That was on a Friday, and on the following Monday the robbery took place. All the jewellery defendant put into the business was stolen. Defendant then refused to carry out his former agreement. He said that plaintiff could take one-half of the stock remaining. Practically all the jewellery was stolen. Defendant said at that time that plaintiff could have half of what was left. Witness said she would have to get one-half of any jewellery recovered, and defendant said that was so. Correspondence ensued, and in July witness wrote to the effect that to avoid litigation and to effect a settlement, Miss Clark was willing that the stock be sold by public auction, and that she should get one-half of the proceeds and defendant the other half, and also that she should get the half of any jewellery recovered. A reply was received on behalf of defendant saying that he would accept that proposal, with the understanding that instead of disposing of the remaining stock by public auction, defendant should take it over at cost price, and that after the payment of all remaining liability, the balance of profit remaining should be divided between them, and provided also that there should be a division of the stolen stock if recovered. After further negotiation the deed of dissolution was drawn up by Mr. Du Preez. It was known at the time of the dissolution that there were no accounts in the business; that it was all loss.

Cross-examined by Mr. Wilkin-

son: Witness was not to prepare the deed of dissolution. After being drafted the deed was submitted to witness, who, on behalf of the plaintiff, made certain alterations. Witness approved of the deed—unfortunately. Witness understood the deed to mean that Miss Clark was to get half of the balance left after deducting liabilities. Practically all the stock was stolen.

Mr. Buchanan closed his case.

Mr. Wilkinson called

Joseph Jacobson, the defendant, who said he entered into partnership with plaintiff early in February. The terms were equal loss, equal profit, both parties to work. The young lady found £300; witness found about £900 in jewellery and about £50 in outside goods. The jewellery was all old-fashioned. Witness assessed the value by weighing and by his own judgment. He was born in the business. Witness valued the jewellery at no more than its trade value. He valued the gold jewellery at its weight. There was no deed of partnership. The terms were arranged between the plaintiff and witness. Mr. Clark consented to the partnership. Witness told plaintiff at the interview in February, when he made the arrangement, that the jewellery was worth £900. The terms of equality referred to loss or gain. Nothing was said as to equal division of the stock. The partnership was to be for three years, and after this period there was to be an equal division of stock and everything. Witness was worried into a dissolution. Witness never authorised any accounts to be prepared other than were consistent with the deed of dissolution. Witness never consented to any form of dissolution excepting that provided for in the deed.

Cross-examined by Mr. Buchanan: The property was stolen from the room in which witness was sleeping. Witness was chloroformed. The robbery took place after a dissolution had been arranged, but before the deed was prepared.

[Buchanan, A.C.J., pointed out that the stock book showed nothing like the value of stock on the 14th February, the witness said he had put into the business. The value of the stock on that date, according to the stock book, was £436.]

John Howard Cosnett, accountant, said he was engaged by Mr. Jacobson's attorney a few weeks ago to make up an account in accordance with the deed of dissolution. He did so, and prepared the account put in. This showed the total loss to be £818 5s. 9d. He took the deed of dissolution and the valuation of the stock shown on ac-

counts produced. He did not examine the books.

Cross-examined by Mr. Buchanan: Witness got his facts from the accounts sent to plaintiff and returned.

By Buchanan, A.C.J.: If the stock was to be equally divided, witness's account was wrong. The goods to be divided amounted in value to £272 17s. 6d. If there was to be an equal division, the share of the plaintiff, after deducting liabilities and costs of the deed, would be £118 9s. 7d.

Mr. Buchanan said that this was the amount claimed by the plaintiff.

Mr. Wilkinson closed his case.

Mr. Buchanan (for plaintiff): By the deed of dissolution we have to bear half the losses, and we are entitled to half the assets.

Mr. Wilkinson (for defendant): Defendant's case, as disclosed by his own evidence, is that the stock was to be divided between the parties. But that arrangement was subject to the understanding that the partnership was to continue for three years. Defendant put in (practically) £900 and plaintiff £300. But every agreement of partnership is over-riden by an agreement of dissolution, and that agreement, in the present case, provides that defendant should take over the stock at cost price, and then certain provisions follow as to accounts, liabilities, etc. I submit that all clauses of the agreement of dissolution should be considered, and a balance-sheet framed.

Mr. Buchanan was not heard in reply.

Buchanan, A.C.J.: The plaintiff in this case, Miss Clark, entered into partnership with the defendant in or about December last year, or January this year, to carry on business together as dealers in second-hand goods and jewellery. The plaintiff had £300 in cash; the defendant had a quantity of second-hand jewellery, some of which he said he acquired 20 years ago, and which he had no business or other means of disposing of. He wanted money to open business premises. The plaintiff's father and her sister say that at the time that the partnership was negotiated, which was all done verbally, it was stated that Miss Clark would put in £300 and the defendant his jewellery. Miss Clark's sister says that the defendant said at the time that his jewellery was worth from £400 to £600, and her father says that the defendant stated it to be worth about £400. Defendant himself says that at that time no mention

was made of the value of the jewellery. It is clear upon the evidence given, and upon the defendant's own statement in the witness-box, that the parties entered into partnership on equal terms, and that defendant's jewellery was supposed to be equivalent to plaintiff's cash. Defendant says that the whole of the assets belonged to them equally, and that they should share the profits or loss in equal proportion. He also says that the agreement was that, when the partnership was dissolved at the end of the three years agreed upon, each should take an equal share of the assets. The business did not go on for as long as was contemplated, but in July an agreement for dissolution was come to between the parties. Shortly before this the plaintiff wished to terminate the partnership, to which defendant agreed, and negotiations took place as to how the stock was to be disposed of. It was suggested on the one side that there should be a sale of the stock by auction, and, on the other side, that the stock should be divided into two equal parts, each partner to take half. While these negotiations were going on, and before the agreement was completed and finally entered into, the defendant says that a large quantity of jewellery was stolen out of the room in which he was sleeping at night by a robber, who put him under chloroform. Plaintiff, having, I suppose, no means of testing this statement, accepted the situation, and agreed to divide the remaining assets. A statement was afterwards drawn up by defendant, based on what appears to me was the true agreement between the parties. He took into account the remaining stock, the assets, and the liabilities of the business, struck a balance, and divided the balance into equal parts, and showed an amount due to the plaintiff of £118 9s. 7d., which is the amount sued for in this action. Afterwards defendant's attorney employed an accountant, and a balance was drawn up on a totally different basis. This second account showed something like £61 to be due to plaintiff; while in a third account the unfortunate plaintiff was brought in a debtor to the amount of £90 odd. The account is admitted by Mr. Cosnett, the accountant employed, to be framed by him solely on information given by defendant and his attorney. Mr. Cosnett says he took the figures supplied to him unsupported by any books or vouchers, and he admitted that the accounts were not framed on the contract admitted by defendant himself in the witness-box. Con-

sequently the accounts prepared by the accountant were framed on a wrong basis altogether, and was therefore not a proper statement of accounts between the parties. The agreement of dissolution provided that defendant should retain the assets, and that a proper balance should be struck, and that the value of the property which is alleged by defendant to have been stolen was to be carried forward to a suspense account, the property, if recovered, to be then divided between the parties. The plaintiff says that the value of the assets still remaining is £236 19s. 3d. From the evidence from the correspondence, and from the first account filed, it is clear that the parties stood on equal terms as owners of the stock and assets. The plaintiff is therefore entitled to have half the value of the remaining assets paid to her. The stock and assets have been reduced to considerably below what they were at the commencement of the business, but there still remains the sum of £236 19s. 3d., and this must be divided equally. Plaintiff claims the one-half, and judgment will be given for her for £118 9s. 7d., with costs. With the suspense account we have now nothing to do. If it can be shown that the defendant is liable at any future time for any item brought up in this account, that will be for future consideration. Judgment will be given for plaintiff for £118 9s. 7d., with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, Mr. P. de Villiers;
Defendant's Attorney, Mr. Sinclair.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice) and the Hon. Mr.
Justice MAASDORP.]

B. V. JAGER AND WIFE. } 1901.
R. V. PIET AND WIFE. } Dec. 4th.

Buchanan, A.C.J., said that a case had come before him for review from the Resident Magistrate of Calvinia, in which four prisoners (two men and two women) were charged and convicted of stealing and slaughtering a goat. The evidence in the

case showed that the two women were the wives of the two men. There was no doubt that the men stole the goat and killed it, and took the meat to the huts where the women were, but there was no evidence to show that the women were parties to the theft or that they ate any of the meat. The conviction of the women must be quashed, and the conviction of the men confirmed.

REX V. PIETERSE.

Accomplice—Evidence

Buchanan, A.C.J., mentioned the case of the King v. Pieterse, a prisoner undergoing sentence. The charge was that he did wrongfully and unlawfully conspire with William Fortuin, also a prisoner undergoing sentence, to make his escape. The only evidence against the prisoner was that of William Fortuin, who from a statement made by him seems to have attempted to escape. He said that the prisoner advised that they should both escape, and in an undertone suggested that Fortuin should ask for leave to go to the river, and then escape, and that when the guard pursued him, he (the prisoner) should get away in an opposite direction. The prisoner denied that he ever said anything of the kind, and referred to his record of good behaviour while in gaol. As a general rule, a crime could not consist in mere intention only. In this case the charge was that prisoner conspired with another person to effect the prisoner's escape, and it was a question whether there was any overt act. Again, while the law allows an accomplice to give evidence, it requires that the fact of the commission of a crime must be proved *aliunde*. Here the only evidence is the statement of an accomplice, and there is no evidence otherwise that the prisoner committed any crime. On this ground alone the conviction could not stand. Conviction quashed accordingly.

MAXWELL BROS. V. GERALD } 1901.
AND CO. } Dec. 4th.

This was an action to recover the sum of £153 14s. 4d., being balance of an account less £75 9s. 5d. admitted as a set-off.

Plaintiffs' declaration was as follows:

1. Plaintiffs carry on business at Cape Town as importers and defendant carries on business at the same place as a wholesale confectioner.

2. Defendant is indebted to plaintiffs in

respect of goods imported for and on behalf of defendant, and at his request, to the amount of £153 14s. 4d., as will more particularly appear from the account hereunto annexed.

3. Defendant has rendered plaintiffs a contra account, showing their indebtedness to him to the extent of £91 7s. 3d., which plaintiffs admit as correct, except in respect of certain items, by deduction of which their true indebtedness is shown to be in the sum of £75 9s. 5d., as will likewise appear from the said account annexed.

4. Plaintiffs are willing, and herein tender to set off the said amount of £75 9s. 5d. against their claim in respect of the aforesaid amount of £153 14s. 4d.

- Wherefore plaintiffs pray:
- (a) Judgment for £153 14s. 4d., less £75 9s. 5d., admitted as a set-off.
 - (b) Interest *a tempore moræ*.
 - (c) Alternative relief.
 - (d) Costs of suit.

ACCOUNT ANNEXED.

Cape Town, July 1, 1901.

Messrs. Gerald and Co.,
Pontac-street,
Bought of Maxwell Bros.

		£	s.	d.	£	s.	d.
1898. Dec. 31.	To Imports ..	48	0	8			
	Int. Jan. 21, 1899, to April 9, 1901 ..	8	12	8			
					56	13	4
1899. June 28.	To Imports ..	47	6	7			
	Int. Sept. 28, 1899, to April 9, 1901 ..	5	19	10			
					53	6	5
	To Goods as per Statement at- tached ..	46	0	7			
	5 p.c. discount	2	6	0			
					43	14	7
					153	14	4
	Less Contra A/c ..	91	7	3			
1898. Dec. 10.	From which						
1899. Sept. 26.	deduct to						
	error ..	1	9	9			
	Do. ..	6	1	0			
	Discount ..	8	7	1	15	17	10
					75	9	5
					78	4	11

Defendant's plea was as follows:

1. He admits par. 1 of the declaration.

2. With reference to par. 2 he admits that there is due and owing by him to the plaintiffs the sum of £141 7s. 10d., in respect of goods imported and supplied to him at his special instance and request by the plaintiffs.

3. He denies that he is indebted to the plaintiffs in respect of the further sum of £14 12s. 6d., or any portion thereof, being the amount claimed by plaintiffs as interest from January 21, 1899, till April 9, 1901, and

from September 28, 1899, till April 9, 1901, on the two sums of £48 0s. 8d. and £47 6s. 7d. respectively.

4. In regard to par. 3, the defendant says that plaintiffs are indebted to him in the sum of £85 6s. 3d., being the sum of £91 7s. 3d., in terms of the contra account, less the sum of £6 1s. 0d., the inclusion of which sum in the original account was due to a clerical error.

5. Defendant admits that in respect of these accounts between plaintiffs and himself there is due by him to the plaintiffs the sum of £56 1s. 7d., and he asks that the claim of plaintiffs for the further sum of £19 7s. 10d. may be dismissed with costs.

And for a claim in reconvention defendant (now plaintiff) says:

1. He craves leave to refer to the matters hereinbefore pleaded, and prays that they may be considered as inserted herein.

2. In or about the early part of the month of August, 1899, he entered into a verbal agreement with the defendants in reconvention whereby the said defendants in reconvention undertook to import for and supply him with 20 cases of chipped cocoa-nut and 20 cases of fine cocoa-nut for plaintiff's Christmas trade, and, though repeatedly requested to do so, the defendants in reconvention failed to make delivery of such chipped cocoa-nut and fine cocoa-nut.

3. That the plaintiff in reconvention was accordingly compelled to purchase such chipped and fine cocoa-nut locally, and sustained thereby a loss of £42 10s. 0d., as is more particularly set forth in the memorandum annexed hereto.

Wherefore the plaintiff in reconvention prays:

- (a) Judgment for £42 10s. 0d.
- (b) Interest *a tempore moræ*.
- (c) Alternative relief.
- (d) Costs of suit.

MEMORANDUM ANNEXED.

Cape Town, May 3, 1901.

Messrs. Maxwell Bros.,
Cape Town.
Dr. to Gerald and Co.,
Wholesale Manufacturing Confectioners, etc.

To loss sustained through non-delivery of 20 cases chipped cocoa-nut, 2,500 lb., at 2d. per lb. £20 16 8

To loss sustained through non-delivery of 20 cases fine cocoa-nut, 2,600 lb., at 2d. per lb. 21 13 4

£42 10 0

The replication was general.

As a plea in reconvention:

1. Plaintiffs (now defendants) crave leave to refer to their allegations in convention.

2. They deny each and every allegation in pars. 1 and 2 of the claim in reconvention, and say specially that they deny that they entered into any verbal or other agreement as alleged in par. 1, and they deny that defendant has sustained a loss of £42 10s. 0d., or any other amount by reason of any act, neglect, or default for which they are liable.

Mr. Benjamin (with him Mr. S. Solomon), for the plaintiffs; Mr. Wilkinson (with him Mr. Currey) for the defendants.

Mr. Benjamin called

George Maxwell, the plaintiff, who said he was a partner in the firm of Maxwell Bros. Witness had been charging the defendants 5 per cent. commission on indent orders. This was for cash on arrival. If there were credit, interest was charged. The defendants had paid interest at 8 per cent. on previous transactions. This was the bank rate of interest. Defendants had allowed 10 per cent. on the amounts of goods purchased by witness's firm from them. They took the goods at Gerald's price, less 5 per cent. to customers; the other 5 per cent. was witness's firm's profit. Witness had proceeded in the Magistrate's Court, but exception was taken, and it was thrown out.

Buchanan, A.C.J., said he would like to see the Magistrate's Court proceedings. There did not seem to be any sound ground for sending the case to the Supreme Court.

Witness (proceeding) said he had not indented cocoanut for the defendants. Witness never received an order from defendants in August, 1899. For the last indent order witness made Gerald sign, there having been a dispute about the preceding order. The signed order was dated January, 1899, and this was the last transaction. The orders were executed in Ceylon, and witness did not think it was possible to get the goods ordered in August for the Christmas trade, for which defendant said he required them. A complaint was first made to one of witness's employees in July, 1900.

Cross-examined by Mr. Wilkinson: Defendant paid interest at 5 per cent. in 1894. It was only usual to deduct discount when the account was paid within 30 days. Orders had been executed in Ceylon, and goods sent here within four months. Witness did not remember Gerald telephoning to him about

an order in December, 1899. Witness sent an invoice for cocoanut to Hill and Co. in November, 1899. The goods for Hill probably came in about January. They were not sent to Hill and Co. at the same time as the invoice. Witness sent an order for cocoanut on his own account, and sold some to Hill and Co. The goods sold were marked "n.b." 3, and a diamond. The letters "h.b." appearing on the invoice were an error. By having the goods indented through witness or ordering from him about 1d. or 1½d. a lb. would be saved. After witness sold to Hill, the latter did not complain that he had not ordered the goods. Witness went to Mr. Hill to sell the goods. The goods were ordered for witness's firm.

Re-examined by Mr. Benjamin: The price of cocoa-nut at that time in Cape Town was about 5½d. or 5½d. a lb.

Malcolm Turnbull, bookkeeper in the employ of the plaintiffs, produced an invoice on which defendants were charged with and paid 8 per cent. interest, and accounts on which discount appeared as having been allowed to plaintiffs and to defendants. He also produced copies of accounts in connection with this case.

Cross-examined by Mr. Wilkinson: Witness did not hear until July, 1900, that Gerald was expecting cocoa-nut. Between August and Christmas, 1899, Gerald was not often at witness's office, so far as witness remembered. Witness did not remember defendant telephoning.

Mr. Benjamin put in certain correspondence and closed his case.

For the defence Mr. Wilkinson called

Maurice Gerald, the defendant, who said he carried on a confectioner's business. No arrangement was ever made between witness and plaintiffs as regards payment of interest. Witness was not aware that he had paid interest. Witness had allowed discount within thirty days, but after that time no discount was allowed. At about the end of July, or beginning of August, witness personally gave an order for cocoanut to Mr. Maxwell, who wrote down the order at his desk. The order was for about forty or forty-five cases of cocoanut; he could not say from memory exactly the number of cases. Witness believed the order was for twenty cases of chipped cocoanut, ten cases of fine and ten of stripped. Witness made no note of the order. He did not remember ever having entered an order given by Maxwell. It was understood that the goods would come in about the usual time—four or five months,

Witness had complained to plaintiffs about the goods not having arrived, and they always told him that the goods might come by any boat. Witness had to buy cocoanut in consequence of the non-arrival of that ordered through Maxwell, and had paid 2d. a pound more for it. Witness did not know of plaintiffs having charged commission on goods sent from the store. Cocoanut obtained on indent cost about 3½d. a pound; from merchants, 5½d. or 5½d.

Cross-examined: He did not deny that he had given the plaintiffs 10 per cent. in previous settlements.

Aaron Shinwald stated that at the end of 1899 he was a traveller for Mr. Gerald. At that time there were complaints that orders were not executed owing to their firm being short of cocoanut. In consequence of that circumstance a communication was made to Maxwell's by Mr. Gerald through the telephone. Witness heard what Mr. Gerald said, but what the answer was he did not know.

Joseph James Hill stated that a parcel of about forty-five cases of cocoanut was delivered to his firm from Maxwell's about the 6th of November. Those goods had not been ordered, but he took them on the assurance that they had indented for them. Subsequently he found that he had not indented for them; they did not want the goods, but they did not object to take them.

Charles William Hill stated that the forty-five cases of goods were never ordered by his firm; he was not there when the goods were delivered.

Mr. Wilkinson was heard on the behalf of the defendants.

Buchanan, A.C.J.: The plaintiffs carry on business in Cape Town as general merchants and importers. Defendants are a firm of manufacturing confectioners. As far back as 1894 the plaintiffs have imported from time to time goods on the order or the indent, as they call it, of the defendants. The practice between the parties has been for the plaintiffs to charge all expenses, 2½ commission on their outlay, and if the account is not paid in cash, interest at the rate of 8 per cent. when credit is given. Accounts between the parties have been settled up to the end of 1898. Early in 1899, the plaintiffs imported some goods for the defendants, and again, on an order given in January, the plaintiffs imported further goods, which were received in June. They also sold to the defendants, out of their own stores, a further lot of goods. The goods in these two indents and the invoice amount

to about £140. These amounts were not paid by the defendants, and the plaintiffs have charged on the two indents of imports the sum of £8 12s. 8d. and £5 19s. 10d. for interest to the 9th April, 1901, when they took proceedings against the defendants in the Magistrate's Court. These proceedings, owing to an exception taken by the defendants, were thrown out, and the plaintiffs were forced into this Court. The defendant admits these three items, but disputes the charge for the interest which has accrued thereon. Against the plaintiffs' claim there is a contra account for goods purchased by the plaintiffs from the defendants, which is also admitted. For this account the plaintiffs give credit, but they have made an error of £1 19s. 9d., which they now admit, and which must be deducted from their claim. In these two accounts, *pro* and *contra*, the only dispute besides the question of interest is connected with discount which the plaintiffs allow on both sides. Plaintiffs have allowed the defendants discount on the goods bought from them, which seems to be rather liberal, considering that the goods were not paid for; and they also, on the other side, have given themselves credit for discount on the goods purchased by them from the defendants. The interest is £14, and the balance of the discounts is about £6. From the previous dealings between the parties and the vouchers put in, the charging of interest and the allowing of discount appears to be the usual course of business which has been followed between the parties. We are, therefore, of opinion that the interest is properly charged, and that the discount allowed on both sides must be taken into account, and as the balance happens to be in favour of the plaintiffs they must have the benefit. So much for the claim in convention. When the plaintiffs sued in the Magistrate's Court, then for the first time a letter was written on April 12, in which defendants complain that the plaintiffs have not given the defendants any compensation for a shipment of cocoanut ordered by them in August, but not delivered. The plaintiffs say that they have received no such order for such cocoanut, and that they never had any complaint from the defendants about the delivery of goods, and they know nothing about this alleged order. The defendants, in their plea, say that some time in August, 1899, they gave the plaintiffs a verbal order for forty cases of cocoanut, in lots of 20 cases for two different kinds of goods. It appears, when the books were

put in, that on the very last occasion when an order was given by defendants, in consequence of previous disputes between the parties, the plaintiffs required the defendants to sign the indent and so complete the order in writing. The defendant Gerald stated that when he gave the order the plaintiff Maxwell at once entered it. When we look at the plaintiffs' indent book there is no order indented of any kind for the defendant in August, 1899. Every page of the indent book has a printed number, and there is no indent of such a kind as alleged by the defendant to be found anywhere in the book. Maxwell swears that no such order was given to him, and that he knows nothing about it. The defendant made no record of having such an order. After the plea was filed, and after an inspection obtained of plaintiffs' books, it was found that Maxwell had indented for themselves forty-five cases of cocoa-nut. The defendant comes into court and says he is now not certain as to the actual amount of the order. He says, "I think it was twenty cases of one kind, and twenty cases of another kind of cocoa-nut, but very likely it was the ten and the fifteen and the twenty cases of three different kinds of cocoanut mentioned in the indent of July 26." The practice of Maxwell Bros. is to put in the margin of the indent the mark to be put on the cases of goods when they are shipped, and this mark shows for which of their customers the goods are indented. When they are indented for Maxwells themselves they are marked M.B. in a diamond; when they are indented for Gerald and Co. they are marked G and Co., and for other customers accordingly. These marks are intended to show clearly, when an indent is given for whom the goods are ordered, and the marginal marks are inserted at the time of the order. If these goods had been ordered for the defendants in this case, why should Maxwell not at once put in the margin the mark G. and Co.? And as to this particular indent of July 26, Maxwell says the goods therein mentioned were ordered for themselves and not for the defendants. When the indent was executed in Ceylon, the shippers in Ceylon mistook or mismarked the goods, and put HB, instead of MB. Among Maxwell's customers were Hill Bros., and when these goods came out they were sent to Hill Bros., who had not ordered them, but, having received them, were quite willing to keep them, and they accepted the indent and paid for them. Maxwell, therefore, sold

the goods to Hill Bros., although they had not given the order. In the face of the evidence, and on an examination of these documents, we are forced to the conclusion as to the defendants' statement that no order was given by the defendants, bearing in mind especially the fact that Maxwell insisted in the last preceding order that the defendant should sign the indent when he gave the order. There is no indent found in the books, and we cannot hold that the defendants have established their claim in reconvention. Even had the defendants given the order, the question would have arisen whether, considering the relationship of the parties, plaintiffs would have been liable for an action for damages for not supplying goods which were indented to them. That question is open to argument, but it is not necessary to discuss it now, because we are of opinion that no such indent was ever given. Judgment must be given for the plaintiffs for the balance, which is £76 15s. 2d., with costs. I must say that I regret very much that this case was not settled in the Magistrate's Court.

[Plaintiff's Attorneys, Fairbridge, Arderne and Lawton. Defendant's Attorney, J. J. Michan.]

HERMANN AND CANARD V. BERNSTEIN.

This was an action brought by the plaintiffs, who are a firm of manufacturing tobacconists, carrying on business in Plein-street, to recover the sum of £48 3s. 6d., alleged to be due to them. The defendant is a retail shopkeeper, and alleged that the statement of account by the plaintiffs was incomplete and incorrect, and that if a proper statement of account were prepared, the plaintiffs would be shown to be indebted to the defendant, who asserted that he had overpaid the plaintiffs.

Mr. Benjamin appeared for the plaintiffs; Mr. Buchanan for the defendant.

The Court ordered the matter to be referred to an accountant (Mr. Nash), to take an account between the parties, and to report as soon as possible. The Court further intimated that, as soon as the report was completed, the Court would give judgment.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon. Mr.
Justice MAASDORP.]

THE EDISON BELL CONSOLI-
DATED PHONOGRAPH CO. } 1901.
(LIMITED) V. W. F. BRIT- } Dec. 5th.
TAIN AND CO.

This was an application upon notice of motion calling on the respondents to show cause why they should not be restrained and interdicted from selling and dealing in certain instruments alleged to contain parts which infringed the patent rights of the applicants.

Affidavits and correspondence were read, from which it appeared that in July last the respondents were first written to respecting the alleged infringements. They wrote back to say that they would communicate with the Columbia Phonograph Company, by whom they had been supplied with the instruments in question, and from whom they had had a guarantee that there were no infringements of registered rights. The respondents had also undertaken to desist from selling pending communication with the Columbia Company. They stated that they had no more of the instruments.

Sir Henry Juta, K.C., appeared for the applicants; Mr. Searle, K.C., for the respondents.

Mr. Searle applied for a postponement of the case, and read affidavits from which it appeared that the respondents had written to the Columbia Company in reference to the communications from the applicants. The company had replied stating that they had infringed no rights, and expressing the belief that the applicants would not proceed. To a subsequent letter addressed to them by the respondents, after this reply had been sent, the company had not yet had time to reply. Respondents asked that the case should be allowed to stand over until the 12th January.

After hearing Sir Henry Juta in argument, the Court ordered the case to stand over until January 12.

Buchanan, A.C.J., said that it was not necessary to go into the merits at the present stage. The respondents had been selling the instruments complained of as infringements, but they had no more in stock, and had undertaken to sell no more, and in regard to the other part of the claim

for an account, they wished to find out from the firm which supplied them whether they could defend the proceedings. There would be no prejudice of the rights of the applicants if the case stood over. The application would be ordered to stand over until January 12, costs to abide the result.

Ex parte VAN ZYL AND BUIS-) 1901.
SINNE, N.O. } Dec. 5th.

Testamentum Militare.

Where a member of the Cape Mounted Rifles had written to his sister in England, while on active service, stating that in the event of anything happening to him, he wished his estate to be shared by her with another sister and was subsequently killed in action, The Court upheld this letter to be a last will and testament and granted an order to the Master to accept it as such.

This was an application for an order authorising the Master to accept a certain letter as the last will and testament of one James Robert Leedham.

The petitioners were Caspar Hendrik van Zyl and William Templer Buissinne, carrying on business in Cape Town as Van Zyl and Buissinné, in their capacity as the only authorised agents of Ellen Leedham and Sussanna Leednam.

The petition set forth that by power of attorney, dated September 20, 1901, the petitioners were appointed by Ellen Leedham, of 57, Beverley-road, in the city of Kingston-upon-Hull, and Susanna Leedham, of 113, Westbourne-Avenue, in the city of Kingston-upon-Hull, to act for and on their behalf, and obtain letters of administration in the estate of the late James Robert Leedham, a sergeant-major in the Cape Mounted Rifles.

That the said petitioners annexed a letter received from the said James Robert Leedham (deceased), and dated December 7, 1899, by which he appointed the said Ellen Leedham and Susanna Leedham to be his heirs.

That certain correspondence, copies of which were annexed, passed between the Master of the Court, the Paymaster of the C.M.R., Ellen Leedham, and Susanna Leedham, and Messrs. Allison and Allison, the solicitors in England for Ellen Leedham and Susanna Leedham.

That application was made to the Master of the Court to file the said letter as a will of the deceased, and to grant petitioners letters of administration, but the Master refused to do so, as he had no power, and more especially as it had come to his knowledge that some of the brothers of the deceased objected to the letter being read as the last will of the deceased.

Petitioners prayed that their lordships would order the Master to accept this letter as a last will of the deceased, and to grant letters of administration to the said petitioners.

The affidavits of William Brewer, of Louth, in the county of Lincoln, and of Ellen Leedham, stated that the letter in question was in the handwriting of the deceased. Sergeant-Major Leedham was killed in action at Jammersberg Drift, near Wepener, on April 10, 1900.

The letter above referred to was dated December 7, 1900, and stated that if anything should happen to him it was his wish that his property should be divided between his two sisters, Ellen and Susanna. He further said he had given his sister Ellen's name to his paymaster, Captain Gordon, as his next-of-kin, and that he had £205 in the savings bank. Captain Gordon deposed on affidavit that the deceased left his sister Ellen's name as his next-of-kin.

[Buchanan, A.C.J.: In a recent case the testator was a member of the Queen's Town Volunteers, and yet administration was taken out in England. Why was not that done in this case?]

Sir H. Juta, K.C. (for applicants): The deceased belonged to the C.M.R., a permanent Colonial corps. He might therefore be considered as domiciled here.

[Buchanan, A.C.J.: The better plan would be to take out letters of administration in England, and the Master would recognise them.]

Under Roman-Dutch law a soldier on active service may make his will in any way he can. The Wills Act does not affect privileged wills, such as this. We therefore ask to have the letter to his sister accepted as a will, and for an order on the Master to grant letters of administration.

[Buchanan, A.C.J.: He cannot do that without a meeting of next-of-kin, in terms of section 21 of Ordinance 104 of 1833.]

Mr. Searle, K.C. (for respondent), was not called upon.

Buchanan, A.C.J.: The applicants in this case are agents for the two Misses

Leedham, who are sisters of the late Sergeant Robert Leedham. Sergeant Leedham belonged to the Cape Mounted Rifles, and was on active service with his regiment. While in the field he wrote a letter to his sisters, in which he says that if anything happened to him he wished his property to go to them (his sisters). The letter stated that he had given the paymaster of his regiment their names as his next-of-kin. The letter contained a clear indication that he wished his sisters to take the benefit of any property he might leave in case he should be killed in action. Under the old civil law a soldier on active service can make a will dispensing with all formalities required in other cases. This privilege only lasts while the soldier is on active service, and when active service has ceased and the soldier has returned the privilege terminates. In this case the letter was written while Sergeant Leedham was on active service. The applicants now apply for an order on the Master of the Court directing him to receive this letter as the last will of the deceased. A similar case came before the English courts some time ago. In the letter in that case the soldier wrote: "We may have big fighting at any time now, and should anything happen to me, remember you are to have what I possess." This letter the English court accepted as the will of the soldier, and granted probate. That case is very much in point. The privilege which is extended to soldiers to make informal wills has never by any law or statute of this colony been taken from them, and the Court will order that this will be received as the last will of the late Sergeant Leedham. The Master is quite correct in causing the application to be made to the Court. I do not think the Master would be justified in receiving a privileged testament such as this without an order of Court. It is said in the application that the brothers of the deceased object to the disposition of the property as stated in the letter. This application will not prevent the brothers from taking any action which they may be advised to take at their own risk. All the Court has to do now is to order that this letter be accepted as the privileged will of a soldier on active service.

[Applicants' Attorneys, Van Zyl and Buissinne.]

Ex parte ZONDAGH. { 1901.
Dec. 5th.
1902.
Feb. 3rd.

Will—Construction — Renunciation of Benefits by Usufructuary—Transfer.

Z. and his wife (married in community) executed a mutual will whereby they bequeathed all their landed property to the survivor, to be held free and undisturbed by such survivor during his or her natural life, after which the joint property was to devolve upon such of their joint sons as might be living at the survivor's death. The testator died and his widow, who was also executrix, adiated under the will and she now wished to renounce her life interest in favour of her sons, who were prepared to pay the hitherto unpaid balance of the sum prescribed by the will, on transfer of the property. The Registrar of Deeds refused to pass transfer of the property.

Held (1) that as the effect of the will was to institute the children heirs on the death of the survivor and to substitute directly the survivors for such children as might predecease their mother: and for their father to substitute the children of such predeceased children: and as further the will fixed the death of the survivor as the date for ascertaining the ultimate beneficiaries:—while the renunciation of benefits by the survivor might give the children the benefit of occupation at an earlier date than that contemplated in the will, it could not alter the provisions of the will.

(2) Hence that while there was no objection to a transfer of the property to the sons, subject to the provisions of the will, their petition for an unconditional transfer must be dismissed.

This was the petition of Maria Catherina Zondagh (born Rautenbach), of Uniondale, widow and executrix testamentary in the estate of the late George Frederick Zondagh. The petitioner alleged that on July 20, 1888, she and her late husband, to whom she was married in community, executed a joint will. That it was their intention to give the landed property referred to in the will to their five sons, and that it was stipulated that of the bequest price of £300, one-half should be payable by them on the happening of the death of the first dying, and the other half at the death of the survivor of the testators, that the first half of the bequest price, or £150, had been paid by her sons. That the reservation of a life interest was inserted as a provision for the support of the survivor, and that the intention of the petitioner and her husband, in referring to the lawful descendants of a son predeceasing the longest liver was to make it clear that a share devolving on a son at the death of the first dying should be secured to him and not accrue to his brothers in the event of his predeceasing such survivor. That she was anxious to now give to her sons free and unrestricted transfer of the bequeathed property, and had waived and resigned absolutely all her life interest in respect of the same. That her sons were prepared to pay and had tendered to pay the other half of the bequest price against transfer. That the Registrar of Deeds had raised a doubt as to her power to give unconditional transfer of the landed property to her sons, and had intimated his inability to allow such unconditional transfer to pass without an order of Court. That each of the petitioner's sons has children. The prayer was for an order authorising the Registrar of Deeds to pass free transfer of the property to the sons upon their paying the balance of the bequest price, £150. The clause of the will referred to in the petition was as follows: "We give, devise, and bequeath unto the survivor or longest living of the two the whole of our landed property . . . to be held free and undisturbed by such survivor during his or her natural life, after which we give, devise, and bequeath the aforesaid landed property to such of our joint sons as may be then living, but in case one or more of our sons be deceased before the death of the longest living of us two leaving lawful descendants, then such shares as our son or sons would have inherited if still living shall become the property of such descendants upon the same terms under which our said son or sons would have been entitled to such inheritance, and we further

will that in consideration of our said sons so inheriting the whole of our landed property, they shall be bound to pay to our daughter, or daughters jointly, the sum of £300, one-half of which shall become due and payable at the death of the first of us, and the other half at the death of the survivor." The Registrar of Deeds reported that although he had no objection to register transfers if made subject to the conditions of the will, he was not prepared in view of the express terms of the bequest to allow unconditional transfers without the sanction of the Court. The Master of the Supreme Court, in his report, pointed out that if the properties be now unconditionally transferred to the sons of the testator, and any one of them disposed of his share and died before the surviving spouse, leaving a son, that son would be entitled to his deceased father's share, but the property would then have been disposed of. There might be no objection to an order to pass transfer subject to the condition that the sons should not have the right to alienate or mortgage the property during the lifetime of their mother, the petitioner, but an unconditional transfer would be prejudicial to the interests of the testator's grandchildren who might become entitled to the property.

Mr. Schreiner, K.C. (for applicant): If the Master is right in saying that the survivor is to retain the usufruct of the property there can be no difficulty about transferring the property to her sons. The whole question is one of vesting. If she has only the usufruct the property has already vested in the heirs.

[Maasdorp, J.: A condition precedent may be attached to the vesting.]

Yes; as in *Geddes v. Klein* (10 Sheil, 274). In that case the brother intervened, and the Court refused to sanction a sale to a stranger. There was a substitution on a substitution.

[Maasdorp, J.: If the Court should grant this application the sons would be able to sell the property to strangers.]

Undoubtedly, but my point is that there is no *fidei-commissum* in this case.

[Maasdorp, J.: Surely the survivor can cede her life interest to anybody she pleases?]

No; all authorities are against that view. A life interest, it is true, may be sold in execution but it cannot be alienated unless it is consolidated with the estate. Suppose, in this case, the survivor had first alienated and then renounced all benefits, then, according to the Master's contention, the

ownership of the property could not be determined until her death.

Strydom v. Strydom's Trustee (11 S.C.R., 423) goes much further than I now ask the Court to go. In that case the language of the will was much more strongly in favour of a *fidei-commissum* than in the present case; but nevertheless the Court decided that the heir took an immediate vested interest.

[Buchanan, A.C.J.: In the present case there is a substitution.]

Only of children in the place of their father. It is not a *fidei-commissary* substitution, and therefore the vesting took place on the death of the first dying. As to the ways in which a usufruct may be lost see *Voet* (7, 4, 3), which shows that a usufructuary cannot cede the usufruct to a stranger. He may let or lease, but he cannot sell his rights. If the usufruct, however, be ceded to sons they can at once enjoy the property and then the restriction as to the further heirs vanishes.

[Maasdorp, J.: Referred to *Galliers v. Ryecroft* (10 Sheil, 777), decided by the Privy Council.]

[Buchanan, A.C.J.: May there not be a vested contingent interest?]

No doubt, and the fact that it is so is quite in my favour. The whole object of this will was clearly to protect the children, and to prevent the *jus accrescendi* from operating in the event of the death of one of the sons. See also *In re Zipp* (Buch., 1878, p. 134).

[Buchanan, A.C.J.: In that case there was no substitution.]

No, but there was a reservation in favour of the children. According to *Burge's Colonial Law* (vol. 3, p. 160) a usufructuary may give up his rights in favour of the owner, and such cession will have precisely the same effect, as far as that property is concerned, as if he had lost them by his death.

Mr. Sheil, K.C. (*curator ad litem* for the grand-children): The material point which the Court has to decide is whether the petitioner under the will is a fiduciary or a mere usufructuary.

If she is merely a usufructuary her sons acquired a vested transmissible interest on the death of the testator, whereas if she is a fiduciary she retains the *dominium* until her death, and no interest vests in her children until that event. *In re Zipp* (Buch., 1878, p. 132).

In nearly every case in which the Court has held that a usufruct and not a *fidei-commissum* has been constituted it will be

found that the will appointed the testator's children heirs, and not the surviving spouse as in the present case. See *Rahl v. De Jager* (1 Juta, 38), *Steenkamp v. De Villiers* (10 Juta, 56), *Pike v. Buckley's Executors* (9 Sheil, 371). If we look at the will in the present case we shall find that the survivor is alone appointed heir and it is only such of the sons or their lawful descendants as may be living at the death of the survivor as are entitled to the property, showing, it is submitted, that it was intended to create a *fidei-commissum*.

The words of the will, *would have inherited if still living*, that is, if still living at the death of the survivor, show that it was intended that the sons or their children's interest should only vest at the death of the survivor. If it had been intended that the sons should take a vested interest at the death of the first dying the language which would have been employed would have been then "such share or shares as our sons inherit at the death of the first dying of us."

Again the use of the words "such of our joint sons as may then be living" would prevent such a vesting of the inheritance in any son dying before the surviving spouse as would make the inheritance transmissible to his heirs. In *Galliers v. Rycroft* 10 Sheil, 777) very similar language was used.

[Buchanan, A.C.J.: Has not renunciation the same effect in terminating the interest as death?]

No voluntary renunciation can be allowed to prejudice the interests of the children.

[Buchanan, A.C.J.: How can she prejudice the will by renouncing her rights under it?]

She may prejudice the grandchildren.

[Buchanan, A.C.J.: As far as I am aware the effect of renunciation is a new point?]

I do not remember any case in which the point has arisen.

[Buchanan, A.C.J.: In whom would the estate lie if she renounced or refused to adiate?]

In the executors under the will.

Mr. Schreiner (in reply): In cases relating to transfer duty it has been held that vesting takes place on renunciation. My point is that if a person can lose a right by death, he can do so by renunciation, unless the law forbids him to renounce. The case of *Galliers v. Rycroft* is not in point, because there there was no substitution. *Strydom's case* is one of the latest, and is quite against respondent's argument, for there the sur-

vivor was appointed heir, and yet was held to be only a usufructuary.

Cur ad vult.

Postea (3rd February, 1902).

Buchanan, J., delivered judgment as follows: The late George Zondagh and his wife, who were married in community, executed in 1888 a mutual joint will, whereby they bequeathed all their landed property to the survivor, "to be held free and undisturbed by such survivor during his or her natural life"; and then the will directed: "after which we give, devise, and bequeath the aforesaid landed property to such our joint sons as may be then living, but in case one or more of our sons be deceased before the death of the longest living of the two, leaving lawful descendants, then such shares as our son or sons would have inherited if still living shall become the property of such descendants upon the same terms under which our said son or sons would have been entitled to such inheritance." These terms were that in consideration of the sons inheriting the whole of the landed property they should pay to the daughter or daughters of the testator and the testatrix the first half of the bequest price the sum of £300, one-half to be paid on the death of the first dying, and the other half at the death of the survivor. On the death of the testator, the widow adiated under the will, and the sons paid to the daughters the first half of the bequest price of the farms. The widow now wishes to renounce her life interest as survivor in favour of the sons, who, in consequence, are ready to pay the remainder of the bequest price. The widow, who is also executrix in her husband's estate, wishes to transfer the property unconditionally to the sons, but the Registrar of Deeds has raised a doubt as to her power so to do. For the applicants it was contended that on the death of the testator and adiation by the testatrix, the survivor took only a usufructuary, and not a *fidei commissary* interest in the property, and consequently the sons had a vested right, possession only being postponed during the continuance of the life interest, and further as soon as this intermediary estate terminated, whether by death or by renunciation, the sons became entitled absolutely. It was urged that the provision in the will as to descendants was intended only to make it clear that there should be no *jus accrescendi* in favour of such sons as might outlive the survivor, but that in such an event their children should take by representation. On the other hand, it was

argued that the survivor took as heir under the will, and that it was only after her death that the fiduciary heirs could be ascertained, and, therefore, that the survivor could not by renunciation of her life interest defeat the provision in favour of the grandchildren, who on her death might be entitled to the property. The widow has filed an affidavit stating the object her late husband and she had in framing their will in the terms stated; but the Court must endeavour to discover the intention of the testators from the will itself, and not from the declaration of the survivor. Turning to the will, there appears no ambiguity in the language used. There is first a simple bequest of the property to the survivor during her natural life, and then upon her death the property is given to "such our joint sons as may be then living." If the will ended here the recent decision of the Privy Council in *Galliers v. Rycroft* (Ap. C., 1901, p. 130) shows that the effect of this direction would be to institute the children as heirs on the death of the survivor, and to substitute directly the survivors for such children as might predecease their mother; but those children who might die before their mother would not enter upon any inheritance. The next clause of the will provides, however, that instead of the survivors only succeeding to the property, the lawful descendants of any predeceased son should be substituted for their father, and thus follow the rule usually dictated by natural affection. But the will fixes the time for ascertaining who the ultimate beneficiaries are, at the death of the survivor, not the date of the termination of the mother's life interest by renunciation. The stipulations that the sons should pay half the bequest price on the death of the first dying, is certainly in favour of the view that there is a vesting in them of a right of succession, but this fact alone is not sufficient indication of an intention on the part of the testators which would override the clear provisions of the will, which couples any such right with the condition that they should outlive the survivor. There is nothing contrary to law in annexing such a condition to a bequest or even to the transfer of property. The effect of the renunciation of her interest by the survivor may give the children the benefit of occupation of the property bequeathed at a date earlier than that contemplated in the will, but the renunciation cannot of itself alter the will. The objection taken by the Registrar of Deeds to an unconditional transfer is well founded; but there is no

objection to a transfer of the property from the estate to the sons, subject to the provisions of the will. The order prayed cannot be granted; applicants to pay costs.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Walker and Jacobsen; Government's Attorneys, Messrs. J. and H. Reid and Nephew.]

REX V. SADODIEN. { 1901.
Dec. 5th.

This was an appeal from a sentence pronounced by the Special Court of Griqualand West. The accused was one Sadodien, an Indian, who was charged with contravening section 3 of Act 48 of 1882, in that upon or about July 1, 1901, and at or near Bultfontein, within the district of Kimberley, he, not being duly licensed or authorised under the provisions of Act 48 of 1882 did wrongfully and unlawfully buy, deal in, or receive by way of barter, pledge, or otherwise, either as principal or agent from Moses Jack, in the employ of the Detective Department at Kimberley, one rough and uncut diamond.

The prisoner pleaded "not guilty," and the following evidence was adduced:

Moses Jack deposed that he was a "trap" in the employ of the Detective Department. On July 1 he received from his employers a rough and uncut diamond after being duly searched. In accordance with instructions received he went to prisoner's place escorted by detectives. There he found prisoner and prisoner's father. Another "trap" named "January" accompanied witness. Prisoner said to January: "Have you come with it." January said, "Yes." Prisoner: "Produce it." Witness produced the diamond from his mouth, handed it to January, who gave it to prisoner. Eventually prisoner bought it for £1, and paid 20 shillings in silver. Witness here said: "I correct myself, it was in two pieces of 10s. No one entered the shop while the traps were there. Prisoner was standing behind the counter, and took the money from the till. They went out to the detectives, and when they returned there were several Indians in the shop. Prisoner was near the kitchen door when arrested."

January's evidence differed from that of last witness in the following particulars: Two natives came in while the "traps" were talking to prisoner. They did not stay long. No conversation with prisoner took place in their presence. When they returned with the detectives other Indians came into the shop from the kitchen, and

they might have been in the kitchen all the while.

Graham (detective) deposed to the searching of the last two witnesses. They had no communication with anybody en route to prisoner's shop. Witness and Clear (detective) saw "traps" enter the shop at 6.45 p.m. At seven they came out, and then two natives entered, and came out. He thought another native entered. When the traps came out they gave witness two half-sovereigns. The detectives went to the shop, and found prisoner standing near the kitchen door. Besides him five Indians and one native were in the shop. Nobody was in the kitchen. As soon as the detectives came in prisoner ran out through the kitchen, and Clear (detective) followed and brought him back. The detectives then searched the "traps," and all others then present. The two traps were both present together when they made their respective statements.

Clear (detective) gave corroborative evidence chiefly as to the identification of the prisoner.

For the defence,

Goolam Mahomet deposed that he kept the shop in question in partnership with the prisoner (his son). The man who ran into the kitchen and was brought back by Clear was one Laloo, and not prisoner. There were five Indians in the shop all the time the traps were there.

Abdul Raman deposed to being present the whole time the traps were in the shop. There were five persons present. The "traps" did not sell any diamond to prisoner. It was Laloo who ran out to the kitchen. Prisoner never left the room.

Connel, Jacob Williams, and the accused generally corroborated the evidence of last witness.

Prisoner was found guilty, and sentenced to five years' imprisonment with hard labour. Against this sentence he now appealed.

Sir H. Juta, K.C. (for appellant): The first irregularity in the proceedings in the Court below was that the two "traps" were allowed to make their statements in presence of each other. There is no independent corroboration of their evidence. A trap is an accomplice, and the evidence of an accomplice must be corroborated. Again Moses Jack said that the money was paid in silver. The detective said two half-sovereigns were paid. He afterwards corrected that.

[Buchanan, A.C.J.: He corrected it at once.]

It follows at once on the record, but we do not know what transpired in the meantime. There are also other discrepancies. To come to the second point. How many people were there in the shop? Moses Jack went in first. He swears that nobody else came into the shop while he was there. In this he is contradicted by the other trap, and by the detectives. We are therefore justified in saying that Moses Jack in this made a false statement. He must have had some motive in making that false statement. He must have seen the other people come in. The case for the Crown is that nobody, but the prisoner could have bought the diamond, while the detective evidence shows that other natives were in the shop, and that some walked away without being searched. No diamond was found on the accused, and the detectives and traps contradict each other as to whether the prisoner ran into the back yard or not. The traps say that he did not leave the shop. If they are wrong in this what is their whole evidence worth? Yet theirs is the only direct evidence that prisoner bought the diamond: and yet, strange to say, when the detectives came in not he, but another man ran away.

Mr. Jones (for the Crown) was not heard.

Buchanan, A.J.C.: The appellant in this appeal was tried and convicted before the Special Court of Griqualand West of the crime of contravening the Diamond Trade Act, in that he purchased a diamond, not being a properly licensed person. He pleaded not guilty, and had legal advice in his defence. In the appeal now brought before the Court, it was not alleged that there had been any irregularity or illegality in the Court below. The grounds upon which the Court is asked to upset the conviction of the Court below are that of discrepancies in the evidence of different witnesses, and that the traps in this case had not been sufficiently corroborated. These points were urged in the Court below. On the objection of want of corroboration of the traps the records show that there was some corroboration. The traps were searched and were watched. They were seen to go into appellant's premises with a diamond and with no money. Immediately after the sale they were searched, and no diamond was found upon them, but money was. The detectives who watched the traps saw them speak to the man behind

the counter. One of the alleged discrepancies was as to other persons going into the store while the traps were there. One detective, who was stationed right in front of the door, said that he saw two people enter the shop and go out again without having any communication at all with the traps. It was said also that there was an irregularity in that after the prisoner was arrested both the traps, when taken to the police office, were allowed to be present while making their statements. The Court below had, it was stated, inquired into this matter, and if that was so, it showed how careful the Court below had been in weighing everything that could be urged on behalf of the prisoner. There was enough direct and positive evidence to support the conviction of the prisoner. Sir H. Juta had ably analysed the evidence, pointing out the discrepancies, and had given an excellent address on prisoner's behalf. But on his own showing the Court below, which had been very careful in the matter, after hearing everything, convicted prisoner. The Court could not say that the evidence was so contradictory or so wanting in corroboration that this Court would be justified in setting aside the finding of the Court below. The appeal must therefore be dismissed.

[Appellant's Attorneys, Messrs. Findlay and Tait.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice), and the Hon. Mr.
Justice MAASDORP.]

REX V. EMMERICK. { 1901.
Dec. 6th.

Police Offences Act 27 of 1882—Section 5, sub-section 18—Conviction quashed.

Maasdorp, J., said that a case had come before him for review as judge of the week from a Special Justice of the Peace of Herbertsdale, near Mossel Bay. The accused, Gert Emmerich, was charged with

contravening section 5, sub-section 18, of Act 27 of 1882, by having unlawfully insulted a lock-keeper by giving him a nickname, by saying "Florishers." He pleaded guilty, was found guilty, and fined 5s., or 24 hours' imprisonment. Now the section under which the accused was charged provided for the punishment of offenders who used abusive, obscene, and insulting language in the public streets. It appeared that the accused in this case was talking to some friends as the complainant was passing, and he said to his friends, "The Floris said you will get nothing." In itself there would appear to be nothing insulting in these words, but the explanation given is that the complainant asked whether the words referred to him, and the accused said "Yes," and then the explanation of the words was that they referred to a certain beggar called Floris, and they intended to convey that the complainant was a beggar, who refused to give certain property to somebody. However annoying this might have been to the complainant, I do not think this fell under the section which provided for a punishment for the use of abusive, obscene, and insulting language in the streets. The conviction and sentence must be quashed.

FALKOW V. RICARDI. { 1901.
Dec 6th.

This was an action for the specific performance of a certain contract of lease. The plaintiff alleged that a contract of lease was entered into verbally and was subsequently reduced to writing as evidence. Plaintiff obtained possession of the premises, but defendant now refused to execute the contract. The declaration set forth that the plaintiff and defendant both resided in Cape Town, and that on or about June 1, an agreement was entered into whereby the defendant agreed to let and the plaintiff to hire the premises known as 56, Hanoverstreet, for a period of 18 months at a rental of £18 a month. Plaintiff had always been willing to perform his part of the agreement, but defendant had refused to give possession. Plaintiff alleged that if the contract were not carried out he would sustain damages to the amount of £250, which sum he claimed as an alternative to an order for specific performance. The defendant admitted that he refused to execute any lease or to give possession. He denied the existence of any agreement.

For the plaintiff, Mr. Benjamin; for the defendant, Mr. Gardiner.

Harris Falkow said he carried on a boarding-house at 56, Hanover-street. It was with regard to the lease on this house that he was bringing this action. He had about thirty-five boarders. On May 22, witness went to see Ricardi, who showed him over the house. Ricardi was then living in the house. On the same day witness went again in company with a Mr. Robinson. The latter, after seeing the house, advised witness to take it. Ricardi said the rent would be £20 a month. Eventually it was agreed that there should be an eighteen months' lease at a rental of £18 a month, and that if witness went to Johannesburg he would give defendant a month's notice. Witness went a third time with Robinson and a boarder named Hillison. He paid defendant £3 on account of the rent, and asked defendant to give him an agreement for 18 months. Defendant said he would give an agreement at any time he liked. Witness took possession on June 1. He paid £15, the balance for the first month, but he could not remember whether anyone was present. Defendant told witness the place was worth £1,000 to witness. Witness asked Ricardi for a lease, and the latter said that if he (witness) would write out a lease, he (Ricardi) would sign it. This was at the beginning of June. Witness got one of his boarders to prepare an agreement. When the second month's rent was paid, at the beginning of July, witness gave defendant the lease, and the latter took it away with him, saying he could not read, and would get it read over to him. He said he would bring the lease back signed the following morning. He did not return the lease. Witness afterwards asked him about it, and could then see that he was hesitating about the lease. Witness told him it was a business transaction, and that if he would not sign it, he (witness) would have him summoned. Subsequently he refused to sign the lease, saying that the agreement was for two months' notice.

Cross-examined by Mr. Gardiner: It was not true that witness only spoke about a lease some time after he had been in possession. When the terms of a lease were suggested by witness, Ricardi did not say it was not fair that he should lease the house for eighteen months, and that witness should be able to give one month's notice.

Solomon Robinson deposed that he twice accompanied the last witness to the defendant's house in May. He corroborated plain-

tiff's evidence as to the agreement then entered into.

By the Court: Ricardi was to let the house for eighteen months; Falkow could give a month's notice. The reason for this arrangement was the high amount of the rent. Ricardi said he would let plaintiff have a lease for fifteen or twenty years.

Cross-examined by Mr. Gardiner: Defendant first asked £20 for a monthly tenancy. Witness wrote the name on the receipt. He could have written the condition about the eighteen months' lease, but he did not do so because he was not given permission.

Chiam Pulman said he was present one day in June when defendant called for the rent. Falkow paid £18 and gave defendant a document. Defendant said he would take the lease, show it to his daughter, and bring it back. Witness believed plaintiff had then been in the house for about a month and a half.

Mr. Benjamin put in certain correspondence and closed his case.

Mr. Benjamin mentioned that the property had been sold, and the present owner was suing plaintiff for rent and ejectment.

Mr. Gardiner called

Frank Ricardi, the defendant, who said he first saw plaintiff in connection with this house on the 23rd May. Witness offered to let the property at £19 a month, but afterwards agreed to a rental of £18. Nothing was said about a lease. Plaintiff said he wanted a room to put his things in at once, and he gave witness £3 deposit. Witness had tenants in the house. There were three houses in one. Witness collected £9 10s. for June from these tenants, and plaintiff paid the balance of £5 10s. Plaintiff took over witness's tenants. Nothing was said about a lease then. Before the July rent was paid plaintiff spoke about an agreement. Witness told him to write one out, and said that if he (plaintiff) would write out a document witness would see what sort of agreement he wanted. Next day plaintiff gave him two papers. He took them away and had them read to him at Mr. Leiberstein's shop. Witness found out what was in the paper. Plaintiff wanted an eighteen months' lease, while he would give a month's notice. Witness tore up both papers. Next day witness told Falkow that he could not give him such a lease. Harris interpreted what witness said to Falkow.

Cross-examined: The conversation with Harris was after he tore up the paper. The

property was sold on August 15. Witness did not let the house to Falkow after he sold it. He never got the £100 on account on July 15. He did not get the money. Witness had never spoken to Robinson or Skea about Falkow wanting the property. When Falkow came to witness, the latter said he would have let him have an eighteen months lease if he had good security. Falkow came to witness with the document for an eighteen months' lease, without having previously spoken about a lease.

Re-examined: His objections to the lease were that he objected to giving it without a surety, and that he did not see his way to give the plaintiff the option of quitting at one month.

Max Harris, a plumber, said that one month he went to Ricardi's house to do some repairs, and while there he heard a conversation between Ricardi and Falkow. The latter called witness down, and asked him to explain to Ricardi, who did not understand Jewish, that he (Falkow) wanted an eighteen months' lease, with the option of leaving at any time upon giving a month's notice. Ricardi said he would give no lease at all, and ran away round the yard. When witness had finished his work, Falkow gave him a little work to do. Witness asked him for half a sovereign as his share of the work already done on the house. Falkow said he could not do that, as he had not got the lease, and was here to-day and away to-morrow. Falkow said that if he got the lease he would give witness £2, and said, "You are a Jew, and you keep his part more than mine." He also said that if witness would take his part, Ricardi would not get him so quick out of the house.

Cross-examined: Witness knew Mr. Ricardi well, as he always gave him (witness) a job. Falkow wanted a lease for eighteen months.

Moritz Levinstein said that some time in July Ricardi brought him in a lease to sign. This contained a clause that it was a lease for eighteen months, but that Falkow might give a month's notice at any time. Witness explained this to Mr. Ricardi, and the latter tore up the paper.

After hearing Mr. Benjamin in argument on the facts, and without calling upon Mr. Gardiner, the Court gave judgment for the defendant, with costs.

Buchanan, A.C.J.: It is common cause between the parties in this case that about the 22nd of May the plaintiff hired, and the defendant let to the plaintiff, a house at 56, Hanover-

street, at a rental of £18 per month, rent payable monthly in advance. On the 22nd of May the plaintiff paid a deposit of £3, and obtained a receipt. At the beginning of June the plaintiff settled the balance of the rent for the month of June, and took possession, and is still in possession of the premises. What is in dispute is for what period were the premises let to the plaintiff. The plaintiff alleges in his declaration that, by an agreement, the premises were let to him for a period of eighteen months certain, with the liberty reserved to him of terminating the agreement on his part by giving one month's notice. The defendant denies that there was any such agreement, and says that there was only a monthly tenancy, and that he objected to signing a lease in terms claimed by the plaintiff. We have here, therefore, a direct conflict of testimony, and there is no writing of any kind to assist the plaintiff in this matter. The receipts given for the deposit and for the first month's rent are silent altogether as to the terms such as those claimed by the plaintiff. On the first receipt one would naturally expect something to be said if there was such agreement, but it was simply a receipt for £3 deposit of rent paid in advance on account of the rent at £18 per month from the 1st of June. One of the plaintiff's witnesses said he was present, and asked the defendant to put the eighteen months' term in the receipt, and that the defendant said that as his daughter could not write well the plaintiff might write the lease out and bring it to him, and that he would then sign it. No doubt after the plaintiff came into possession he endeavoured to get the written lease from the defendant, and he had a document drawn up and submitted to the defendant. The defendant said that the plaintiff had asked him for an eighteen months' lease, that he had refused, and that the plaintiff then asked him for a six months' lease, and that he (defendant) then said that if the plaintiff would give him security or paid him two months' rent in advance he would give him the lease for six months. The plaintiff, however, says that this conversation referred to two months' notice, and not to two months' rent in advance. When the plaintiff gave the document drawn up by him to the defendant the latter said that he could neither read nor write, and that consequently he took it to a friend, and after that friend had read it he was so enraged at the suggestion that he should

Maasdorp. J., concurred.

Nuisance—Interdict.

The plaintiff's declaration was as follows:

The defendants are: (1) The Mowbray Municipal Council, constituted under the provisions of Act No. 45, 1882; and (2) Hendrik Frederick van Eyssen, John Charles Stephan, and Charles Newton, all residing at the Observatory-road, in or in the neighbourhood of a road called Trill-road.

6. The three last-named defendants are occupiers of premises in or in the neighbourhood of the said Trill-road, and before and during the year 1901, and especially in the

aforesaid months, they have on divers occasions caused or permitted to be discharged from their said premises into the said road, and thence down the aforementioned ditches or gutters, and to and on to the said railway line and property of plaintiff, such dirty and offensive water or liquid as aforesaid, whereby the said defendants have contributed to cause or aggravate the said nuisance.

7 The plaintiff thereafter, upon notice served on all the defendants and also on certain other persons, required them to show cause why they should not be interdicted from allowing any dirty water or offensive matter to flow down the road on to the railway line, and calling upon them to abate the nuisance caused thereby, but the Hon. Court declined to grant such application on motion, and directed that the notice of motion should stand as a summons in this suit.

The plaintiff claims: a. An interdict restraining the defendant Council from allowing dirty water and offensive matter to flow down the road on to the railway line or adjacent property of the plaintiff at the Observatory Road Railway Station, so as to cause a nuisance; and restraining the other defendants from discharging or causing to be discharged into the said road or on to the said ditch or gutter, so as to cause a nuisance; b. alternative relief; c. costs of suit.

The defendant Council's plea was as follows:

1. The defendant admits paragraph 1.

2. The defendant admits that the said road is vested in the defendant Council and under its control in terms of the said Act No. 45 of 1882, and that in about the year 1888 the Council paved the said road on either side so as to form gutters in the road, and that it was and is at all times the duty of the Council so to keep and maintain and to use the said gutters and any other constructed by it and vested in it and under its control so as not to cause any nuisance from the use thereof, but the defendant denies the other allegations in paragraphs 2 and 3.

3. The defendant Council denies that it has caused any dirty water and other offensive liquid matter with or without sewage, and waste to flow down the said gutters or ditches as alleged in paragraph 4, or that it has caused any nuisance, and the defendant Council says that if such water and liquid matter has flowed down as al-

leged, it has been done without its knowledge and consent, and against its will. It says it has made all due and lawful provision for the removal of soap and sewage and dirty water, and if the other defendants or any of the owners or occupiers of houses or lands abutting on or in the neighbourhood of the said road do the act alleged in the declaration, the defendant Council says that they are not the acts of itself, its servants, or agents, and are done without its knowledge or consent, and that it is not legally responsible therefor.

4. Save as aforesaid, the defendant Council denies the allegations in paragraphs 4, 5, 6, and 7.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs as against itself.

Mr. Searle, B.C. with him Mr. Searle, K.C. and Mr. Steel, K.C., for the Government.

Mr. H. J. van K.C. with him Mr. Buchanan, for the Municipality.

Buchanan, A.C.J., pointed out that notice of the suit had not been served on the last three defendants, and that the case could not proceed against them.

Mr. Searle asked that the question of the other defendants should be allowed to stand over until it could be seen whether the difficulty could be cured.

Mr. Searle, in opening, handed in a plan of the locality, and pointed out the situation of the various points. He explained that the three last defendants were selected as more or less typical instances, and not because they were worse than others. They were selected to put with the Municipality in bringing the matter as a whole before the Court.

Louis Henry Corbitt said he was district railway engineer on the suburban line. He had been in that position for the last twenty months. The plan put in was made in the District Engineer's office. The plan correctly represented the locality. On the left-hand side of the station there was a three-foot cutting and there was a small culvert near the gate at the bottom of the road. This was covered by a grating. Running down the road on each side was a gutter. The two gutters conveyed to the culvert which was on the left-hand side looking towards the mountain. The water from the other side of the road was conveyed in a pipe under the gate. There was a small pipe from the culvert into the normal way, and it went into the open track drain. There had been a continual

flow down Trill-road. In dry seasons water from kitchen sinks and washwater generally came down the road. There were pipes under the footpaths from different houses into the gutters of Trill-road. Witness had seen water coming from the yards of houses into the drain which led to Trill-road. Witness had many times seen offensive matter coming down, generally kitchen garbage. The drains were so constructed as to carry everything down so long as it was not too heavy. In winter stormwater came down. Last summer the matter coming down was offensive, both at the catchpit and in the open brick drain. The department employed a man to keep the railway course clean and to see that it was not blocked. Water came under the railway in a covered pipe, which went outside the railway on the mountain side. Witness had gauged the liquid coming from houses between the Lower Main-road and the railway. Witness gauged the flow at the opening of the Observatory brick drain, running off the railway property. It was running at the rate of from 12,000 to 20,000 gallons per 24 hours. He had also gauged the flow down Trill-road at the catchpit. On the the right-hand side, looking towards the mountain, there was a flow of from 5,000 to 5,700, and on the left-hand side of from 300 to 400. Roughly speaking, two-thirds of the water would come down Station-road and a third down Trill-road. He made these tests on Friday last. There had been no rain previously. Speaking generally, these were the amounts which would come down on an ordinary day. Witness considered it to be a nuisance, injurious to the health of the people. There was a steep fall down Trill-road.

Cross-examined by Sir Henry Juta: Witness did not know where the drainage from the houses below the railway on the Woodstock side went to. When witness observed that stuff was flowing from houses he did not give information to the Council, nor did he speak to any of the inspectors. He gave information to his chief. Witness blamed the Municipality. The station was connected with a covered cesspit. This cesspit was pumped out by the Municipality. Witness did not know what the stationmaster did with his slopwater. There was a drain from the back of his premises into the drain in the permanent way. Witness had not noticed a smell from the stationmaster's drain. The stationmaster sent his bathwater down. Witness did not object to the people in the Trill-road houses sending their

bathwater down. Witness only caught water for a few minutes at a time to take the gaugings. Water would not be running down in the same quantity for 24 hours; it would be running for 18 hours. Witness took it three times at three o'clock for a few minutes. If he wanted big figures he would have taken the gaugings in the morning before breakfast. There was a block between the railway property and Sir David Gill's, and this aggravated the nuisance.

Re-examined: The stuff coming down when witness took the gaugings was not all bathwater. There was a stream all day. Witness had watched tubs outside the yards of houses and found that some of them were not used. The kitchen water did not drain into these tubs; they were too low. In the stationmaster's yard there was a small opening with a grid, and that grid was to take the bathwater down.

Arthur Wright, railway detective, said he was instructed by the Railway Department to find out where the water which entered the catchpit at the bottom of Trill-road came from. On the 22nd January witness was going up Trill-road, when he noticed a quantity of filthy liquid running down the right-hand side of Trill-road. He traced it to the back of Disa Villas. He saw a man with the Municipal cart who had just emptied a slop tub, and who told witness that it was so solid that if he had put it in the cart it would have blocked the outlet. Witness had made a list of houses from which he had seen dirty water flowing during April and May. This list he had annexed to an affidavit. Not many of the tubs were used. In February one of the defendants (Van Eyssen), from whose house filthy liquid was flowing, told witness he had no tub. In July witness compiled another list of houses from which dirty water was flowing. The conditions were much the same as before. The water that flowed down was very much stronger than bathwater. The condition of the back lanes was very offensive, but there had been some little improvement of late. In regard to the premises of Van Eyssen, Newton, and Stephan, he had frequently seen offensive water issuing from those premises.

Cross-examined by Sir Henry Juta: He did not report anything he had seen to the Council, nor did he lay a complaint. He was not instructed to prosecute. He had never seen a single inspector; he did not know any of the inspectors, but should have known them had they been in uniform. He had not seen kitchen water thrown out, but

he had seen it running in the drain. There had, however, been some improvement of late.

Re-examined: He reported the matter to Government, and he was aware that there was correspondence going on at the time between the Government and the Municipality.

By the Court: He did not complain of bathwater as a nuisance.

Thomas Smith McEwen stated that he was Assistant General Manager of the Cape Government Railways, and at present, in the absence of the General Manager, he represented the Railway Department. Formerly he was district engineer at Cape Town, and knew something of the Observatory-road "question." He had made protests as district engineer to the Municipality in regard to the nuisance caused by the discharge of dirty water. He knew of no steps being taken by the Municipality to prevent the nuisance. The object of the Government was to have the thing put a stop to, but they did not desire to hamper the Municipality.

Cross-examined by Sir H. Juta: It would be easily possible to avert the nuisance by many schemes, but a drainage scheme was the only proper way to deal with it.

By the Court: A drainage scheme would cost many thousand pounds.

Cross-examination continued: The nuisance complained of might also be averted by having a drainage farm, or by a system of cesspits. He was not aware where they took the sewage after it was pumped up from the cesspits, but he thought it must be taken away to the Flats. He had lived at Mowbray for six months. His own bathroom water ran off on to a field, but he did not know what became of the bedroom slops.

By the Court: If any of the improvements were to go on in the suburbs they must have a drainage scheme; it was part of the growth of the suburbs, and they would have to provide the money to carry out a proper scheme.

Dr. Alfred John Gregory, Medical Officer of Health for the Colony, stated that in September last he made an affidavit. He had also made two inspections of the locality—one in September and one in November. In the Trill-road gutters everything unsatisfactory except actual excremental matter was being discharged. He had also observed that stable refuse was being discharged, and kitchen and soapy bath-water was running into the gutters. There was a narrow lane

outside the back-yards of the houses, in the centre of which was a surface drain which communicated with Trill-road. The condition of things was certainly injurious to health, and the place would make an excellent breeding-place for disease. Cleaning and flushing would reduce the danger, but no matter how much they might clean it, it would be always a nuisance.

Cross-examined by Sir Henry Juta: He had been in other parts of the suburbs, and had seen the same thing everywhere. In fact, it was one of the most disgraceful things in the sanitation of the suburbs that they had not got a drainage scheme. The condition of things at Observatory was worse than a more thickly-populated suburb, but it was rather better than Woodstock. In Observatory-road it was becoming a tremendous danger to health.

By the Court: The only satisfactory remedy that could be suggested was a drainage scheme.

Sir David Gill, the Astronomer-Royal, stated that he had lived at the Observatory since 1879, at which time there were no houses visible except Mr. Trill's house. In those days there was an open ditch out in the gravel, and the water ran down it when it rained, but at no other time. In 1894, they first began to experience evil smells, and of recent years the condition of the Observatory-road drain had become very much worse. He had frequently complained to the Municipal Council in regard to the matter, and had had promises and denials, and prevarications of all kinds. Since February, 1900, the nuisance had greatly increased in consequence of what came down the Trill and Station roads. The stuff was to be seen coming down the gutters every day, and there was a horrible slime, which collected there, which could be scraped with a stick.

Cross-examined by Sir Henry Juta: At the meeting spoken of in a certain letter, the Admiralty Civil Engineer was present. Mr. Tonkin was, witness believed, present on behalf of the Municipality, and there were several others. They asked witness to point out where the nuisance was. Witness pointed out the ditch commencing at the railway, and they were also shown the nuisance thrown on to the 6-foot way—between the lines. As far as witness remembered, they went up Trill-road. Witness understood that the Councillors admitted the nuisances and made promises. They distinctly admitted to witness that there was a nuisance, and they said they would put it out. And

then they wrote a letter denying that there was a nuisance. Witness had frequently seen water coming from houses in Trill-road which was a nuisance. Witness was aware that there was a regulation providing a penalty against householders allowing offensive matter to run into the watercourses or drains. Witness had pointed out such cases to the Councillors themselves at these meetings. On Thursday the nuisance was almost intolerable. To-day it was bad. Witness was not there on Thursday, Friday, or Saturday. There was a bazaar there on Saturday, but it did not come across witness's mind that this nuisance would keep people away. It did occur to witness that it might give offence to people. Witness could not say whether any people going down by the station to the bazaar experienced any unpleasantness while passing. They might have done something to abate the nuisance there.

Sir Henry Juta: On account of your bazaar? What do you base that supposition on?

Witness: On the general slimness; because, as the case was coming on, they would like to weaken the evidence as much as possible. In further cross-examination, witness said he blocked up about a foot of the exit into his ditch from the drain which led the drainage from Observatory-road and Trill-road—that was, across the railway. He did this about eighteen months ago. He blocked up one foot, and left two feet.

Re-examined by Mr. Searle: In still weather the smell was very bad. When the wind blew, the nuisance was not so bad. On more than one occasion the Council had admitted to witness that there was a nuisance. No water now came from the Woodstock side. He had once given permission for stormwater to come, but took precautions that there was nothing but stormwater.

Stephen Trill said he lived at Rondebosch. Three years before he had lived at Belvliet, which immediately adjoined the Observatory Station. He had resided there for twenty years previously. When witness was there, there were no houses on the Trill-road side. There was a foot-road, down which stormwater came, but not in large quantities. This found its way on to the railway. About seven or eight years ago building was commenced on that side. One of the principal reasons why witness left was because of the want of sanitation. On account of the stench arising from the culvert, his family avoided using

the original carriage entrance. Witness complained of a nuisance caused by filthy water coming down from the houses on the road to the railway. At that time there were no gutters. This was about six or seven years ago. After witness approached the Council, it was remedied for a time, but afterwards it came down on the right-hand side. Witness had not made any observations during the time he had been away—August, 1898. Witness had observed this frequently as he drove to town.

Cross-examined by Sir Henry Juta: A strong reason why witness left Mowbray was because of the want of sanitation.

Sir Henry Juta: Can you tell me what the Rondebosch Municipality does that the Mowbray Municipality doesn't in the way of sanitation?

The Witness said that he really had not inquired into it. He looked after his own affairs, and did not trouble the Municipality. He had never been down to the thickly-populated parts of Rondebosch to look narrowly at the sanitary arrangements there. He had not seen any tubs at the backs of the houses at Rondebosch over which one could fall. Witness's family preferred using the Observatory-road entrance to the Trill-road entrance. The offensive matter which accumulated in Observatory-road came partly from Trill-road. The smell in Observatory-road was more accentuated. It was decidedly offensive in Trill-road. Witness had seen dirty water coming down Trill-road. He had never traced it to any houses.

Edward Mayall, permanent way inspector on the Wynberg line, said he had occupied this position for the last 23 years. The drain between the platforms was put in at about the time the line was doubled. It then carried off stormwater coming down. There were then no houses in Trill-road. The brick drain from Observatory-road to the river was at first open under the line, but was afterwards closed up. Building commenced in Trill-road about seven years ago. There was a ditch coming down the railway which entered into the centre way. The catchpit had twice been altered. It was last altered two years ago, when it was made larger. The position was much the same as when the catchpit was put there. Witness had seen offensive matter flowing down the Trill-road. The railway drain was cleared daily. They had to pick the time to do this because passengers complained.

Cross-examined by Sir Henry Juta: They had to choose times when there were no trains. They could not do it when trains

were running. The Municipality do clean the Trill-road gutters. The underground pipe connecting with the catchpit was put in about three years ago before the present catchpit was put there. It was put in the old catchpit and afterwards put in the new one.

Re-examined by Mr. Searle: In spite of the cleaning up there was a nuisance and a smell. People on the platform had complained to witness's men of the smell when the drain was being cleaned.

George Edward Higgo, general foreman of works on the Wynberg line, said he had been nearly three years on the Wynberg line. The gutters were in Trill-road before he came. There had been a continuous flow of house sewage—something more than bathwater. It was obnoxious at times. Witness had been up Trill-road himself, and noticed the way in which the water came from the houses. He was there on Friday night. The smell was bad, and there was a continuous stream, which anyone could notice.

Cross-examined by Sir Henry Juta: It was about the same condition all along the line to Wynberg.

Re-examined by Mr. Schreiner: There were no catchpits except at Mowbray. There was a similar nuisance at Newlands.

Herman Joshua Hasseriis said he resided at Observatory-road, and had the property on the left-hand side going down Observatory-road through which the old servitude drain passed. Witness had complained to the Municipality through his solicitors. The nuisance suffered by witness on his property was bad owing to the drainage on the other side. It smelt abominably. Witness lived on the Woodstock side. Witness's health and that of his children had suffered. Witness had lived there nineteen years. What the other witnesses had said about Trill-road and the catchpit was not exaggerated.

Cross-examined by Sir Henry Juta: Witness complained three or four years ago. It had not improved the last three months. Some of witness's slopwater ran over the ground; part ran into the old servitude ditch. Slopwater from the houses above the houses fronting Fir-street ran down in an open drain. This passed by the side of his house, outside the grounds. Witness had a swimming bath further down. Witness had refused to allow the Mowbray Council to clean out the sluic if they did not do it properly. This was fully a year ago.

Re-examined by Mr. Schreiner: Witness

stopped the cleaning because sometimes the Mowbray Council only cleaned the worst part, and did not clean the other. This caused a hole in which the new stuff stagnated.

By the Court: This servitude ditch had always been used while witness was there. In former years it was only used for storm-water. It was only since houses were built higher up that it had been so bad.

Hubert McKay Solly, railway engineer, said he was in charge of the Observatory engineer works for the last two years. Two years ago the catchpit at Observatory was enlarged to keep the gravel from running on to the line. It was not done to take further water.

Cross-examined: The pipe from Trill-road was, witness thought, enlarged at the same time the catchpit was altered.

John Power, assistant to H.M. Astronomer, said he had been at the Observatory since 1891. Formerly he lived in the village, in a turning just off Station-road. Witness had frequently passed the station to go to the Observatory. Witness had never seen any offensive water coming down from Fir-street. He had frequently seen it dry. The Observatory-road brick drain was offensive. On Thursday night last he had never smelt anything worse, not even in the slums of London. The place began to smell offensive in about 1893 or 1894. In 1894 witness noticed the nuisance complained of in Trill-road. It had increased as building went on. It was not only bathwater which came down Trill-road. Witness had vomited on the road three times owing to this nuisance. He considered it dangerous to health.

Cross-examined by Sir Henry Juta: Witness had pointed out the drain to Councillor Ketteringham last week. He had not previously pointed out the nuisance to an official.

Frederick B. Percival, the stationmaster at Observatory-road, said he had occupied that position for nine years. When he went there there were very few houses above the station, on the Trill-road side. There were only a few houses in a field. Storm-water then came down as it now does, and that brick drain in the 6-foot way was already there. After the houses were built, at a time when witness had been there for some years, the drainage began to come down from the houses. After about three years these gutters were put down in Trill-road, and since then, apart from the rain-water, much more drainage had come down.

Even in dry weather there was always water coming down. The catchpit on the railway property was cleaned out by the Municipality every two or three days. Passengers from the Mowbray side of the station had to go that way, and when Mr. Trill was there his people had to come from that side. The catchpit was offensive, especially when the sediment was removed. The brick drain in the 6-foot way was cleaned out daily by men from the engineer's department. The stuff from this was always more or less offensive. The station urinal had no connection whatever with the drain. The bathwater from witness's house ran into the drain. Vegetable water was drained into a small yard witness had. The water used for washing knives, forks, plates, and such like went into the yard, and that communicated with the drain nearer the Cape Town end. His bedroom slops were put into the sanitary pails provided by the Municipality, and from there it was removed three times a week by the Council's officials. No clothes were washed upon witness's property. Passengers frequently complained when the drain was being swept out, and when the stuff from the catchpit was being removed.

Cross-examined: Witness had small children when he went to Observatory. They were now aged 15, 16, and 19 years respectively. They were all healthy children. Their health had not suffered, neither had the health of witness's wife. The drain had not affected witness's health, although he lived right on it. Witness would have a tub for slops if it was provided. He was asked to have one only a few days ago, and he said he did not want one, as he used the sanitary pails. He had no sink in the kitchen. Towels used in the kitchen and small articles were washed by the servant.

This concluded the case for the plaintiff.

For the defence, Sir Henry Juta called

Samuel Tonkin, who said he lived in the Mowbray Municipality and had known the place for over forty years. He had been eleven years in the Council, and was at present the Mayor. The gutters in Trill-road were made in 1898, and the Municipal men were instructed to clean out these and the catchpit daily. Witness did not know who cleaned out the drain in the permanent way at the station. The Municipal men also had instructions to clean out the drain in the Observatory-road daily. Each house was provided with a sanitary pail. There were two sanitary inspectors. According to the regulations no person was allowed to throw

any slops or offensive matter into the drains. So far as he knew the regulation had been carried out whilst witness had been a Councillor. Tubs were supplied for slopwater, and these were emptied daily, except Sundays, by the Municipal carts. In the beginning of the year the Municipal Council issued a special caution to the householders. The Municipal Council had given instructions from time to time to the inspectors with regard to Trill-road. Since letters were received from the Railway Department in July, special instructions had been given to see that the spot was visited and cleaned daily. When Sir David Gill had complained before, they had had special men put on. These special men had to see if there was anything that could be complained of, but they could not bring a single case. The Council did everything they could to prevent people putting foul or offensive matter into the drain. They had left nothing undone to enforce their regulations. They had had three meetings with Sir David Gill. In February, 1900, Mr. Tearnan, Mr. Attwell (the then Mayor), and witness had met him by appointment in Station-road, Observatory. Whilst they were standing there, the only thing Sir David Gill had pointed out to them was some water coming down the gutter, and he said "There, there, look at that." Witness and the others looked at it. It was nothing more than a little discoloured water. Nothing was pointed out that was a nuisance or offensive. He then wrote a letter, and one was written in reply. They did not admit that there was any nuisance. If Sir David Gill said that they did, witness would be sorry to say that Sir David prevaricated, but would say that he had certainly got an awful bad memory. They met on a subsequent occasion. Then they saw nothing that bore out the statement that there was a nuisance, and there was nothing to show that there was any smell whatever. On other occasions witness had been there to see for himself, and he was prepared to say that he had never seen anything offensive or to cause a nuisance. Witness knew Fir-road, which was in the Woodstock Municipality. There they had no arrangement for removing bedroom slops, which had gone down the drain. Some of the Woodstock Council and some of the Mowbray Council had met Mr. Hasseriis at his place about eighteen months ago. They saw then that a pipe was coming from Mr. Hasseriis' house into this very drain. An arrangement was

come to by which the Mowbray Council said they would keep the drain there clean, and Mr. Hasseriis said that if they did that he would be satisfied. From that time the Mowbray Council had given their men instructions to keep the drain clean day by day. The reason they agreed to do so was because it was water from their Municipality that went into the drain at that spot. They did not want to have any further trouble or bother with anybody. With regard to the stable in Trill-road, witness had gone there in person, and had seen that there was a proper receptacle into which all the liquid from the stable had been received. As to the gully Dr. Gregory had spoken about, it was in the middle, on one side of the yard. The receptacle was on one side and the gully on the other. All the stuff from the stable must go into the receptacle, and could not possibly go into the gully. The stuff went into the receptacle, and was mixed with the stable manure, which was removed at intervals. There was no connection between the Trill-road gutters and the receptacle. Witness had read the declaration in which it was stated that dirty water, offensive liquids, and sewage had flowed from these houses into Trill-road.

Buchanan, A.C.J.: Do you deny that it does do so?

Witness: It is impossible for me to know what servant girls do when their mistress is not there.

Examination continued: If any information was received as to that being done, the Municipal Council would take steps at once. They had had prosecutions, but not from Trill-road. Arrangements were being made for underground drainage. That matter had been before the Council for the past ten years, and he thought they would have had it carried out then, but some people upset the whole scheme. Witness detailed the steps at present being taken in connection with the underground drainage scheme.

Cross-examined: He had seen water running down Trill-road, but he had also been there at times when it was not running. Witness never admitted to Sir David Gill that there was a nuisance.

George William Tearnan, one of the Mowbray Council, said he had known the place for forty-two years. He had been a Councillor from the beginning of the Council, about eleven years ago. He agreed with what Mr. Tonkin said as to the regulations, pails, etc. Witness was at the meeting with Sir David Gill. They stood for some time at Station-road, and Sir David pointed out a

stream of discoloured water coming down. The discolouration was caused by the debris on the road, this debris coming there through dogs overturning paraffine tins with refuse in them. He did not consider it a nuisance. They would find far worse in going through the suburbs. Mr. Tonkin did not on that occasion admit that it was a nuisance. Witness was often at the station. He would not say there was no nuisance, because often the garbage thrown about came down, but there was no nuisance coming from the houses. If they could get information of anything offensive being thrown into the gutters, they would prosecute.

Cross-examined by Mr. Searle: Witness had seen kitchen garbage coming down the gutters. Their men were employed daily in cleaning out these gutters. The place that Sir David Gill had pointed out was a place they often had complaints about. The Municipal Council's instructions were that this place should be cleaned daily. Witness had proposed to adopt a system carried out at the Mowbray Station, where it had been very successful, but the Railway Department would not sanction the construction of a necessary catchpit on the railway property. The pipes taking water from the yards into the gutters should not be allowed.

Walter Ketteringham, one of the Councillors of Mowbray, said he was acquainted with the locality of Trill-road. Last week he met Mr. Power, and the latter asked where a stream of water was coming from, and witness replied that he supposed it came from the Albion Spring originally, but that there was no nuisance. Witness had been present when the catchpit was being cleaned out, and he had seen nothing offensive. Trill-road was one of the cleanest in the Municipality. Witness knew the drain in front of the station. He discovered that water from the stationmaster's house was running into the drain. The previous night witness heard Sir David Gill say that the catchpit was offensive, and witness in the afternoon took a sample bottle of water, which he now produced. He could assure the Court that the water was without smell, although it had been in the catchpit all that day.

Cross-examined: He had once smelt something like a dead horse in the drain when he was making his way to the camp, but at that time he was not interested in the Municipality, and did not make inquiries as to where the smell came from.

Re-examined: Witness entered the Council last August. Before that he had no com-

plaint as to this drain in Trill-road or the catchpit.

John Smith, chief sanitary inspector of Mowbray Municipality, said he was appointed to that position in July last. He had experience in sanitary matters in England. Since July last witness had special instructions to watch Trill-road. Witness had under him Inspector McKenzie, and then there was the collector, Hines. The catchpit at the end of Trill-road was cleaned out by the sweeper every morning. Witness and McKenzie went there on alternate mornings. The brick drain was not cleaned out by witness's men, but beyond this, down the Observatory-road to the bridge, witness's men cleaned it out every morning. Witness knew the stable in Trill-road. He corroborated as to there being a receptacle and a gully there, between which there was no connection. Trill-road was the cleanest and best-kept street in the whole Municipality. Since July they had kept a special eye on Trill-road, and had not been able to find any of the offensive matters complained of. If witness had seen anything he would have taken steps under the regulations. He positively stated he had never found anything on which to base a prosecution. He had seen ordinary bathwater, discoloured certainly, flowing into the gutter, but nothing to prosecute on. He had never seen any nuisance in Trill-road. He had been present on many occasions when the catchpit was opened, and had never noticed anything offensive. There was nothing witness had suggested or could suggest by which matters could be remedied. Witness had seen the stationmaster, and he had said that he had no slopwater tub. He said he put the greasy water into the garden and the slopwater into his stercus tub. Witness did not think the latter would take all the slopwater. Purcell said he never had had a slop tub, and did not want one.

Cross-examined: Witness never was a sanitary inspector before his present appointment, but he had been an inspector of police in London, and as such had to understand sanitary matters. He had been seven and a half years in this country.

J. McKenzie, a sanitary inspector at Mowbray, generally corroborated the evidence of the last witness as to there being no nuisance in Trill-road or at the catchpit or beyond. Witness deposed that he had gone with Mr. Tonkin to the stable in Trill-road. The liquid from the stable went into a receptacle,

and there was no possibility of its getting into the gutter.

Cross-examined by Mr. Searle: Witness had never noticed anything offensive when the drain was being swept out. There was, perhaps, a little smell. He would call a smell offensive when it almost knocked one over. When the catchpit was cleaned out in the morning it was generally pretty full; up to the pipe. It was not mostly solid matter. There was a lot of sand and, perhaps, some cabbage leaves.

Thomas Hines, presently collector in the employ of the Mowbray Municipality, said that previous to July he was the chief inspector at Mowbray. Previous to that he was employed as an inspector in the Woodstock Municipality. He knew Trill-road, and the special instructions given to watch it about the latter end of last year. They were strictly to see that nothing offensive was allowed to go into those drains, and that if they saw any they were to report to the Council. Witness did his duty thoroughly, but he did not report that this regulation had been broken, because he found nothing in Trill-road to report upon. Witness went there every morning, and walking past the houses, carefully examined these alleyways, generally spending the greater part of the morning there. Witness had been present at the cleaning out of the catchpit and the drain down Observatory-road, and never noticed anything offensive. Trill-road compared favourably with the rest of the suburbs.

Cross-examined: He had noticed a slight smell in the drain, as if of water running over stones. The solid matter in the catchpit was mostly sand.

Charles Barry, clerk to the Mowbray Municipality, said he had been Municipal Clerk since April last year. He was acquainted with the houses in Trill-road. The rents would be between £4 and £5 a month. Middle-class people, such as clerks, lived there. While witness had been Municipal Clerk no information had been brought to him of any breach of the Municipal regulations.

Sir H. Juta closed his case.

Mr. Schreiner, K.C. (for plaintiff): If the Municipality are entitled to discharge matter of any kind on our ground, that right must be founded on some law or some servitude. No such right has been set up. We admit their right to discharge storm-water on to our property, but nothing else. They themselves admit that they have no right to discharge offensive matter, but they say that not they but other people have done

this. But the road from which this matter comes is theirs; the gutters which bring it down are theirs, and therefore they are clearly responsible. Then as to the nuisance. Is this discharge a nuisance? Even if we failed to establish that it was a technical nuisance we should be entitled to an interdict to restrain them from discharging anything, save storm-water, on to our property. It does not follow because we have allowed this nuisance to continue for some time that we are not now entitled to stop it. If I let A, B, or C walk across my property I may at any time interdict either them or anybody else who attempts to do so. In this case not only storm-water but for some years drainage has flowed down on to our property. Whatever this drainage consists of, it is offensive. Dr. Gregory said that the stuff in the catchpit is dangerous to health. It is also offensive to the smell. Stable yards with the drainage therefrom are in the vicinity, and these add to the nuisance. Then the kitchen slops are sent down, and some of the kitchen sinks are connected with the road. No wonder the tubs in Trill-road stood dry. But while these tubs are dry, the gutters in Trill-road are discharging thousands of gallons of offensive matter. This goes on not only in the morning, but all through the afternoon, when people do not usually take baths. It is quite within the powers of the Municipality under section 50 of Act 23 of 1897 to insist that the pipes shall drain into these tubs. See also section 64. Not one single proprietor has come forward to deny the facts. The fact that the Municipality comes on our property and cleans drains and catchpits is an admission which shows the existence of a nuisance. The Government do not wish to act unreasonably, but the Municipality can buy a sewage farm, and dispose of their refuse in that way. They have no right to send down even slops on to our property. The Public Health Act (No. 23, 1897) puts such water on the same footing with night soil. The Municipality have not done all that was necessary in order to abate the nuisance. They have only two sanitary inspectors—one apparently not in very good health. It is true that the Municipality have served a notice on the residents, but there have been no prosecutions. If a road had existed before we got a servitude across the land over which it now runs possibly we should have no right to complain of a nuisance, but the railway was made long before Trill-road.

[Buchanan, A.C.J.: What you yourself

allow you cannot consider a nuisance. The stationmaster discharges slop-water on to the line.]

A stationmaster is not clothed with a representative character, and cannot prejudice the title of his employer.

[Buchanan, A.C.J.: It is not a question of title, but whether what is done is a nuisance. Some 80 or 90 houses contribute to this alleged nuisance, and the stationmaster's house is one of these. The real question is, "Is this a nuisance or not?" The stationmaster does not seem to consider it a nuisance.]

The stationmaster's opinion is immaterial. We have proved that there is a nuisance, and the only evidence brought to rebut this proof is the mere negative evidence of people who say that they do not find any nuisance. If a man commits a nuisance he cannot justify his act by the fact that other people commit it. The Municipality can easily devise some scheme whereby this nuisance may be abated. I will quote some cases in support of the propositions I have advanced.

[Buchanan, A.C.J.: It is mainly a question of fact.]

No, they say that they are not responsible; but see *Attorney-General v. Colney Hatch Asylum* (4 Ch., 146). In that case (as in this) a number of other persons in the neighbourhood contributed to the nuisance. See also *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1 Ch., 349), *Charles v. Finchley Local Board* (23 Ch. D., 1883, 767), *Attorney-General v. Hackney Board of Works* (44 L.J., 545). In the last two cases the Court granted injunctions against public bodies because it was their duty to abate the nuisance. See also (45 L.J., N.S. 726). This case confirms the doctrine stated in *Garrett on Nuisances*, and shows that the Court can grant an interdict provided the nuisance is not merely temporary, or trivial.

Sir H. Juta (for defendants): This action is simply about a nuisance. We are not sued for discharging water on to plaintiffs' land; that is not their case; they only ask the Court to interdict a nuisance. I may observe incidentally that no evidence has been adduced to show that the land in question is the property of plaintiffs. The case then narrows itself down to two points: (1) Has a nuisance been committed; (2) have we allowed it to be caused? What then is the locality of this alleged nuisance? The evidence shows that it must be limited to the catchpit and the locality in front of

the station, and it has been shown that at least two-thirds of the so-called nuisance comes down Station-road. First of all then, does a nuisance exist? There is a station-master and his family near the place of the nuisance, but they were not called as witnesses. No; we had railway officials from Cape Town, and people who had walked along the line instead of those who were living at the place.

[Maasdorp, J.: Is not dirty water a nuisance?]

No, there is dirty water in every house.

[Maasdorp, J.: But to put dirty water on another's man's land is a nuisance?]

It all depends on the local circumstances, e.g., if I throw a tumbler of dirty water on to my neighbour's land it surely could not be held that that was a nuisance. Then we have to consider the question of rights. We have a right to discharge water into the catchpit, and it cannot be supposed that that water is very clean. Section 4 of the declaration contains the real gravamen of plaintiff's case, and shows that the whole complaint is about a nuisance.

[Maasdorp, J.: The plaintiff says that dirty water has been discharged on his ground.]

We deny their title. We deny the allegations as to ownership.

[Maasdorp, J.: Why should the Government have taken up this matter if the property is not theirs?]

An occupier can object to a nuisance if it interferes with his enjoyment of the tenement.

[Maasdorp, J.: A trespasser with dirty water is a nuisance (see *Gale on Easements* under "nuisance").]

In that case there was a pure stream in which somebody had placed foul matter. That was a clear case of *injuria*. But that is not this case. To sustain an action of this kind we must have *injuria cum damno*.

[Maasdorp, J.: Nuisances are one thing and *injuria* another.]

Yes, if the Government had sued us for trespass the case would have been very different. Here there is no question raised as to servitude, or of trespass, but only of nuisances. If plaintiffs had raised the question of servitude we should have had to go into the whole history of the servitude ditch; but the real issue is, as to nuisance. We say that if there is a nuisance, it is not committed by the Municipality. Plaintiffs must show that we have acquiesced in our gutters being used to send down offensive matter.

[Maasdorp, J.: They say that you did not stop the dirty water.]

There is no authority for saying that we are obliged to stop these pipes. Then a nuisance is a question of surrounding circumstances, and time and place. What would be a nuisance in a West End square might not be a nuisance in the East End. No man can complain of a nuisance if he himself helps to commit it. A system under which we all live cannot be a nuisance, and here three of plaintiff's own witnesses admitted that the state of things was neither better nor worse than that which obtains in any other suburb of Cape Town. The stationmaster had been living at the place nine years, and he did not find the catchpit a nuisance, or he would have been called to say so. We cannot believe that a Government department would contribute to a nuisance or that the stationmaster would assist in causing it. Why did not Wright go to the Town Council and complain if he found a nuisance. But no, and for months the Railway Department gave us no information and afforded us no assistance to enable us to prosecute the offenders. Coming to the evidence for the defence, that of Municipal Councillors shows that the Council employed detectives to see if there was anything wrong, and they said that they could discover nothing on which to base a prosecution. Then looking to the class of people living in Trill-road—respectable, middle-class people. Surely they would not tolerate a nuisance such as that complained of. Plaintiffs' witnesses have been guilty of gross exaggeration. As to the evidence of Power, Higgo and Hasseriis, that referred only to the ditch, and not to the nuisance at the platform and at the catchpit. If there had been a nuisance surely the stationmaster would not have been allowed to have contributed to it. In *Walter v. Self* (4 De G and S., 315), Knight-Bruce, V.C., clearly intimates that a nuisance must be judged by the standard of comfort which the people who complain of such nuisance have set up for themselves. The mere fact that the population in the neighbourhood has so greatly increased, in spite of the fact that all these people have to pass the catchpit, shows that there is no nuisance of which anybody can justly complain. Even if there be a nuisance, have we created it? We are not liable unless we have acquiesced in it. *Clarke v. Chambers* (3 Q.B.D., 1878, p. 330) (cited by *Pollock, Law of Torts*). So far from acquiescing, we have forbidden the discharge of offensive matter by our regula-

tions. We have appointed a reasonable number of sanitary inspectors, and have even appointed a detective to prevent people from throwing out these slops. How then can it be said that we are consenting parties? We have done all that we can do to abate the alleged nuisance, and the Railway Department would have been better advised had they assisted us to discover and prosecute the offenders instead of bringing the present action.

Mr. Schreiner was not heard in reply.

Buchanan. A.C.J.: The plaintiff in this case is the Commissioner of Public Works, and as such representing the Government, who are the owners of the railway line between Cape Town and Wynberg. The defendants are the Councillors of the Municipality of Mowbray, through a portion of which Municipality the railway runs, almost due north and south. Three private individuals are joined as co-defendants. The ground on the west side of the railway slopes from the mountain towards the railway, across the line, down to the Liesbeek River on the east. Formerly there was a road running at right angles to the railway from the Main-road, on the west side, which is now known as Trill-road. That road was formerly only a cart track, and down this track the stormwater used to find its way to and across the railway down to the Liesbeek River below. Some six years or more ago in consequence of a water supply having been provided for the neighbourhood of Observatory-road, building operations began and extended very rapidly in this locality, and with the creation of small houses without garden ground began the circumstances out of which this action has arisen. Formerly, before these buildings were erected, there was nothing but stormwater and rainwater to find its way down to the road, but with the advent of these buildings and the supply to them of water, the water used in the houses had nowhere to go to except into the road. After the houses began to appear, the defendant Council hardened the road, formed footpaths, and placed gutters down the road, by means of which gutters the water which found its way into the road was led more quickly and more speedily and in a greater volume down to the railway premises. It is alleged in the declaration that the water so coming from these houses is dirty water; that it contains kitchen, slop-water, and sewage, and that this water so coming down creates a nuisance on the

railway property. It is further alleged that, more especially during the months of January, April, May, July, and September, 1901, the Council wrongfully and unlawfully allowed this offensive water to flow down so as to cause a nuisance; and the plaintiffs pray for an interdict restraining the Council from allowing dirty water and offensive matter to come down in such manner as to result in a nuisance. The defendant's defence to this claim is, in the first place, that this water does not create a nuisance, and, secondly, that they are not responsible for the water coming down. These are the two issues which arise in this case. In regard to the first issue, we have to consider whether the water coming down, other than stormwater or rainwater, is or is not a nuisance. The first complaint, according to the correspondence put in in this case, is a complaint made by the residents on the east side, or below the railway, so far back as 1895. The railway authorities in 1896 seem to have also taken up the matter, and called frequent attention to the complaints which had been made. From the communication sent to the Council, and from the Council's reply, it is evident that this water so coming down did create a nuisance to the inhabitants. I think it is something more than what is called a mere fanciful complaint. It is a substantial interference with the ordinary life of the inhabitants of the neighbourhood. In 1895 the Astronomer, Sir David Gill, wrote calling attention to the fouling of the culvert leading from the railway to the run on the east side of the line. In 1896 the General Manager wrote stating that the department could not allow other than stormwater to pass the railway line. In 1898 he wrote to the effect that the water passing through the railway fence into the side drain, caused a most offensive smell, and also in 1897, and again in 1898, he protested against offensive water being turned on to the railway property. In 1901 he states that Sir David Gill has threatened without further notice to place a dam across the culvert so as to stop the flow of this foul water. It is evident from this correspondence, and from the evidence that the Railway Department, though not wishing to be hard on the Town Council, have been forced into this action by the liability of action being taken by the lower proprietors, and by the action of Sir David Gill in erecting a dam, which checks the flow of the water, and throws it back on the railway property. In

the letter of the 5th January, the General Manager sent to the Council the report of the Engineer-in-Chief, and in this he said that bath and other soapy water still runs down. He also said that the drains from the back yards of the villas were in a filthy condition, and that the foul water and offensive matter therefrom ran into the drains in Trill-road. He goes on to say: The inspector himself saw soapy water, and the catchpit inside our fence is filled with dirty water covered with scum, although it is cleaned out daily by our men." The Council, in answer to these complaints, never once said that no nuisance was created. On the contrary, in answer to that letter of the 5th January, they say that the Council is taking active steps to stop the flow of foul water into this drain. Here is an admission that foul water does flow. I think there is no doubt that this foul water which is allowed to flow down Trill-road into the ditch along the railway property, and thence down the Observatory-road, caused a nuisance. I think, moreover, on the evidence, that this nuisance, which, as I have said, commenced with the building of these houses, is a serious nuisance, which, as these houses increase in number, must also increase. There is no doubt, from the evidence given in this case, that there are similar nuisances existing in all the suburbs. One of the plaintiff's witnesses, who lives at Salt River, and whose duty takes him all through the suburbs, says that the smell commences at Salt River, and continues all through the suburbs. But though similar nuisances may exist in localities in the other suburbs, it is not a necessary incident of residence in the suburbs. There are people who are fortunate enough to have sufficient ground whereon to dispose of their refuse, but when people have not enough ground into which to run their surplus water, that fact does not justify them or entitle them to send such water on to their neighbours' property, and that is exactly what is done here. Here is a nuisance created on the upper property, and that nuisance is sent down on to the plaintiff's property. Then the second question arises: Who creates the nuisance? No doubt in the first place the nuisance is created, not by the Municipality, but by the residents, who have not sufficient property of their own on which to keep their dirty water, but it is admitted on the pleadings that the property between the houses and the railway is vested in the Council, and is under their control

and though the Council themselves do not in the first instance create the nuisance, still by their own act, and by the means provided by them, they carry the nuisance on to the property of the plaintiff. They have hardened the road, made gutters, and allowed pipes to be made from these houses into the gutters, by means of which pipes and gutters they carry the nuisance on to the property of the plaintiff. It is true they say that the pipes are there for the purpose of carrying off only rainwater. If so, and they are used for a wrong purpose, they are entitled to stop such other use, as Sir David Gill has done below. They say that they have warned householders not to send down dirty water, but it is not enough to attempt to stop a nuisance by a mere paper prohibition; they must do something more. It is said in this case that the Municipality are unable to provide effective means to put a stop to the nuisance. The witnesses say that there is no system by which this nuisance could be effectively abated except by a drainage scheme. It may be so, but the Municipality has attempted to meet the difficulty by establishing a system of tubs. The tub system may not be effective in a large area like this; but very fortunately and happily it is not for the Court to devise the means for abating the nuisance. All the Court can do is to say that it cannot allow this nuisance to continue. The Municipality say that the Government themselves contribute to the nuisance by allowing the foul water from the stationmaster's house to flow into the drain, but though the Municipality may be greatly sympathised with in, the difficulty in which they find themselves, the fact that the Government themselves create a nuisance on their own ground cannot affect the responsibility of the Municipality for the nuisance which it is answerable for, though it might have been a very strong point had Sir David Gill or the persons on the lower property brought an action against the Railway Department. The action of the Government themselves in allowing the stationmaster to do what they complain of the people above doing might perhaps have laid an action at the instance of the Municipality, but that question is not raised in this case. It is said that the water from the stationmaster's house is only a small trickle, but from each of the houses there is only a small trickle, and it is the combined trickles which form the mass. If the Government themselves stopped the flow from the stationmaster's house,

each householder stopped it at his own house, there would be no nuisance. But the fact that the Government, on their own ground, commits a nuisance, which affects others, is not in issue in this case. We must come to the conclusion that a nuisance, permanent, serious and increasing, has been established, and that the Mowbray Municipality carry on this nuisance to other people. How this is to be avoided, is not, as I have said, for us to devise, but as far as the law is concerned, the Court must order them to abate this nuisance. Judgment must be given against the Mowbray Municipality as prayed in the first prayer, the words "other than stormwater" to be inserted after "dirty water." An interdict will be granted restraining the defendant Council from allowing dirty water, other than stormwater, and offensive matter to flow down Trill-road on to the railway line or adjacent property of the plaintiff at the Observatory-road Railway-station, so as to cause a nuisance. As to the three other defendants joined in the matter, not much evidence, if any, has been directed against them, and there is a question whether they are properly before the Court. They have not appeared, and absolution from the instance will be entered as regards them. The main action is between the Government and the Municipality. The judgment will carry costs.

Maasdorp, J.: The plaintiffs in this case alleged that for many years past the defendants had discharged stormwater from their property on to plaintiff's property, and they said that lately they had had grounds to complain of the defendants allowing dirty and offensive water to flow down on to the railway line, to such an extent that it constituted a nuisance. The defence set up was, first, that no nuisance had been permitted; and, in the second place, that if it were proved that offensive water flowed from defendants' land on to the plaintiff's, it was placed there without their consent, and that they did not allow it. I am of opinion that the second point was quite disposed of by the arguments in the case of *Charles v. The Finchley Local Board*. Almost all the points here raised were raised in that case. It was there held that if it were physically within the power of the upper proprietor to stop a nuisance he was bound to do so. In my opinion, it was within the power of the Municipality, even physically, to stop this nuisance. The Municipality had laid certain

pipes under their footpaths, which were supposed to carry only bath-water, which was not of an offensive description; and if these pipes were used for other purposes, they could be closed against receiving offensive water. Under these circumstances, I think that, not only has it been proved that the nuisance could be abated by the defendants physically, but the evidence in the case went further, and showed that the defendants, by constructing these pipes and gutters along the street, had facilitated the discharge of this stuff on to the ground of the plaintiff. As to the question of whether a nuisance has been proved, it was clearly shown that a nuisance did exist. I concur in the judgment.

On the application of Sir Henry Juta, the interdict was suspended for a month, with leave to apply again.

[Plaintiff's Attorneys, Messrs. Reid and Nephew; Defendant's Attorney, Mr. G. Trollip.]

REX V. POTGIETER { 1901.
Dec. 11th.

Convict—Escape—Harbouring—Act
23 of 1888, section 35.

Harbouring a convict who has escaped from gaol not in furtherance of any preconceived plan to aid his escape is not per se a contravention of Act 23 of 1888, section 35.

This was an appeal from a sentence passed upon the appellant, Magdalena Catharina Potgieter, by the Resident Magistrate of King William's Town.

The appellant and her husband were charged with contravening section 35 of Act 23 of 1888, in that upon or about the 20th October, 1901, and at or near King William's Town, they did each or both, or one or the other of them, aid in the escape of the convicted prisoners, Johannes Christian Troskie and William Sadler Blignaut, from the King William's Town gaol, where they were at that time undergoing sentence of hard labour.

The prisoners pleaded not guilty. The male prisoner was found not guilty, and the female prisoner guilty, and sentenced to four months' imprisonment with hard labour within the precincts of the gaol. From this sentence she now appealed.

The evidence showed that on the 20th October, 1901, two prisoners Troskie and

Blignaut, who were undergoing sentences of ten years and five years' imprisonment with hard labour for treason, escaped from the King William's Town gaol, and on the afternoon of their escape Blignaut was seen lying under a tree in the appellant's garden, and afterwards going into their house.

The grounds of the appeal were:

1. The evidence adduced does not support the charge, inasmuch as the prisoner (the appellant) is charged with contravening section 35 of Act 23 of 1888, and the evidence before the Court at the most merely proved that the prisoner harboured an escaped convict; this is not a crime in terms of the section quoted above.

2. The whole evidence before the Court was insufficient to support the charge, and the weight of such evidence was against the verdict.

Mr. Gardiner was heard in support of the appeal.

Mr. Howel Jones for the Crown.

Buchanan, Acting C.J.: The appellant and her husband were charged before the Magistrate with contravening section 35 of the Convict Stations and Prisons Act. In this case two persons were confined in the gaol at King William's Town. They were convicted of the crime of treason, and the evidence shows that they were waiting there to be conveyed to a convict-station. Incidentally it has been remarked that they were military prisoners, but there is no evidence of that kind on record, and no objection to the proceedings has been taken on any such ground. If it had been shown that these were military prisoners, very different considerations would have come before the Court. We must assume, therefore, that they were prisoners properly in the custody of the civil authority. These two persons escaped from the gaol and got away up the river. One of them was seen hiding under a tree while the pursuit was being made by the Volunteers. Native girls who saw the man hiding said that when the soldiers passed the man got out of his hiding-place and ran into the accused's house, whereupon the accused shut the door and went inside, afterwards coming outside and standing at the door with her daughter. A great deal of evidence was led in the Resident Magistrate's Court as to whether the escaped prisoner went into the accused's house at all, but the Magistrate found that the escaping person did get into the accused's house and was harboured there, and there is ample evi-

dence to support that finding. But the question is whether the subsequent harbouring of a prisoner who has effected his escape from gaol is an offence under this 35th section. The Act certainly makes a prisoner who escapes punishable for escaping from custody whether inside the gaol or outside the gaol; and Mr. Gardiner has admitted that if aid was given outside the gaol, if it was part of the whole plan of escape from the gaol, the accused might have been convicted under this section. In this case there is no evidence that the accused made any plan, or took part, in any preconceived plan, or had any cognisance of any intended escape from the gaol. The Magistrate says he had no doubt in his mind that the woman had knowledge of the intended escape. He says in his reasons that there were very few Dutch houses in the neighbourhood, and this was one of the most convenient ones for a person to escape to, and he had little doubt that the man going there was part of a preconceived plan. In this case there may be a suspicion founded on the fact of the nationality of the people and of their desire to help a prisoner of their nationality, but at most it is suspicion only, and without some proof that there was some preconceived plan we cannot hold that this section applies. There is a harbouring which it may be is punishable at common law, but it certainly is not punishable under this 35th section, which is limited to escapes from convict-stations or prisons. Under these circumstances this conviction must be quashed.

WEISS V. GREATHEAD AND (1901.
CO.) Dec. 1 th.

Sale and purchase—Bottles.

Appellant had been sued by respondent in a Magistrate's Court for the value of certain empty bottles and of the bins in which they had been packed. These bottles had been supplied full to appellant and he had undertaken to return all empties or pay for them. Appellant had admitted his liability for the bottles, &c., of a former consignment and the Magistrate found that the transaction between the parties in respect of the former bottles was so closely associated with a contract of sale

and purchase that judgment must be for the plaintiff. On appeal by defendant the Court confirmed the Magistrate's judgment.

This was an appeal from a judgment dated September 26, 1901, of the Court of the Resident Magistrate for Albert, in an action in which plaintiff claimed the sum of £43 9s. 8d. as the balance of an account for goods sold and delivered during January and March, 1901, and in which action defendant claimed in reconvention £14 5s. for 120 dozen of aerated waters paid to plaintiff by defendant about January, 1900, and which plaintiff failed to deliver, and in which action the said Court gave judgment for the plaintiff as prayed with costs and absolution from the instance on the claim in reconvention.

In his plea defendant admitted liability for 14 1-3 doz. bottles at 5s. per doz. (£3 11s. 8d.) and two bins at 9s.—total £4 9s. 8d. With reference to the consignment of aerated waters in January, 1900, he denies delivery of 120 doz. bottles and 20 bins alleged to have been delivered in March, 1900.

The Magistrate's reasons were as follows:

1. Claim in convention. The bottles and bins charged for in the account annexed to the summons, are conclusively proved to have been supplied to defendant at his request when ordering aerated waters and paying for them. The bottles and bins not having been returned by defendant the plaintiffs claim their value on a contract of sale. The evidence of plaintiffs' manager proves that the condition stipulated was that the bottles and bins should be returned or paid for. Defendant took all risk and promised to see the bottles returned.

2. Defendant, in reply to the summons for goods sold and delivered, in his plea has admitted liability for £4 9s. 8d. for bottles and bins sold by plaintiff.

3. The transaction, if not quite a contract of sale is so closely associated with one, and the defendant having admitted portion of his liability, I consider that I was justified in refusing defendant's application and giving judgment for plaintiff in convention with costs.

4. Claim in reconvention. My reason for giving absolution from the instance is that no evidence in support of this claim was adduced. On the contrary, the defendant in reconvention proved the sale and delivery of the aerated waters to the authorised agent of plaintiff in reconvention.

Mr. Schreiner, K.C., for appellant; Mr. Searle, K.C., for respondent.

After argument on the facts.

Buchanan, A.J.C.: The plaintiff in the case, who resided at Aliwal North, sued the defendant on a balance of account of goods sold and delivered. On looking at the evidence, it appeared that the defendant bought from the plaintiff the aerated water, for which he paid cash. This aerated water was supplied with the bottles, and the agreement was that the bottles should be returned or paid for. The defendant in his plea admitted liability for a certain number of the bottles for which he tendered payment, but denied the delivery of 120 dozen bottles in January. That was the only issue before the Magistrate, and when it was proved that delivery was actually taken by the defendant's agent, in accordance with contract, at Aliwal North, on the issues raised the defendant was out of Court. The Magistrate was perfectly justified in giving judgment on the evidence for the plaintiffs. According to the evidence, the bottles were supplied with the aerated water on the condition that they should be returned or paid for. The appeal will be dismissed, with costs.

[Appellant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, Messrs. Walker and Jacobsohn.]

MDUNA V. BRUCKHAUSEN. { 1901.
Dec. 11th.

Native customs—Surety—Interest.

In the Transkei the Magistrate must decide according to native law and customs in cases in which natives only are concerned: but in a case between a European and a native he must follow the Colonial law. Hence

Held, that in all such cases between Europeans and natives, a surety is entitled to the beneficium excussionis unless it has been expressly renounced.

Held further, that as there is now no law against usury a person is bound to pay whatever interest he has contracted to pay.

This was an appeal from the decision of the Resident Magistrate of Idutywa in

respect of a judgment for £20 15s. for goods sold and delivered and for cash lent.

The summons in the Court below called upon Mduna (defendant) to show cause why he had not paid to William Bruchhausen (plaintiff) the sum of £20 15s., being balance of account for goods sold and delivered and for cash lent by plaintiff to defendant during 1898 and 1899. Plaintiff put in his ledger account, which showed a debit to Mduna of £36 15s. 9d., and a credit of £16 0s. 9d., leaving a debit balance of £20 15s. From the evidence for the defence it appeared that certain natives wished to purchase mealies from plaintiff on credit but he refused to supply them unless Mduna would stand security for payment. Plaintiff subsequently called upon the men he had supplied for payment when he had reason to believe that they were in a position to pay, but they refused or neglected to make such payment. Thereupon plaintiff sued defendant.

The Magistrate gave judgment against defendant for £15 15s., being the sum claimed less £5 charged as interest on the cash advanced. Costs against defendant; and plaintiff to be allowed his witness's expenses.

The Magistrate's reasons were as follows:

In this case I came to the conclusion that Bruchhausen's evidence was in the main a correct version of what transpired between himself, O'Koyi (a native to whom mealies were supplied) and Mduna.

The question of the purchase of the mealies and the suretyship of Mduna are the chief points at issue; and there is a cross appeal by plaintiff as to the disallowance of the money lent. Bruchhausen, it seems, did not know Mqoki, Magogo and Mzamo. The mealies were purchased for them by O'Koyi and Mduna was present when the grain was sold, and accepted responsibility for the payment of it. O'Koyi resided in another district and was not known to plaintiff, therefore the latter would not sell unless Mduna were present and vouched for due payment. The natives do not understand the term "surety" as it is understood in transactions between Europeans. When the purchaser fails to pay at the appointed time, or on demand, the native who undertook responsibility for payment understands that he is in the position of a co-principal debtor. It is well-known that the Kaffir word "Umeli" means "to stand" in the debtor's place on his failure to pay. Generally the trader, after the sale, takes no further notice of

the purchaser, but makes his demands from time to time upon the surety, who makes no complaint, being aware that he is liable unless he can hunt up and bring to the trader the principal debtor together with the money due. Bruchhausen states that Mduna not only guaranteed payment, but also specified a black and white cow and its calf as available for payment. This is very frequently done: the surety pledges stock of some kind, and if the animal is not known he either brings it to be seen by the trader or one of the latter's servants is sent to look at it. The defendant (acting on advice) maintains that the principal debtor should first have been sued, but I am of opinion that this was not necessary, as he well knew, as all other natives do in similar cases, that he stood in the position of co-principal debtor.

As to the cross appeal, I declined to allow the usurious interest claimed by plaintiff; and it is well that it should be decided by a higher Court whether Magistrates should take cognisance of such claims.

Mr. Searle, K.C., for appellant; Mr. Benjamin for respondent.

After argument,

Buchanan, A.C.J.: The plaintiff, who was a storekeeper, sued in the Magistrate's Court being "not indebted." Counsel on both sides had been forced to admit that the record was in a most confused state, and that it was difficult to ascertain from the evidence what was the dispute before the Magistrate. The onus was on the plaintiff to establish his claim. There seemed to be two sets of items in the account in dispute. The first was the price of certain bags of mealies at £18, and the sum of £1 4s. as interest on the purchase price. The plaintiff had previously sued Okoi for that £19 4s., but he failed in his action. In the present action he repeated his statement that Okoi bought the mealies, and that the defendant stood security for the amount. In the Transkei the Magistrate has to decide according to native law in cases in which only natives are concerned, but in a case between a European and a native, he is required to follow the Colonial law. By that law a surety who had not renounced the benefit of the exception was entitled to require that before he was sued the principal must first be excused. That has not been done. I consider, therefore, that the amount of £18 for the price of the mealies ought not to be brought up in the account. But there is another objection to bringing up that

amount. Okoi was called by the plaintiff himself, and he said that, after the case was heard against himself he actually discharged that debt of £18 by payment. The plaintiff admitted that he had given credit for £3, paid by Okoi, but said nothing about the balance. Therefore there are two objections to including that amount in the account, and it ought, therefore, to be struck out. Another matter in dispute is a loan of £8. The defendant swore he only received £5. The parties were agreed that the amount lent was to bear interest. The Magistrate considered that the amount of £3 charged as interest on this loan was usurious, and struck it out; but there again the Magistrate has erred, because there is no law against usury, and if a person agrees to pay interest, which in former times would have been considered usurious, a man is bound by his contract. The appeal will be allowed, with costs, and the judgment in the Court below altered to one of absolution from the instance, with costs.

[Respondents' Attorneys, Messrs. Godlonton and Low; Appellant's Attorneys, Messrs. Walker and Jacobsohn.]

HEYNS V. MUNICIPALITY OF (1901.
RONDEBOSCH.) Dec. 12th.

Sub-division of land—Plans—Powers of Municipal Council—Act 41 of 1899, section 7.

Act 41 of 1899, section 7, gives a Municipal Council the right to refuse to sanction such sub-division of landed property for building purposes as they may consider inexpedient. Their rights are not limited merely to the securing of proper roads and streets: and provided that their powers are exercised bonâ fide and within the authority given by Statute the Court will not interfere with them in the exercise of their discretion.

This was an application by Johan Frederick Heyns for an order compelling the Municipality of Rondebosch to pass certain plans of sub-division of his property situated at Rondebosch, and to show cause why the Council should not bear the costs of the application.

The affidavit of the applicant was as follows:

I, Johan Frederick Heyns, the above-named applicant, make oath, and say:

1. I am resident at Rondebosch, in the Cape Division, and am registered owner of certain property in that Municipality.

2. That intending to sub-divide my property, and sell same in building plots, I caused a plan of such lots to be framed, copy of which plan is hereto annexed (marked A).

3. That this plan was duly submitted, in accordance with section 7, Act 41, 1899, to respondents, for the purpose of obtaining their sanction.

4. That same were returned for one or two minor amendments, and on account of the frontage of the lots not being large enough.

5. I annex hereto certain letter received from the Municipal Clerk, forwarding a copy of the report of the architect to the Council (annexures B and C), from which it will be seen that the plans were returned for amendment. All the required amendments to the plans were attended to, with the exception of the widening of the lots, and the plans were duly returned.

6. Thereafter I advertised the sale of the lots for Monday, the 25th November, 1901, being under the impression that the plans would pass.

7. Thereafter, on the 16th November, or thereabouts, my surveyor received a letter from respondents stating that the frontage had not been extended, and that the lots should not have a frontage of less than 45 feet (letter annexed, marked D).

8. My surveyor thereupon wrote asking under what enactment the Council had jurisdiction over the size of the lots on private property in cases of sub-division, and received the reply hereto annexed, dated 19th November, 1901, stating that the Council had such jurisdiction under section 7 of Act 41, 1899, and further pointing out that no sale under the Act could take place unless the plan was approved.

9. That under the section referred to it is provided that it shall not be lawful for any person to sell sub-divided lots, unless the plan of sub-division has been sanctioned by the Council.

10. That under the Council's regulations the question of the width of streets or roads is dealt with, chap. 8, Regulation 33, but nowhere in the regulations is the size or dimensions of lots referred to.

11. That the Council, in refusing to pass

these plans on account of the size of the lots, is acting wrongfully, and furthermore, has caused me considerable damage and loss, and that their refusal to pass the plans on the grounds stated is wholly illegal.

12. On the 22nd November I instructed my attorneys to write stating that, unless the plans were passed, this Hon. Court would be moved for an order compelling the passing of same, since the rejection was unreasonable.

13. That I, through my attorney, did my utmost, on the 23rd inst., to obtain a decision as to whether the plans would be passed, but failed, and therefore was unable until this morning, the day of advertised sale, to do anything towards the postponement thereof.

14. That a considerable number of people attended on the ground for the purpose of the sale, and were then informed by the auctioneer that the sale had been postponed through the action of the respondents, and therefore the postponement of the sale, as above stated, will have caused me considerable loss, as the price realised for the lots will be considerably affected by the action of the respondents.

15. That this morning my attorney received a letter from the respondents, which I annex hereto, from which it will be seen that the respondents may still, at their meeting on Thursday, refuse to sanction the plan.

16. That the longer the sale is put off the greater will be my loss, since the summer season will be further advanced, and it is therefore absolutely necessary for the same to be held as soon as possible.

For the respondents the following affidavit was read:

I, William Alexander Batchelor, Municipal Clerk of Rondebosch, make oath and say:

1. That I have perused the affidavit of the applicant, sworn to in this matter on the 26th November, 1901.

2. That under section 7 of Act No. 41 of 1899 it is provided that it shall not be lawful for any owner of property to sell such property in subdivided portions without having first submitted a plan of such subdivision to the Council and obtained the sanction of the Council thereto. The section goes on to say that the Council may by regulation duly framed and published prescribe the procedure which shall be followed in submitting such plans for approval and in regard to the dealing of the Council with them.

3. That the Rondebosch Municipal Council is of opinion that it is not advisable for sanitary reasons that any lots of ground for building purposes should be of a lesser width than 45 feet, and in the exercise of what it believes to be its rights has refused to pass the applicant's plan, which shows eight lots of a width of only 31.25 feet and others 35 feet.

4. There is no underground drainage in the Municipality of Rondebosch, and what would be a reasonable width for a lot of ground in a town with a proper drainage system is in the opinion of the Council quite inadequate in the Rondebosch Municipality under existing circumstances.

5. No provision is made by road or otherwise on the plan for admission to the backs of the houses, which may be built upon the ground, and it would therefore be necessary to have a passage on each plot for that purpose, which would reduce the width available for building to a considerable extent.

6. It is respectfully submitted that the Council, in refusing to pass the plan, is acting in a reasonable manner, and for the benefit of the inhabitants of the Municipality.

7. No lots of ground of a lesser width than 45 feet have, so far as I am aware, been sold within the Municipality for many years.

The replying affidavit of the applicant was as follows:

I, Johan Frederick Heyns, the above-named applicant, make oath and say:

1. That I have perused the affidavit of William Alexander Batchelor, sworn to on 27th November, 1901.

2. That I have already stated in my previous affidavit that no regulations have been framed with regard to the size of subdivisional lots.

3. That paragraphs 3, 4, and 5 are irrelevant, in that, should any houses be built upon the lots in question, the plans for any such buildings must be passed by, and have the sanction of, respondents before such buildings could be erected, and due provision made for sanitary arrangements.

4. That with regard to paragraph 7 of the said Batchelor's affidavit, I say that allegations made may or may not be, but I fail to see in what way that affects the legal position.

Sir H. Juta (for applicant): The question is, has the Municipality any right to reject plans for the sub-division of land because they consider that the proposed frontage is too narrow. Questions as to sanitation

are irrelevant, because when the plans for buildings are sent in the Municipality can prohibit the erection of them if proper provision is not made for sanitation. *Non constat* that this land is going to be used for building lots. The purchaser of the lots is not compelled to build, and if he does the Municipality can refuse to pass the plans if not satisfactory. The Municipality claims to deal with the plots under Act 41 of 1899; but the whole gist of that Act is to deal with roads. Section 7 of the Act must be read in connection with the sections which precede and which follow it. It is incredible that the Municipality should be able to forbid a man to sell his land in such lots as he might please. Section 7 must be interpreted reasonably, and to do that we must refer it to roads and streets.

Mr. Schreiner, K.C. (for respondents): This is a question of interpreting a very plain statute. It must be remembered that section 17 makes the Statute permissive.

[Buchanan, A.C.J.: Is this Statute remedial or empowering, and should it be interpreted restrictively or extensively?]

I would rather leave it to your lordship to classify the Act. *Clark v. Town Council of Cape Town* (4 Sheil, 42) shows that the Court will not interfere if a Municipality acts *bonafide*. It can hardly be contended that if I cut up my ground into plots 10 feet square, the Council must pass the plans. They admit that they come under the Act, and cannot say that the Council has no power to disallow the plans because they have not made special regulations on the subject of cutting up land. If the Council exercised its power unreasonably the aggrieved person could come to the Court, and say that they were acting *mala fide*. A frontage of 45 feet has been insisted upon by the Municipal Council for years. The Council then are not using their powers unreasonably, for their consistent policy has been to discourage the erection of houses within the Municipality likely to be tenanted by undesirable persons. The case of *Carter v. Town Council* (10 Sheil, 722) shows how far the Court will go to uphold a Town Council.

[Buchanan A.C.J.: In that case they had reserved to themselves an arbitrary right. Here they must act *bona fide*.]

A fortiori if the Legislature give certain powers to a public body, nobody can challenge their use of those powers, unless he can prove *mala fides*. If we were to do as counsel for applicant has suggested, viz., first approve these plans and then lie by until building plans were before us, and

reject them, thus putting a number of people to great expense and inconvenience, that would be a very good proof of *mala fides*. The Act is in our favour, and we only ask the Court not to interfere with the *bona fide* exercise of our discretionary powers.

Sir H. Juta (in reply): The Act has nothing to do with cutting up a property into lots, but as it relates to streets in every other section, so it presumably does in section 7.

[Maasdorp, J.: If the sanction of the Council is not required, why do you ask for it?]

If we did not they would have applied for an interdict, and if once prospective purchasers got to know there was any difficulty about the land, we should not be able to get any price for it. But Heyns ought never to have sent in his plans to the Council. A man may sell as much or as little of his land as he pleases, unless he is going to sell a number of undivided lots with roads. *Carter v. Town Council* is not in point. There it was a pure question of contract between parties. This Act is highly restrictive, and must be interpreted reasonably. If section 7 relates to the size of lots of ground and the extent of frontage, the Council can do practically as it likes.

Mr. Schreiner referred to *Cairncross v. Oudtshoorn Municipality* (7 Sheil, 286).

Buchanan, A.C.J.: This is an application for an order to compel the respondents, the Municipality of Rondebosch, to pass certain plans of a sub-division of applicant's property on the ground set forth in the affidavits. By the Municipal Amendment Act (Act 41 of 1899) power is given to those municipalities in which the Act is proclaimed to control the sub-division of land within such municipalities. The seventh section of the Act says: "From and after the taking effect of this Act it shall not be lawful for any owner of property to sell such property in sub-divided portions without having first submitted a plan of such sub-division to the Council and obtained the sanction of the Council thereto." The section also goes on to say that the Council may by regulations duly framed and published prescribe the procedure to be followed in submitting such plans for their approval. No regulations have been made prescribing the procedure. Applicant in this case, having sub-divided his property, submitted his plan to the Council for approval. The Council refused to sanction the sub-division. It is contended that

applicant that this section limits the Council to the right only of securing proper streets and roads being provided for in the sub-divided plan. It is true that this section is inserted among other sections which have reference to existing streets and new roads, but it must also be remembered that this Act is an amendment of the General Municipal Act, and has reference to other powers conferred on the Council than those affecting roads and streets. The question we have to consider is whether the Legislature, by section 7, intended so to limit the power of the Municipality. This can only be done by reading words into the section which it does not contain. Looking at the clause itself, and at the general provisions contained in the Act, I am of opinion that these words cannot be read into the section. The Legislature has entrusted local bodies with certain powers of management and control over the areas governed by them; and the Court has repeatedly laid down that so long as those powers are exercised *bona fide* and honestly, and within the authority given by the different Statutes, it will not interfere. But if the local body acts outside of its authority, or if such powers are not exercised in a *bona fide* manner, the Court will interfere. In this case the respondents have acted within their authority, and there is no allegation that the Council acted in other than a *bona fide* manner. The plans were submitted to the Council, the Council looked at them and decided that for sanitary reasons there was good ground for not allowing the property to be sub-divided in this way. They refused to sanction the plans, considering they were to the detriment of the general public and the Municipality. Under these circumstances, I see no ground for granting the order which has been applied for.

Maasdorp, J.: In this case it seems to me that the words of the Act are very clear and unambiguous, and it is unnecessary to go into other sections for the purpose of interpreting this section. It was said that in this case sub-division was for the purpose of providing building lots; and I think that this is an illustration of the usefulness of the section, because it clearly enables the Council, in the interests of the Municipality, to check a sub-division of land in such a way that thereafter, when building took place, it would be difficult to arrange for sanitary and other matters in such very narrow limits as are laid down in such sub-division.

The application was dismissed with costs. [Applicant's Attorney, Mr. Gus. Trollip; Respondents' Attorneys, Messrs. Reid and Nephew.]

INCORPORATED LAW SOCIETY } 1901.
V. ALING. } Dec. 12th.

Attorney—Negligence—Costs.

This was an application calling on Johannes E. B. Aling, an attorney and notary, to show cause why he should not be suspended from practising as an attorney and notary, or receive such other punishment as the Court should see fit to impose on him. The ground for the motion was alleged professional misconduct, respondent having, it was alleged, after applying to the Secretary for Agriculture for leave to transfer an erf known as No. 23, Congo's Hoek in the district of Elliot, to one Koekemoer, and after having been informed that transfer could not be given, fraudulently paid transfer duty and procured transfer of the erf.

The Assistant Under Colonial Secretary for Agriculture deposed, on affidavit, that on the 28th February, 1898, respondent wrote asking leave to transfer the erf in question to Koekemoer. A reply was sent stating that the erf could not be transferred to Koekemoer as by the terms of the title under which the erf was held, it could not be transferred to a person who held other land. Koekemoer at that time had other land registered in his name. Shortly after receiving this letter, respondent paid transfer duty, and obtained transfer, well knowing the illegality of such transfer. On the 8th December, 1900, a letter was written asking respondent for an explanation of his conduct, but he did not reply to this, nor to two letters subsequently addressed to him asking for a reply.

In an affidavit, the respondent said that he sent four other applications in respect of the transfer of erven at the time he sent the application concerning erf No. 23, and had, at that time, not seen the transfer. Subsequently he examined the transfer, and found no condition making it necessary to apply to the Government for authority to transfer. He therefore considered that application to the Agricultural Department was unnecessary. He understood the prohibition only to apply to persons owning ground elsewhere in that division. At the time of the transfer Koekemoer, who was a poor man, and not a speculator, which was the class the prohibition was intended to operate

against, had sold his other property, though it happened to be still registered in his name.

An affidavit was also read in which the Acting Assistant Resident Magistrate of Elliot and Chairman of the Land Board deposed that on the 7th February, 1898, the property of Kookemoer was transferred to one Myburg. Deponent further stated that he considered respondent to be a man incapable of any professional misconduct. He was much respected, and looked up to in the district.

Mr. Searle, K.C. (for the Law Society): This matter was referred to the Law Society by the Attorney-General, and three several times the society called upon Mr. Aling for an explanation. It was not till September 12, 1901, that they obtained from him this explanation, and the explanation was that he had not looked into the tenure of the land in question, and that Kookemoer's property had been sold and transferred before he got the new property. Respondent had written to the Agricultural Department in February, 1898, and not receiving a reply, he wrote again on 6th of June, 1898. On August 10 the department wrote to him to say that the transfer could not be passed, and in spite of this notice, he at once sent down the papers to a Cape Town attorney, and the Registrar of Deeds by an oversight passed transfer.

[Maasdorp, J.: Is it quite clear that the Government was right in saying that transfer could not be passed?]

Clause 6 of respondent's affidavit contains the gist of his defence, viz.: That the clause referred only to erven in the same district. Then respondent went behind the Government, and obtained transfer. If he had any doubt as to the legality of such transfer he ought to have had the case argued on motion. I am instructed not to press for any penalty beyond a reprimand.

Mr. Schreiner, K.C. (for respondent): Your lordships will consider Mr. Aling's position as a professional man. To charge such a man with fraud, where a mere mistake has been committed, would be going very far indeed. No doubt Mr. Aling ought to have answered the letters from the Agricultural Department, and if he had answered as he did finally, it certainly would not have been right to bring the matter before the Attorney-General. No restraint on transfer was shown on the title deeds, and if there had been any indication on the title that the Governor's consent to the transfer was necessary, it would not have passed the Deeds Office. There was

nothing to lead respondent to suppose that there was any restriction. No doubt he ought to have written to say (1) that the consent of the Governor to the transfer was not necessary; (2) that Kookemoer had sold the land previously held on the day the other land was bought. His conduct may have been discourteous, but it was neither fraudulent nor unprofessional. The practice of the Deeds Office takes no notice of any restrictions not explicitly endorsed on every deed of transfer. See *Foster's Practice of the Deeds Office* (p. 42).

Mr. Searle was heard in reply.

Buchanan, A.C.J.: This is an application calling upon the respondent to show cause why he should not be suspended or have some other punishment imposed upon him by the Court, on the ground that he has been guilty of professional misconduct. The respondent applied to the Government for their consent to the transfer of certain property held by a native to another native. In the original grant upon which this property was held the property could not be transferred without the consent of the Government. The Government officials wrote that, having inquired into the case, they found that the native in question was the holder of other property, and under the rules and regulations could not have other fresh property transferred to him. The respondent, on looking at the deed of transfer found that there was no express regulation in it that the consent of the Government was necessary though there was reference to the property being transferred, subject to the conditions contained in the original title deed. Respondent did not look at the original title deed, but he says that he sent forward the transfer to Cape Town, under the impression that if any error was made, it would be discovered there by the conveyancer or in the Deeds Office. He did not draw the attention of the conveyancer to this point, and the latter did not discover the error, neither did the Registrar of Deeds in passing transfer. The respondent says he acted in good faith, and refers to the regulations of the Deeds Registry Office, which require that restrictions of this kind should be expressed in the title deed. This regulation in regard to restrictions being expressed on the title deeds is a direction to conveyancers which they ought to observe, but which, apparently in this case was not observed. The respondent was called upon by the Government to give some explanation as to why, after their refusal in September, 1898, to

give their consent, he should have transferred this property. To this the respondent vouchsafed no explanation, and the matter was referred to the Law Society, and the respondent called upon to make an explanation. He now makes an explanation to the Court, and with this explanation before us, we are not prepared to say that he has not acted in good faith, or that he has been guilty of professional misconduct, but, as his counsel candidly admits, he has been at least negligent or careless in the matter. He explains now that this dealing with the property was an exchange between two natives, and is the transfer of the property of one native to the other native, who cross-transferred his erf, though this cross-transfer was not effected until 1900. There was nothing on the face of the papers to show that it was a cross-transaction, nor did the respondent inform the Government that it was such. The Magistrate of the district in which the respondent resides, and before whom he practises, has given a certificate of the good character and good behaviour of the respondent. Under these circumstances, we are not prepared to say that the respondent should be condemned for want of good faith or professional misconduct, but, at any rate, his careless and negligent conduct justified an inquiry being made, and although we will make no order, the respondent must pay the costs. No order will be made, after hearing respondent's explanation, but he must pay the costs of the application.

Maasdorp, J., concurred.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinné; Respondent's Attorney, Mr. J. J. Michau.]

REX V. MCLAREN. { 1901.
Dec. 12th.

This was an appeal from a conviction of the Special Court for Griqualand West. Appellant had been convicted of contravening section 3 of Act 48 of 1882, and sentenced to five years' imprisonment with hard labour. He now appealed on the grounds that the evidence adduced at the trial did not warrant a conviction, and that the said conviction was contrary to law.

The charge stated that upon or about June 19, 1901, and at or near Bultfontein, John McLaren, not being duly licenced or authorised under the provisions of Act 48 of 1882, did wrongfully and unlawfully buy, deal in, or receive by way of barter, pledge,

or otherwise, either as principal or agent, from Job Pambana, in the employ of the Detective Department at Kimberley, in the district aforesaid, one rough and uncut diamond. Prisoner pleaded not guilty, and was defended by Mr. Upington. Mr. McKenzie appeared for the Crown.

Job Pambana stated that he was in the employ of the Detective Department. On June 19, he and Jan were searched by Detective Lawrence, and taken by detectives to Beaconsfield. A diamond was handed to him when near prisoner's house. They went to prisoner's house. He keeps a butcher's shop. They found prisoner and a little white girl in the shop. Prisoner, Jan, and witness went into the dining-room. Prisoner asked Jan, "Where is it?" Jan said witness had it, and witness produced the diamond (exhibited in court) from his mouth. Prisoner took it and asked how much they wanted for it. They asked £5. Prisoner refused to give that. He called his wife, who came and examined the diamond. Prisoner and his wife went into a room, apparently a bedroom. After a short time prisoner and his wife came back to the dining-room, and invited the traps back into the shop. After some further conversation, prisoner came into the shop from the dining-room and threw 8s. on the table. Jan said, "Is that all you are going to give us?" Prisoner said, "Yes, that's enough." Jan said, "You had better give us back the diamond." Prisoner said nothing, as some people came into the shop. Jan wanted to create a disturbance in the shop. Prisoner told him to go out. The traps went away, taking the 8s. with them. This they gave to the detectives, who returned with them to the shop, arrested prisoner, and searched both him and the traps. There were some people in the shop when prisoner put down the 8s., and they must have heard Jan say, "Give me back my diamond." Witness and Jan had nothing to eat while in the house, and witness did not notice anybody eating. Jan Manemela generally corroborated the evidence of last witness, but said that prisoner's daughter was a well-grown young girl. Prisoner knew him before, and was expecting him, as they had arranged earlier in the day that witness should bring a "brother" with a diamond to sell him. On returning to the shop from the dining-room they found some natives in the shop.

John Clear stated that he was a detective officer. The traps were searched in his presence, and no money was left on them.

After prisoner was apprehended he searched him, took him to Beaconsfield Police-station, and left Detectives Lawrence and Graham in charge of the premises. He and Detective Thompson remained in possession of the premises during the night. The following morning he searched them, and found the same rough and uncut diamond which had been given to the traps in a corner of the shop, where two sacks of meal were standing. He found it after moving the sacks.

Robert D. Lawrence, detective, generally corroborated the evidence of last witness. He and Graham remained in charge of the premises, which were locked up until Clear returned in the evening.

Jantje Malosi stated that he knew prisoner. He was at prisoner's house when prisoner was arrested. While in the shop he saw Jan Manyana come out from an inner room accompanied by prisoner, his wife, and Job. When prisoner threw down the 8s. Jan said, "Oh no, give me more." Prisoner said, "Go out, go out." When he entered a tall girl was serving in the shop.

For the defence,

Mary McLaren, prisoner's daughter, stated that she was not serving in the shop on the evening of her father's arrest. She was noting down sales in a book. Prisoner did not go into the dining-room with the traps. He did not give them any money, and there was no conversation between him and them about a diamond. The traps were served at their request with some cooked meat by her mother, for which each of them paid 6d. Prisoner never left his position behind the counter. Three other natives (named) sat at the same table with the traps while they were eating. Witness did not see Jantje Molosi in the shop that night, and said his evidence was false.

Clara McLaren, prisoner's wife, corroborated the evidence of last witness. She and prisoner did not examine a diamond. She never told Graham that the boys had paid her a 10s. piece, and that she had given them 9s. change.

Other native witnesses stated that they were in the shop on the night in question, and corroborated the evidence of the wife and the daughter of prisoner.

After the case for the defence had been closed, the Court called Detective Graham. He said: I took part in the arrest, and when prisoner was arrested I remained in charge of the premises until Clear came and relieved Lawrence and me. While I was in

charge prisoner's wife told me the traps had bought some cooked meat there—two plates—for which they paid 10s. in gold, and that she had given back 9s. in silver to them.

Mr. B. Upington (for appellant): The Court below had no right to call Graham. Whether the prisoner's wife gave the boys money or not was irrelevant to the issue before the Court. See *Attorney-General v. Hitchcock* (1 Exc. Rep., 91).

[Maasdorp, J.: Was it not to the point whether that money was given to them for the diamond, or for something else?]

The evidence for the defence as to the money was relevant only because it impeached the credit of the witnesses for the Crown.

[Maasdorp, J.: Surely evidence which contradicts a relevant statement is, as a rule, itself relevant.

In *Attorney-General v. Hitchcock* (1 Exc. Rep., 91), Pollock, B., said that the true test of relevancy was, would you be allowed to give the statement in evidence?

[Buchanan, A.C.J.: It seems to me most relevant to find out where the 8s. came from.]

I contend that Graham's statement had to do with another transaction altogether. It is at most evidence of a collateral fact. The evidence for the defence was to show that the traps had money when they went into the shop. The defendant, again, had no notice of this evidence until the whole case was closed. The Crown could have called that evidence in the usual way, and if it was going to be brought forward it should have been set out in the affidavits according to the usual practice of the Special Court. The fact that the traps had money is of importance only as showing that they had not been properly searched.

[Buchanan, A.C.J., cited *Stephen's Digest of the Law of Evidence*, Art. 131.]

That is only under an English statute. Our Ordinance 72 of 1830 was never intended to import into our law any of the provisions of English statute law, but only the rules of English common law. The common law on relevancy is stated in the judgment of Pollock, C.B., in *Attorney-General v. Hitchcock* (1 Ex., 91, pp. 100, 105), cited in *Taylor, Ev.*, (p. 949).

[Maasdorp, J.: Does not that agree with what Stephen says in Art. 130? The only difference is that he uses the word "relevant" and Pollock, C.B., uses the word "material."]

There is a broad distinction between "relevant" and "material." In *Crank-*

shaw v. Galloway (5 Juta, 202) evidence was excluded which would have been admissible in England under the Criminal Procedure Act of 1865, and the Civil Law Procedure Act of 1864. If the Court holds that the evidence of Graham was admissible, I say that the prisoner ought to have had an opportunity of rebutting it.

[Buchanan, A.C.J.: He did not ask for any such opportunity.]

It should have been offered to him. Then the evidence was given in a very vague and unsatisfactory manner. My next point is that this is the first time in the history of the Special Court that an offence has been held to have been proved without any corroborative evidence having been given by a white witness. That Court has always held it unsafe to convict on the unsupported evidence of traps.

[Buchanan, A.C.J.: Here there was corroboration.]

Only by a native, and he a friend of one of the traps. In these Special Court cases the proof must be very clear. *Queen v. Abrams* (1 Juta, 393). See judgment of *De Villiers, C.J.* (p. 400). So in *Queen v. Bisset* (not reported), the Supreme Court quashed a conviction which had been obtained on the evidence of a trap. There have also been cases in which convictions have been quashed because sufficient weight had not been given to the legal presumption of innocence, as in *Queen v. Jakhala* (3E. D.C., 225). In this case sufficient weight was not given to the presumption of innocence. The story told by the witnesses for the prosecution teemed with improbabilities as to time and circumstances of the alleged offence.

Mr. H. Jones (for the Crown) was not called upon.

Buchanan, A.C.J.: The appellant in this case was convicted before the Special Court at Kimberley for the crime of contravening the Diamond Trading Act, and sentenced to five years' imprisonment. The appeal is based upon two grounds, the first being that evidence was wrongly admitted. The statute law in the question of criminal appeal is that a conviction should not be set aside by reason of the fact of some irregularity or illegality, or because evidence was improperly admitted or rejected by which no substantial wrong was done the defendant. It was said here that the evidence was wrongfully admitted because it had reference to a matter not material to the issue. It was admitted by counsel that if the evidence was material to the issue,

then it was properly admitted. Now the issue the Court had to try was whether a transaction of buying, selling, or dealing in a diamond had taken place. Part of that transaction was the payment of the purchase price. Witnesses for the Crown detailed that a certain amount of 8s. was paid over by the prisoner for the diamond which he bought. The prisoner's wife had said to the detective that the identical 8s. was produced to her. The prisoner's wife, when called as his witness, said in the witness-box that she never made any such statement. The question as to how the traps got the 8s. was very material to the inquiry. If the fact whether or not the witness for the defence had made contradictory statements on this point only affected the question of the credibility of the witness, according to English law proof of such contradictory statements was clearly admissible. *Stephen's Digest of the Law of Evidence* (Art. 131) states that every witness in proceedings, civil or criminal, might be asked in cross-examination whether he had made any statement relevant to the subject matter of the action inconsistent with his present testimony, and if he denied having done so the fact might be proved. Of course the primary object of that was to affect the credibility of the witness, but if it was only a question of the credibility of the witness, it would be difficult to see how the admission of the evidence would prejudice the defendant. It was said that such evidence was admissible in England under statute, but a similar practice had been adopted here, and had been followed in many cases. Whether the evidence was properly admitted or not, the prisoner had not been prejudiced, and I cannot hold that on that point and case has been made out why the appeal should be allowed. The second point dealt with the traps, and it was said that their evidence had only been corroborated by a native. The traps, however, were also corroborated by the detectives who took all the money from the traps, gave them the diamond, sent them into the house, and then when they emerged from the house took them into custody, searched them, found no diamonds in their possession, but received the 8s. from them. Afterwards the detectives searched the house and found the identical diamond there. It is true the evidence of the traps was further corroborated by a native who was in the house at the time. It is said that the statement made by this witness should

not be accepted simply because the man was a native, but I would be sorry to lay it down that because a witness was a native he could not be a credible witness. These are the two ground upon which the appeal is based, and I think they both fail in justifying the Court in quashing this conviction. There was distinctly clear evidence that the transaction in contravention of the Diamond Trading Act was committed by this person. They had the evidence of the traps, which was corroborated by the detectives, and the diamond in question was found in the house. This seemed to be strong evidence to justify the Court in holding that the presumption of innocence which everybody was supposed to have in his favour while undergoing trial had been most successfully rebutted by the Crown. The appeal would be dismissed.

Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Findlay and Tait.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN
(Acting Chief Justice) and the Hon. Mr.
Justice MAASDORP.]

REX V. KLAAS AND OTHERS. { 1901.
Dec. 12th.

Act 23 of 1888, section 29—Conviction quashed on review.

Buchanan, A.C.J., said a case had come before him for review from the Magistrate of Namaqualand, in which three prisoners were charged with contravening section 29 of Act 23 of 1888, in that they did wrongfully and unlawfully conspire and confederate to make their escape from custody. The first witness was the gaoler, who said that one of the prisoners told him something, whereupon he called in one of the other prisoners, Klaas, and charged him with making a plan to escape. When the gaoler asked Klaas what he meant by it, the latter denied the whole thing, and got so excited that that night, when he was locked up in his cell, he cut his throat, pro-

bably in a state of excitement. However the instrument used by Klaas did not appear to be very sharp, and on his recovery the trial of the three prisoners took place. After being partly heard the charge was withdrawn against one of them, and he was called as a witness, and said they had talked about escaping. That was absolutely all the evidence against the prisoners. No escape was attempted, and there was nothing to show that even if there was any such intention, that it was carried into effect in any way. It had been repeatedly pointed out that crime did not consist in intention only, but that it must go a step further. Here evidence only went to the fact that a crime was contemplated. Moreover that evidence was given by an accomplice. There was no proof *aliunde* that any crime had been committed. On both these grounds the conviction must be quashed. This matter had been referred to the Attorney-General, and he had declined to support the conviction. In conclusion his lordship said that the question as to how a prisoner in his cell was allowed to have in his possession an instrument with which he could cut his throat was a matter requiring further inquiry.

ADMISSION.

Mr. Searle, K.C., moved for the admission of Hugh Antony Wilford as an advocate. Order granted, and the oath administered

PROVISIONAL ROLL.

KIDRON V. DE WET.

Mr. P. S. Jones moved for provisional sentence for £205 6s., due on a promissory note, with interest from due date and costs of suit.

Provisional sentence granted as prayed.

MARCUS AND OTHERS V. MEYERS.

Mr. McGregor moved for the final adjudication of defendant's estate as insolvent. Final sequestration adjudicated.

CARR BROS. V. TIFFIN BROS.

Mr. Bisset moved for the final adjudication of defendant's estate as insolvent. Final sequestration adjudicated.

CONROY V WISE.

Mr. Close moved for provisional sentence for £750, being the first instalment due of a mortgage bond.

Defendant appeared in person, and said that if he had a little time given him he would be able to get money to meet the debt.

Mr. Close, in reply to the Court, said that they only asked for provisional sentence, and did not ask that the property specially hypothecated be declared executable.

Provisional sentence was granted, Buchanan, A.C.J., pointing out that as the property would not be taken in execution the defendant would have time to get the money.

DREYER V. BURSLEM.

Mr. Gardiner moved for a decree of civil imprisonment on an unsatisfied judgment of the Court for £20, with costs.

Defendant appeared in person, and going into the witness-box, said that before the case came into Court he had tendered the amount due, £20, but that plaintiffs would not accept that without legal costs. He had earned a little by teaching riding. He had no property of any kind.

Cross-examined: £10 of the £20 he had tendered had gone to the solicitors. The other £10 he had applied to paying off other amounts he had borrowed to buy horses. Some months witness did not make £4, and other months he might make £10. Off that he had himself, his wife, and the horses to keep and rent to pay.

Buchanan, A.C.J., said that since the passing of the Act of 1879, civil imprisonment had been abolished in the cases of persons having no property or means to pay their debts. Defendant had shown that he had no property or means to satisfy the debt, and the Court would therefore refuse the decree.

TEUBES V. FILIES.

Mr. Howel Jones moved for provisional sentence on two mortgage bonds of £20 each, with interest, and further that the property specially hypothecated be declared as executable.

Granted.

SMITH V. VAN DER MERWE.

Mr. Russell moved for provisional sentence for £161 18s. 5d., due on a promissory note, with interest from date.

Granted.

COLONIAL GOVERNMENT V. 1902.
BOTHA. Dec. 12th.

Mr. Sheil, K.O., moved for provisional sentence for £1 18s. 5d., being interest due on a mortgage bond.

Provisional sentence was granted as prayed.

HURTON V. JONES AND ANOTHER.

Mr. Weir moved for provisional sentence for £45 17s. 2d., balance due on a promissory note, less £9 paid on account since the issue of summons.

Provisional sentence was granted as prayed.

DU TOIT V. GERLOFF.

Mr. Gardiner moved for a decree of civil imprisonment on an unsatisfied judgment of the Court for £165 7s. 6d., with £8 0s. 11d. costs.

Mr. Benjamin appeared for the defendant, and put the latter into the witness-box, when he stated that the debt was the result of an unsuccessful building contract. He had no property or money, but he earned £4 10s. per week as foreman to a firm of builders in town. He had several other debts. One of these amounted to £50, and he was paying it off at the rate of £2 per month. On another debt he had paid £10 last week. He had offered the plaintiffs instalments of £3 per month, but they refused to accept this offer unless he could give security. He had himself and wife to support.

Cross-examined: He did odd jobs, but these would not amount to £2 per month.

The Court granted a decree of civil imprisonment, but stayed execution pending payment of the debt by instalments of £3 per month, the first instalment to be paid on the 15th of this month, and the remaining instalments on the 15th of each succeeding month. Costs of the application to be paid by the defendant.

HEATH V. SERREURIER.

Mr. Close moved for provisional sentence on certain judgments obtained before the Special Judicial Commissioner at Johannesburg in 1897, with other costs since incurred.

Granted.

URTEL V. FREDERICKS.

Mr. Gardiner moved for provisional sentence for £800 due on a mortgage bond, together with interest. The bond had become

due owing to the non-payment of interest. He also asked that the property specially hypothecated be declared executable.

Granted.

COLTON V. GREYVENSTEYN.

Mr. De Villiers moved for provisional sentence for sums of £10 and £4 4s., being interest due on two mortgage bonds.

Granted.

EATON, ROBINS AND CO. V. DANEMAN.

Mr. Gardiner moved for the extension of the return day in the above matter.

Return day extended until February 28, 1902.

ALHEIT V. WEPENER.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £350, less £6 5s., with interest. The bond had become due by reason of the non-payment of interest. He also asked that the property specially hypothecated be declared executable.

Granted.

ILLIQUID ROLL.

LOUW V. TODT. { 1902.
Dec. 12th.

Mr. Benjamin moved, under Rule 319, for judgment for the sum of £183, being the balance of account for goods supplied.

Judgment as prayed.

THE COLONIAL GOVERNMENT V. THE BECHUANALAND SYNDICATE.

The summons called upon John Pooley, of Kimberley, in his capacity as secretary of the Bechuanaland and Kimberley Estate Syndicate, Limited, to answer Henry de Smidt, in his capacity as Assistant-Treasurer of the Colony and Receiver-General of Revenue, in an action wherein the plaintiff claimed:

1. Payment of £598 6s. 10d. for quitrent and stamp duty due in respect of certain farms in the division of Gordonia, for the year ending December 31, 1901.

2. Costs of suit.

Defendant was in default.

On the motion of Mr. Sheil, K.C., the Court granted judgment as prayed, with costs.

ERICKSTEDT V. WHITE.

Mr. Buchanan moved for judgment for sums of £42 and £12 10s., and for the keep of certain animals, and for a further sum for the keep of the animals from the issue of summons to the date of payment.

The Court granted judgment, with costs, for the two sums named and for the keep of the animals until the date of the service of summons.

HALES AND ANOTHER V. FORSTER.

Mr. Benjamin moved for judgment in respect of several sums, being in respect of certain dishonoured bills of exchange, together with the expenses incurred in a connection with the dishonouring of the bills.

Judgment as prayed.

REHABILITATION.

Mr. Solomon moved for the rehabilitation, under section 117 of the Ordinance, of the insolvent estate of Robert Morton. The certificate of the Master was put in.

Order granted as prayed.

GENERAL MOTIONS.

Ex parte LANGSCHMIDT.

Mr. Benjamin moved that the rule nisi granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

OBERMAN V OBERMAN.

Mr. Benjamin moved for a decree of divorce, the defendant not having complied with the order of the Court, and restored to her husband his conjugal rights.

Decree of divorce granted.

Ex parte VENABLES.

Mr. Buchanan moved that the rule nisi authorising the petitioner to mortgage certain property without the assistance of her husband be made absolute.

Rule made absolute as prayed.

LENNON, LTD., V. THE CORPORATION OF CAPE TOWN. { 1901.
Dec. 12th.
Buildings—Contract with Town Council.

Where the firm of L. and Co. had purchased certain property in

Cape Town and had agreed with the Town Council to widen the pavements in front thereof to certain dimensions on condition of the Council contributing to the cost of so doing, which the Council had done.

Held, that the Council could not now be compelled on motion, to pass certain building plans submitted by the said firm which showed that the buildings proposed would encroach on the present existing pavements: though applicants contended that there would be no encroachment if the building line as existing at the time the contract aforesaid was entered into were adopted.

This was an application for an order, on notice of motion, requiring the Town Council to pass and approve of certain plans submitted on behalf of the applicants, and for authority to proceed with certain proposed alterations to their premises at the corner of Strand and Adderley Streets. The affidavit of Arthur James Rivett, managing director of Lennon Limited, stated that the said firm are the registered proprietors of certain land situate at the corner of Strand and Adderley Streets, Cape Town. That the plan of the proposed alterations was annexed (which showed that the firm wished to continue the respective walls of their premises facing Strand-street and Adderley-street in a straight line to a point of intersection at the corner of those streets and thus to substitute a corner of the building in the form of a right angle for the present curve). That when the proposed alterations should have been effected, the altered corner of the buildings would be well within the boundaries, according to the title-deeds of Lennon Limited, as would appear from the tracing annexed. The Town Council had refused to sanction these plans, though they had made no offer to expropriate the bit of land on which it was proposed to build.

The affidavit of Josiah Robert Finch, Town Clerk, stated that in the months of June and July, 1886, plans were submitted by Messrs. B. G. Lennon and Co., the predecessors of the present

applicants, in connection with the premises in question. He annexed correspondence between the Council and Messrs. Lennon at that time, which, he said, constituted a contract whereby Messrs. Lennon and Co. contracted, on payment by the Council of a sum of £20, to widen the pavements in Strand-street 13 feet, and in Adderley-street 10 feet. The Council had adopted a line of building recommended by the engineer as per plan.

R. C. Wynne Roberts, City Engineer, stated, on affidavit, that the plans of the applicants, if carried out, would have the effect of narrowing the side-walk, and would make the width at one point in Strand-street 10 feet 1 inch, and at one point in Adderley-street 9 feet 1 inch. It would be an inconvenience to the public if applicants were allowed to extend their building line.

In a replying affidavit, Anthony de Witt, architect for the applicants, annexed certain plans showing the lines of curve at different places, the present and contemplated frontages, and the boundary of building line.

Mr. Searle, K.C. (for applicants): The present line of pavement is not the original line agreed upon; if it had been, I must confess I should have had a difficult case to make out. The original plan of 1886 allowed a full 13 feet of pavement in Adderley-street and a pavement 10 feet wide in Strand-street. The Town Council have altered the original line.

[Buchanan, A.C.J.: How far does the title extend?]

As far as the line of the old building. The old stoep was not included in the title.

[Buchanan, A.C.J.: In 1886 you went beyond the line of your title?]

Yes, we did; unless, indeed, we had acquired a right to the stoep by contract.

[Maasdorp, J.: You made the pavement for the public and now you want to break it up?]

No, we did not make all the pavement for the public, we made a portion of it for ourselves. Counsel for respondents said that the building line was the line in which the buildings run, but surely the Town Council could not arbitrarily determine a building line after they had received notice of motion. *Short and Co. v. Town Council* (8 Sheil, 224) does not warrant that.

[Buchanan, A.C.J.: The important point is, to whom does this land belong according to the contract?]

It is not contended that the ground which the Town Council now wish to re-

strain us from using has been bought by them, or that they have any servitude over it. Their object in fixing a building line is in view of what was said in *Short and Co. v. Town Council*. But that case only goes to show that the building line must be a line actually in use and not an imaginary line. This curve is not like the curves adopted at the corners of other streets. The Court may hold that we must widen the pavement, but will not prevent us from using our own land. If there is a well-defined building line, no doubt they can make us keep to it. Sub-section (9), section 170 of Act 26 of 1893. Short's case shows that they cannot fix an arbitrary line; all they can do is to secure the regularity of the line. Nor can they found their claims on contract, as the original diagrams show. It is true that we constructed the pavement, but we had to do so in accordance with the directions of the Town Engineer. They cannot now take advantage of that to deprive us of our property. The fact that we put our building back cannot be construed as an abandonment of the ground.

[Maasdorp, J.: Do you contend that you could go right to the corner?]

No; according to the plans that would not give them their 13 feet and their 10 feet of pavement.

Mr. Schreiner, K.C. (for respondent Town Council), was not called upon.

Buchanan, A.C.J.: This is an application for an order requiring the Town Council of Cape Town to pass and approve of certain plans submitted by the applicants, to enable them to proceed with proposed alterations to their premises, situate at the corner of Strand-street and Adderley-street. The Cape Town Act authorises regulations to be made, and regulations have been made, giving the Corporation control of building within the city. Under these regulations, before any building can be erected, plans have to be submitted to the Council, and the Council have to pass these plans or reject them. It has been repeatedly laid down that the Council cannot exercise its discretion in an arbitrary or *mala fide* way, but at the same time as it is a question of discretion, when they have exercised their discretion *bona fide* and upon good grounds, the Court will not interfere. The Town Council here refused to pass these plans mainly on the ground that a contract was entered into before the present buildings, which it is now proposed to alter, were

erected. In 1886, Lennon and Co., who are now Lennon (Limited), had purchased the property in question, and had submitted to the Council a plan of certain proposed alterations, and asked the consent of the Council to these alterations. In their letter Lennon and Co. made the proposal that they would widen the pavement in the one street to 10 feet, and in the other to 13 feet, if the Council would contribute towards the cost. There was clearly an offer to the Council that they (Lennons) would give up a portion of their ground for the benefit of the public, and make pavements there, which the public could use, if the Council, as the authority governing the city, would contribute towards the cost. The Council considered the offer, and agreed to contribute, and their contribution was accepted by Lennon and Co. In the plan then submitted, the existing buildings, the proposed alterations, and the line of Municipal gutter were shown, and it is also shown where the proposed public pavement was to be. A width of 13 feet is shown in the one street—Strand-street—and 10 feet in Adderley-street. At that time it is alleged that the pavement at the corner was rounded off, but it is said that the plan shows that it was not rounded off to the same extent as it is now rounded off. It is alleged for the applicants that the present existing line was not the line which they wished to be taken at the time when they made the contract with the Municipality, but it is common cause that the existing line was made by Lennon and Co. at the time. This existing line allows 13 feet in one street and 10 feet in the other between the edge of the kerb and the buildings which were then erected. We have it, therefore, that a contract was entered into, and a payment offered and accepted, and in carrying out this contract the applicants themselves made the pavement which is there now. They propose now to alter their buildings, and to bring them forward at the corner in such a way as would encroach on the pavement as it exists now. The alterations proposed to be made now come within the 13 feet on the one side and the 10 feet on the other side of the existing pavement, though the applicants contend that there would be no encroachment if the line as it existed in 1886 was adopted. I think the application to pass these plans was objected to on the ground that the alterations would result in an encroachment on the existing line, and on that

ground I think the applicants have failed to show that the Council were wrong in refusing to allow the encroachment to be made on the pavement, which was constructed by applicants at the time of the contract, and for which they received payment. It may be that the applicants will be able to make out a stronger case in an action, and may be able to show to the satisfaction of the Court that the contract referred to the other line, but certainly on the information before us, the applicants have not made out a case which would justify the Court in saying that the Council have withheld their approval because they have decided upon an altogether wrong legal position. That is the whole point. The applicants have not shown themselves to be entitled to any order, and the application must be dismissed, with costs.

[Applicants' Attorneys, Messrs. Van Zyl and Buissinné; Respondents' Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SCHROEDER v. VAN DER MERWE. 1901.
(Dec. 12th.)

Discovery order—Plea.

Where in an action for damages for slander, a judge in Chambers had granted a discovery order against the plaintiff, the Court refused to supersede the order on the ground that at the time it was granted defendant had not filed his plea; or to direct the order to stand over pending the filing of defendant's plea.

This was an application on notice of motion calling upon respondent to show cause why a discovery order granted on November 21, 1901, by the Hon. Mr. Justice Maasdorp, in Chambers, directing applicant to make discovery on oath of all documents, papers, and writings which are or have been in his power or possession, or in that of his attorneys, relative to matters at issue in a certain suit for damages for slander instituted by applicant against respondent, should not be superseded, or directed to stand over pending the filing of defendant's plea.

Sir H. Juta, K.C., for the applicant; Mr. Schreiner, K.C., for respondent.

The affidavit of Wm. Henry Low, of the firm of Messrs. Godlonton and Low, stated

that summons was issued in the action on the 29th August, and defendant, by application in chambers, obtained a discovery order against plaintiff, before he had filed his plea. Deponent believed this to have been a fishing application to enable defendant to ascertain plaintiff's case, and to mould his plea thereby.

The replying affidavit of J. B. Kaiser, attorney for the respondent, stated that communication by post with defendant's attorney at Upington had been much interrupted, and that the discovery order had been applied for, so that defendant might know how to prepare his defence. That instructions for the plea had now arrived, and were in the hands of counsel.

Sir H. Juta, K.C. (for applicant): When this application for a discovery order came before His Lordship in Chambers there was nothing to show that the plea had not been filed. The action was one for slander, and this was a mere fishing application to guide defendant in framing his plea. In a case of slander the defendant can never ask for discovery until he has filed his plea. In *Harding v. Queen's Town Municipality* (11 Sheil 335) the Acting Chief Justice refused a discovery order because the plea had not been filed, although that was not an action for slander. This is a very simple case, and there can be no documents to disclose with regard to words spoken in the presence of other people.

[Buchanan, A.C.J.: In that case you could easily make your affidavit of discovery. In *Harding's* case I exercised my discretion in refusing the order, but I have since found that some other judges take a wider view as to granting these orders.]

The English practice, according to *Odger's Libel and Slander* (p. 553), is that as a rule the plea must be filed before discovery can be granted, and if the defence of justification is set up, and the particulars are not fully given in the plea, it is doubtful whether discovery can be granted. *Zierenberg and Wife v. Labouchere* (Q.B., 1893, Vol. 2, p. 183). See particularly the judgment of *Esher, M.R.*, at p. 188; *Folkard Slander and Libel* (p. 497) speaking of interrogatories, says that in a case of slander a defendant must not fish to see what defence he is to set up. I can well imagine a case of contract or even of libel in which discovery should be granted before the plea is filed, but not of slander.

[Maasdorp, J.: In granting these orders a judge is to exercise his discretion, but on what facts?]

The applicant should state what documents he wants to see.

[Maasdorp, J.: Why should not a defendant see all documents which will help him in his defence?]

No man has any right to slander another until he is in possession of the facts of the case. I do not contend that as a general rule discovery may not be granted before the plea is filed, but only that this should not be done in cases of slander.

Mr. Schreiner, K.C. (for respondent): This is an extraordinary application. There have been numerous cases in this Court in which discovery has been granted to a defendant before he had filed his plea. I need only refer to *Wiese v. Mostert* (10 Juta, 137); *Upington v. Solomon* (Buch., 1879, p. 204). Subsequently the present rule of Court (No. 333) was made. The first case after this was *Biden v. French Diamond-Mining Company* (1 Ap., 95). The latest reported case is *Van Zyl v. Van Noorden* (12 S.C.R., 50). The defendant has a right to know the facts of his case. See *Cape Law Journal* (Vol. 11, pp. 96 and 101), and cases there quoted.

[Buchanan, A.C.J.: Our rule and the English rule are really the same.]

My point is, that with us discovery is granted almost as a matter of course. *Zierenberg v. Labouchere* does not affect this case.

[Maasdorp, J.: Suppose you had to argue in favour of an application before a judge?]

In that case, I take it counsel would have before him only what the judge now has, and could use only general arguments. Of course some discretion must be vested in the judge, or the rule would authorise the Registrar to grant the order. But while it is in the discretion of the judge to grant or to refuse the order, there are certain general principles which are commonly accepted; such, for example, that the plaintiff has less right to a discovery order than the defendant. Curiously enough, all the old cases in our courts which bear on the subject refer to libel actions. The law was fully stated in *Owen v. Wynn* (9 Ch. D. 29). It is of the utmost importance that a defendant should know whether to plead justification or not. Suppose that an affidavit has been made by a defendant of which he has not kept a copy. He asks an official to be allowed to see the document, and is told that perhaps it may be produced at the trial. Meanwhile he cannot see his own affidavit, though he sees from the declaration that the

plaintiff knows all about it. See the dicta of *De Villiers, C.J.*, in *Hart v. Stone* (1 Ap., 309), and *Budden v. Wilkinson* (69 L.T., 427).

Sir H. Juta (in reply): The first argument for respondent is that if I have slandered a man in consequence of a certain letter, it is very desirable that I should see the letter. That is a very good argument against granting discovery in these cases. The defendant first says that this letter exists and then asks for an order to find out whether it does or not; or he wants to prove justification, and he comes and asks for an order compelling the plaintiff to help him to do so. If he wants evidence of justification, let him plead, and then he can get his order.

[Maasdorp, J.: Why cannot he get discovery before plea; the rule leaves the matter in the discretion of the judge?]

Because it is a mere fishing application. There is not a single slander case reported in which defendant has obtained discovery before pleading. It must be remembered that all the Chamber applications are purely *ex parte*, and your lordship would hardly refuse to cancel an order which had been obtained, as this was, by the suppression of a very material fact (*viz.*, that the plea had not been filed). Then as to the second argument for the respondent. A man has made an affidavit and now wants to see a copy of it; but if he told the truth when he made it, he surely must know what he said. Then my learned friend says, "Come now, be frank; your character is at stake, so is ours; show us the letter on which you have been defamed." But we do not say that we have been defamed on any letter. He says that they ought to know what we know. We know nothing. We did not hear the slander uttered. If it were a question of a lease, it would be only reasonable that they should see it; but not so with a document on which a slander is said to have been based. We say that we have been slandered. Then let defendant come forward and either say "I am very sorry," or else "It's quite true," but he must not first try to get to know all he can and shape his course accordingly. It is true that the books do not speak of slander cases in which discovery has been refused before the plea was filed, for the simple reason that it has never been asked for; but in *Zierenberg v. Labouchere* it was refused after the plea had been filed because the plea was unsatisfactory.

[Maasdorp, J.: If you have the docu

ment and produce it, what harm will that do?]

One man might slander another and then look for his evidence. Neither in England nor here will the courts allow these fishing applications.

Buchanan, A.C.J.: The plaintiff in this matter had filed his declaration against the defendant in an action for damages for defamation of character. Before filing any plea the defendant took out a discovery order under Rule of Court No. 333b. The plaintiff now comes to the court and asks the Court to set aside this order on the ground as stated in the affidavit, that he believed the same to be a fishing application to enable the defendant to ascertain the plaintiff's case for the purpose of modelling his defence thereby. The defendant, in an answering affidavit, replied that that was not the object of the application for the discovery order, but that it was applied for on account of the non-arrival of certain material papers, which had since arrived. Those papers were now in the hands of his attorneys for the purpose of having his plea drafted. Now the rule of Court (No. 333b) allows any party to apply to a judge for a discovery order on the other party. The discovery order obtained under this rule by defendant the plaintiff now wishes to be suspended until the plea has been filed. But it had already been decided by the Court that the filing of a plea is not a necessary antecedent to the granting of such an order. In *Wiese v. Mostert* (10 Juta, 137), the Chief Justice said that this order can be applied for by a plaintiff after he has taken out his summons and by the defendant after he has entered appearance. The rule of Court is, no doubt, founded upon the English rule of practice. The former rule of practice in England had been identical with this. But since then certain words have been added to the English rule, which the English Courts have interpreted to mean that there is now a discretion vested in the judge which he must use judicially, and against which an appeal might be laid. Our rule, however, has not been so added to, but the Court has intimated in the case cited that the judge hearing the application or the Court may exercise discretionary powers if it appears from the documents that it would be unjust to grant such discovery order. The remarks of His Lordship the Chief Justice in the case quoted were that if it was prejudicial to the interests of justice, or if it was merely for the purpose of fishing for

a defence, the Court could refuse to grant such an order. Now the order in the present case has been taken out in due form before Mr. Justice Maasdorp, on seeing the declaration in this case, and there is nothing in the granting of this order which makes it appear that it was unjust to the parties. The question of its being a fishing application is now answered by the affidavit of the defendant's attorney, who says that he has already given counsel instructions as to the draughting of the plea. As I have already pointed out, by the rule either suitor is entitled to take out an order as soon as he is a party to the suit, and the fact that the plea has not been filed does not bar the issue of the order. On those grounds the application will be refused with costs.

Maasdorp, J., concurred. This application was made to me in Chambers in the same way as these applications are generally made in practice—that is to say, that they are granted almost as a matter of course and of right. I think that such applications should only be refused where something appears upon the declaration which appears to make the application unnecessary. I must say that in granting the application I had not gone into a full consideration of the different questions which might be raised in granting the discovery when the action was one of libel, but I acted simply on the clear rule of Court. Now looking at the pleadings, it would appear that some reference was made to certain written documents, and when the application for discovery was made, there was nothing to show me that that written document would be unnecessary for the purpose of disposing of the suit. Seeing that in this libel suit a document has been referred to, I have come to the conclusion that this discovery order should be granted as necessary to the case, without going fully into the pros and cons. Now the applicant in this case said that he would be quite willing to have the rule suspended, and would produce the necessary documents after the plea had been filed. But there was no reason that I can see why no order should be granted after the plea has been filed which should not be granted before the pleas had been filed. If the discovery then would produce a document which would be necessary for the purposes of this case, then the discovery would be equally useful at this stage. If in using my judicial discretion I had done anything which had actually done an injury in prejudicing the

action, perhaps I might have modified my views to save that injury, but there was no indication that this order would work against the interests of either party. The order was simply for a discovery, and I have already recorded my opinion that it was not necessary to have the plea filed before an order of discovery was made.

The application was accordingly refused, with costs.

[Applicant's Attorneys, Messrs. Godlonton and Low; Respondent's Attorneys, Messrs. Van Zyl and Buissinné.]

Ex parte RHODES, IN HIS CAPACITY AS
PRESIDENT OF THE WESLEYAN METHODIST
CHURCH OF SOUTH AFRICA.

Mr. Buchanan applied for an order authorising the transfer of certain property. The trustees for the property were all deceased, and it would be necessary to appoint fresh trustees in order to pass transfer.

The Court appointed the President of the Wesleyan Methodist Church in South Africa for the time being trustee, with power to pass transfer of the property.

MELMAN V. FALKOW.

This was an application for an order compelling respondent to vacate certain premises.

Mr. Gardiner appeared for the applicant.

Defendant appeared, and undertook to vacate the premises before the 1st January.

An order for ejectment was made, defendant to go out on or before the 19th December.

Ex parte GREENBERG.

This was an application for leave to mortgage certain property.

Applicant's petition stated that she, Dora Greenberg, of Wynberg, was lawfully married to Marcus Greenberg without any special settlement or contract in the United States of America. They arrived from thence in this colony about seven years ago, and started business as hawkers. In April, 1901, petitioner, who had for some time carried on business as a hawker on her own account, left her husband in consequence of his ill-treatment. Thereupon he gave public notice by newspaper advertisement that he would not be responsible for her debts; certain firms, however, continued to supply her with goods on her own credit. She subsequently returned to live with her husband at Wynberg, but con-

tinued to carry on business on her own account. While so living with him she advanced him £60, wherewith he purchased certain bricks which were used for foundations on a certain plot of land, the property of petitioner's husband; she also advanced him various other sums. On June 13, 1901, he was declared by order of Court to be of unsound mind, Dr. Dodds being appointed curator to his person and Robert E. Ball, of Cape Town, curator to his property. Finding the estate involved, Mr. Ball called a meeting of creditors, and, it having been decided to offer his business for sale as a going concern, it was purchased by one Isaac Katzen, of Claremont. Katzen placed petitioner in charge of the business, with the understanding that so soon as she should have paid him the money he had expended in the purchase thereof, she should be entitled to retain possession of all the remaining assets. The said estate was afterwards placed under sequestration, and she purchased from the insolvent estate a certain piece of land situate at Wynberg, being a portion of "A" of the lots marked Nos. 12 and 14. The trustee agreed that petitioner should purchase this land, and hold it as her own separate property. However, transfer was passed by the trustee to her as "Dora Greenberg, married in community of property to Marcus Greenberg (a lunatic), but a trader in her own name." The said land was purchased out of moneys derived from the profits of petitioner's separate business.

Petitioner is desirous of erecting buildings upon this land, and for that purpose of raising money upon mortgage thereof, but she is informed that the Registrar of Deeds is not prepared to register such a mortgage except under an order of this Honourable Court, or unless petitioner is assisted by her said husband. Her husband has been allowed by the curator of his person to leave the Valkenberg Asylum, but he is still incapable of managing his own affairs, and the order declaring him of unsound mind has not been discharged or set aside.

Wherefore petitioner prayed that she might be allowed, without the assistance of her said husband, to mortgage the said land for £750, and that she might further be authorised without assistance to pass transfer thereof, in case she should effect any sale thereof.

Mr. Gardiner moved, and the Court granted an order as prayed.

[Applicant's Attorneys, Messrs. W. E. Moore and Son.]

Ex parte LINDENBERG.

Mr. Benjamin applied for an order authorising the Registrar of Deeds to register certain mortgage bonds. The husband of the petitioner had written to her attorneys, stating that he declined to be a partner in any undertaking his wife might wish to make. There had been a separation between the parties.

An order was granted as prayed, subject to a condition that no responsibility attach to the husband.

Ex parte EXECUTORS DATIVE OF THE LATE AJOUHAR.

This was an application for leave to sell certain property. The will of the testator came before the Court on the 6th of May, 1901, when the Court gave judgment on a special case arising out of the said will. (See 11 Sheil 580). The petitioners now stated that the only asset in the estate was the property at Claremont referred to in paragraph 2 of the special case, viz., a certain piece of land, measuring 2 morgen 106 square roods. As some of the issue of the testator's wife by a subsequent marriage still survive, the estate could not in consequence of the said judgment be divided, as the heirs could not be ascertained. On the said land there is a homestead and two cottages; the former and one of the latter being in a dilapidated and unsanitary condition. The other cottage is occupied by one of the heirs at a rental of £1 10s per month. The land is situated in the best part of Claremont, and would sell for a considerable sum. The Colonial Orphan Chamber (being the administering executor) had advanced various sums in the administration of the estate, and was a creditor thereof to the extent of nearly £55. Costs had also been incurred to the amount of £51 8s. 10d., and divisional and municipal rates were nearly due. The heirs (who were all poor) derived little or no benefit from the bequest and it was stated that it would be for the advantage of all concerned if the property could be sold, and after the liabilities of the estate had been discharged, the balance could be invested by the Colonial Orphan Chamber and the investment be administered in such manner as their lordships might order, having regard to the true intent of the testator's will. They, therefore, prayed for an order:

(a) Authorising them to sell the said pro-

perty either by public auction or by private treaty, with directions to the Registrar of Deeds to register transfer, or transfers (free of the conditions of the will executed on July 6, 1847, by the aforesaid testator) to the purchaser or purchasers thereof;

(b) Directing petitioners as to the disposal of the balance of the purchase money, after discharging all the liabilities of the estate;

(c) Alternative relief.

The Master's report pointed out that, as by the judgment of the Court in the special case, it was held that after the death of the children of the testator and Alima, the estate was to be divided among all their grandchildren, and as the portions accruing to testator's descendants were not yet ascertainable, no present distribution could be made. He advised that the property should be sold and the proceeds lodged with the Colonial Orphan Chamber until the time arrives for distribution.

On the motion of Mr. Joubert, the Court granted an order in terms of the prayer of the petition, with costs out of the estate; the proceeds to be dealt with in terms of the Master's report.

Ex parte MILLER.

Mr. Buchanan moved for authority to pass certain bonds without the assistance of the husband, against whom petitioner was instituting proceedings for restitution of conjugal rights.

Granted.

Ex parte THE CAPE OF GOOD HOPE PERMANENT BUILDING, LAND, AND INVESTMENT SOCIETY (LIMITED), IN LIQUIDATION.

Mr. Schreiner, K.C., presented the third report of the official liquidators, and applied for confirmation thereof, confirmation of the liquidators' act in admitting certain claims, authority to admit certain claims, and confirmation of a remuneration to the liquidators of 5 per cent. on collections, and for a rule nisi calling upon Mrs. Moore to show cause by the 28th February next why certain money should not be appropriated to discharge a debt owed by her husband to the society, and why the costs of the proceeding should not be paid from this money.

Granted.

Ex parte NAUDE AND ANOTHER.

This was an application on behalf of Francois Petrus Naude and Petrus van der Merwe, farmers, of Richmond and Britstown respectively, praying for the confirmation of the sale of a certain erf, situate in the village of Richmond, to the petitioners, conjointly with Jacob Petrus Naude and Carel Johannes Viljoen. All four parties were heirs in the estate of the late Helena Margrith Naude, and the two petitioners were also executors testamentary. The erf was sold for £900 by public auction. The Master reported favourably.

On the motion of Mr. Buchanan, the Court granted the order as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN (Acting Chief Justice) and the Hon. Mr Justice MAASDORP.]

REX V. BARLOW. { 1901.
Dec. 13th.

Liquor Licensing Act 28 of 1883, section 75—Sale.

B. bought a bottle of brandy for two natives and received 6d. from them for his trouble.

Held, that this transaction did not amount to a sale.

Compare Regina v. Goedeman (9 Sheil, 71.)

Buchanan, A.C.J., said that a case had come before him for review from the Resident Magistrate of Oudtshoorn in which one Barlow, a European, was charged with having contravened section 75 of the Liquor Licensing Act by having sold a bottle of brandy. The facts proved were these. Two natives wanted some brandy, and for some reason or other they were unable to buy it directly, probably on account of military regulations. They gave 2s. to this man to buy it. He bought a bottle of brandy, for which he paid 1s. 6d., and handed it over

to them, and they said he could have 6d. for his trouble. There was no sale; the accused simply bought the liquor for the natives. Although he might be guilty under some martial law regulation, he certainly did not contravene this section. He was simply a messenger sent by the natives. The conviction must be quashed.

ADMISSION. { 1901.
{ Dec. 13th.

On the motion of Mr. Schreiner, K.C., John B. Kaiser was admitted as a conveyancer.

HERMAN AND CANARD V. BERNSTEIN.

This was an action to recover the sum of £48 3s. 6d., being the balance of a general account for goods sold and delivered and for money lent. On the instructions of the Court the account was referred to Mr. Nash, accountant, for report, and Mr. Nash had now reported. He stated that the defendant in this matter kept no books showing the transactions with the plaintiffs, who, on the other hand, showed every item in their books which they claimed for. In regard to certain cheques, he was satisfied that the plaintiffs were in the habit of changing cheques, and he did not hold such cheques to have been made in payment for goods. He, however, had some doubt respecting certain two of the cheques, for 10 guineas and £2 respectively, and of this doubt he gave defendant the benefit. He recommended that the claim be reduced by these two amounts, and that judgment be given for plaintiffs for £35 13s. 6d. The negligence of the defendant in not having kept account of the transactions was, in his (Mr. Nash's) opinion, the cause of the dispute, and he therefore recommended that judgment be given with costs for plaintiffs.

Mr. Benjamin for plaintiff; Mr. Buchanan for defendant.

Mr. Benjamin moved for judgment.

Mr. Buchanan: I should wish to say a few words on the question of costs. This is a claim for goods sold and delivered. In such cases the magistrate has jurisdiction to the extent of £100. The case ought to have been brought in the Magistrate's Court, and I submit that costs should be awarded only on the scale of that Court.

Mr. Benjamin was not heard in reply.

Buchanan, A.C.J., said there were about 150 items in dispute in the account annexed to the plaintiffs' declaration, and

this account was not only for goods sold and delivered. If it had been so it would have been within the jurisdiction of the Magistrate, but there were a number of cash entries and cash loans and cheques given, which would have excluded it from the Magistrate's jurisdiction. It was, therefore, necessary to bring the action in the Supreme Court. The Court was unable to go into the accounts and referred them to an accountant, who had gone into the matter, and recommended that judgment be given for the sum of £35 13s. 6d. Judgment must be given for the plaintiffs for £35 13s. 6d., with costs.

O'BRIEN V. WHITEHEAD AND { 1901.
ANOTHER. { Dec. 13th.

Divisional Council Election—Contractor.

In 1897 the two brothers W., who were then the joint owners of a farm, allowed the Divisional Council of Port Elizabeth to graze certain mules and to erect certain sheds on their land in consideration of an annual payment of £5. The agreement was terminable on three months' notice on either side. While this contract was still running the brothers agreed to divide the farm and the portion on which the aforesaid buildings were erected fell to J.W. Thereupon G.W., the other brother, gave notice of the division of the farm to the Divisional Council stating that he had no further interest in that portion on which the Council had erected their buildings and requesting that the rent should in future be paid to J.W. In October, 1901, G.W. was elected a member of the Divisional Council. Applicant, who was also a candidate at the same election now moved, to have the election of G.W. set aside, on the ground that he was with his brother a co-contractor with the Council and as such was disqualified by section 30 of Act 40, 1889. Held, that as G.W. was not a con-

tractor the application must be refused with costs.

This was an application by Thomas O'Brien, of Port Elizabeth, the respondents being George Stephen Whitehead and the Divisional Council of Port Elizabeth. The respondent Whitehead was called upon to show cause why his election as a member of the Divisional Council for District 2 of the division of Port Elizabeth should not be set aside by reason of his being ineligible for nomination and election on the ground that he was interested in a contract with the Council. Applicant also asked for an order declaring him (applicant) to have been elected a member of the Council.

Applicant, in an affidavit, deposed that he was duly nominated as a candidate at the Divisional Council election on the 29th October last. Two other persons were nominated, viz., the respondent Whitehead, and Edward Humphries. Deponent alleged that the respondent Whitehead was a partner in the firm of Whitehead Brothers, who are, and were, at the time of the nomination and election, the registered owners of the farm Chelsea. In 1897 Whitehead Brothers hired a certain portion of the farm to the Council, with certain grazing and water rights, at an annual rental of £5, the agreement and contract being subject to three months' notice on either side. He had served a protest on the Civil Commissioner on the 30th October against Whitehead's nomination, on the ground that Whitehead was disqualified by reason of this alleged contract. Applicant alleged that by Act 40 of 1889, sections 4 and 30, the respondent was ineligible for election.

In a replying affidavit, George Stephen Whitehead stated that he was part owner of the farm mentioned, his co-proprietor being his brother. They originally purchased the farm together, and it was transferred to them in the name of Whitehead Brothers. It was a quitrent farm, and had his brother and himself not entered into the arrangement with the Council, the Council could have entered on the land. An agreement was made in March, 1900, whereby deponent and his brother agreed to divide the farm, so that each should have a defined portion. Arbitrators were appointed for the purpose of dividing the farm, and the farm was subsequently divided, respondent's brother, John William Whitehead, having the portion which included the land let

to the Council. Respondent said he had no further interest, and had had no interest since April, 1900, in the portion let to the Council. He stated further that the agreement was for three years, and expired in 1900.

Supporting affidavits were read by George Scott Parkin, one of the arbitrators referred to, who deposed to the division of the farm as stated, and by John Fairish, clerk to the Divisional Council.

In a further affidavit applicant stated that there had been no variation of the contract of 1897, in respect to the contracting parties. He denied that the contract had expired.

Mr. Schreiner, K.C. (for applicant): This is a contract within the meaning of the Act. If A and B are in partnership, and I make a contract with B, A is a co-contractor. Then as to the grazing and water rights, there has been no division of these. The water rights as well as the buildings are paid for by the Divisional Council, for one-fourth of the £1,900 went to the brothers Whitehead jointly. The respondent has therefore a contract with the Council. As to who is a contractor, see Act 40 of 1889, sections 4 and 30, and *Searle v. Parsons and Another* (5 Sheil, 374). In this case the Council is the hirer, in that a Council was the letter, and on that ground the case failed. Here it was the duty of the Civil Commissioner to have held a commission under section 75, and to have done what was prescribed by sections 55, 56, and 57. See also section 59, which is not referred to in section 71; also section 82 (c), as showing that there has been no competent declaration of the election. The office has never been properly filled, and therefore we are entitled to the seat. The gazetting of Whitehead is a nullity, and we are entitled to the seat just as we should be if he had died on November 5.

[Buchanan, A.C.J.: In the case of the Vryburg election, a dead man was elected, but the other candidate did not get the seat.]

No, in that case De Villiers was not actually elected. Here the Civil Commissioner did not do his duty. He could have acted under sections 56 and 57. I refer to his duties merely because if he failed therein the election was a nullity, and we are entitled to the seat. Then on the merits, there is no doubt about the subsistence of this contract. See *Searle v. Parsons and Another* (5 Sheil, 374) and *Rogers on Elections* (Vol. 2, p. 26 et seq.), as to the dis-

qualification of contractors. Under sections 240 and 242 of Act 40, 1889, all contracts in respect of which over £10 is to be paid must be in writing, must be advertised, and cannot run for more than three years unless renewed. This, however, being only a £5 contract was not subject to these restrictions. It was a standing contract, terminable at three months' notice.

[Buchanan, A.C.J.: Section 242 refers to all contracts.]

No; only to contracts for "the doing of work and the supplying of materials, articles, or things." This contract was for grazing rights. Lastly, it is said that last year the brothers agreed to partition their farm, but even if that was so, how could it affect a contract with the Council. I submit that applicant has a right to have the election declared void and to be returned as a member of the Council.

Sir H. Juta, K.C. (for the first respondent: Section 82 of the Act has nothing to do with this case. We must look to section 30. The whole question is, is my client participating in the profit of any contract with the Council? The partnership between him and his brother is not a farming partnership, but a partnership in a grocery business. It is true that the farm was bought in the name of Whitehead Brothers, but the respondent's portion was miles away from the buildings occupied by the Council, and in January last he notified the Council that he had no further interest in the land let to them. The arbitrator said that the farm had been subdivided, and so respondent was clearly not a contractor under section 30. But, supposing he still had an interest in this land, would that make him a contractor in the sense of section 4? Land can hardly be called "a thing." A Divisional Council does not deal in land, but in carts, picks, shovels, horses, etc. Under sections 144 and 147 the Divisional Council has power to take quitrent land; hence the Act could never have contemplated their hiring it or dealing in it. It is true that the Court held in *Searle's* case that letting to the Council and hiring from the Council are very different things, but was this a contract at all? The original so-called contract was for more than one year, and as it was not drawn up according to the Act the Council could not have sued or been sued on it. Then, again, no contract can be made to endure indefinitely. It will not stand for ever simply because no notice is

given of its termination. My main point however is that my client does not participate in any profits derived from letting this land and therefore is not a contractor. Lastly, even if my client is disqualified, I do not see why the applicant should be declared elected. If the proceedings were irregular how can O'Brien be regularly elected?

Mr. Schreiner (in reply): Land is certainly a "thing." Things are divided into *corporales* and *incorporales*, and the former into *mobilia* and *immobilia*. As to the alleged irregularity of the contract, the Court will not listen to that or allow the person who has been guilty of such irregularity to take advantage of it. Then *Green v. Griffiths* (4 Juta, 346) shows that a contract will continue under a change of one of the co-contractors unless it has been novated. Here there was no novation.

[Buchanan, A.C.J.: That is not necessary. As soon as George Whitehead gave notice, the contract was at an end as far as he was concerned.]

There is no indication that he ever gave notice, and the clerk of the Divisional Council did not take that ground, but the ground that the contract was for three years only. We do not impeach the whole proceedings, but only the election and the gazetting of the respondent.

Buchanan, A.C.J.: In the year 1897 the two brothers Whitehead were the joint owners of a farm in the Port Elizabeth division, and the Divisional Council of that division, wishing to erect certain workmen's shelters and sheds for their mules, engaged in the repairing of the roads, communicated with the brothers Whitehead, asking them to let them have the right of putting up these buildings and of grazing their mules on the farm. Whitehead Brothers wrote back saying they would allow this to be done on the payment of £5 per annum. This offer was accepted, and the correspondence on both sides showed that the agreement could be terminated by three months' notice on either side. Section 242 of the Divisional Council Act, No. 40, 1889, says that all contracts entered into by the Council shall be binding upon their successors in office, provided that no such contract shall be made to endure for a longer period than three years. Ordinarily speaking, therefore, this contract would terminate three years after it was entered into. While the contract was still running, in the

month of March, 1900, the two brothers Whitehead, who held the farm in undivided shares, agreed to divide the farm, and the portion upon which these shelters and stables had been erected fell to the brother John. The Council paid the rent for the year 1900, £5, in January, 1901, and both the secretary of the Divisional Council and George Whitehead state that notice was then given by Whitehead to the Council of the division of the farm, and that George Whitehead had no further interest in the portion of the farm upon which these buildings were erected, and that the rent payable in the future should be paid to John, and not to the brothers jointly. George Whitehead, the respondent, in his affidavit further states that since the 1st of April, 1900, he has had no interest whatever, and still has no interest in the land on which the Divisional Council erected the building. The secretary of the Divisional Council says that the original contract having expired, the Council have not yet made up their minds whether to negotiate for a renewal of the contract, but that it remains an open question whether the Council will continue to pay rent, or whether they will avail themselves of the powers given by law, the farm being held on quitrent tenure. This application is founded on the provisions of the 30th section of the Divisional Council Act, which enacts that no person shall be eligible as a Councillor who is concerned in or who participates in the profit of any contract with the Council. In October, 1901, eighteen months after the farm had been divided, and after George Whitehead had given the Council notice that he was no longer interested in that portion of the farm, and after the three years of the contract had expired, George Whitehead was elected a member of the Divisional Council. The applicant was a candidate at the same election, but received fewer votes than did Whitehead. Applicant entered a protest with the Civil Commissioner, but notwithstanding the protest, the latter declared George Whitehead duly elected. When a protest is lodged the Act specifies how the Civil Commissioner is to proceed, but the applicant alleges that the Civil Commissioner did not make a proper inquiry. The applicant now asks the Court to do what he says the Civil Commissioner should have done. On the facts which have been proved by affidavit I cannot hold that at the time of the election George Whitehead was concerned in or was participating in the profits of any contract existing at that time with the Divi

sional Council. The contract had expired, and it had not been renewed; notice had been given the Council by George Whitehead that he had no longer any interest in that portion of the farm, which he was quite entitled to do. The applicant states that the records of the Council do not contain any resolution on the subject of cancellation of the contract, but the passing of a resolution by the Council on the subject was not necessary. Three months' notice was necessary, and that was given in 1901, long before the election. As it has not been shown that the respondent George Whitehead was concerned in or participated in the profits of any contract with the Council, the Court must refuse the application; with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Walker and Jacobsohn; Respondent's Attorney, G. Trollip.]

STEYTLER V. COWLING. { 1901.
Dec. 13th.

This was an application for an order compelling Mrs. Emma Cowling to give up possession of certain premises at Claremont. It appeared that the respondent and her husband, John Frederick Cowling, entered into a deed of separation some time ago, and Mr. Steytler was appointed trustee. Under the agreement it was provided that she should have possession of certain property at Claremont, but that if she neglected the property or reverted to habits of intemperance, the trustee should be entitled to call upon her to leave and deliver up the property. An affidavit was now filed showing that Mrs. Cowling had abandoned herself to habits of intemperance, and had absented herself from the property, and her present whereabouts were unknown. It was stated that on one occasion she set fire to a cart which was standing in front of the door, and declared that it was her intention to burn the house down, and that she would drink as much as she liked.

Sir H. Juta, K.C., moved.

In reply to the Court, Sir Henry Juta said that the respondent had apparently got to know that legal steps were about to be taken against her, and had left the property. She could not now be found. Service had been made at the place.

The Court granted a rule nisi, returnable on January 12 next, calling upon respondent to show cause why she should not give up possession of the property.

Ex parte HEIDE. { 1901.
Dec. 13th.

Liquor licence—Temporary transfer
—Section 56 of Act 28 of 1883.

Applicant had received temporary transfer of a hotel licence from one R. Subsequently applicant applied to the Resident Magistrate to grant a temporary transfer of this licence to one G. This the Magistrate refused to do on the ground that he had no power in the matter as the transfer from R. to applicant had not been ratified by the Licensing Court. Held, that the power vested in the Magistrate and two members of the Licensing Board of sanctioning a temporary transfer is not exhausted by the fact that one temporary transfer has already been allowed.

This was an application for an order authorising the Resident Magistrate of Cape Town to grant a temporary transfer of the licence of the Camp's Bay Hotel. Early this year a licence for the Camp's Bay Hotel, which was owned by Mr. Heide, was granted to Mr. Bertie Rack. Subsequently temporary transfer of the licence was given to Heide, who resumed occupation of the premises. On November 2, 1901, Heide sold the hotel to Percy Woodhead Green for a sum of £17,000. He applied to the Resident Magistrate to grant a temporary transfer of the licence to Green, but the Magistrate declined to grant the transfer on the ground that the transfer from Rack to Heide had not been ratified by the Licensing Court. The point at issue was whether, according to the Liquor Licensing Act of 1883, when once a temporary transfer had been granted no second temporary transfer could be granted until the first had been confirmed by the Licensing Court. There was no objection to Mr. Green personally.

Mr. Schreiner, K.C. (for petitioner): This is a mere question of the interpretation of section 56 of Act 28 of 1883. Sections 7, 18, and 19 define a "temporary" licence. "Temporary" in section 56 must refer to the same thing as in sections 7, 18, and 19. A temporary licence, or a club licence, con-

not be temporarily transferred. But section 61 refers to an entirely different thing. Surely the executor of an estate can get a temporary transfer of a licence to another person. The Magistrate has probably been misled by the vague language of section 58. His idea seems to be that the temporary transferee must hold on till the next Licensing Court; but the section only means that such temporary transferee is placed in the position of a man who never held a licence.

[Maasdorp, J.: By Act 25 of 1891, section 13., sub-section 4, the temporary transferee is not quite in the position of a new holder.]

No, but the transferee from the holder is in the same position as an executor of a deceased licensee would be, and so can give a temporary transfer to anybody else. See also section 8 of Act 44 of 1885. By this the Magistrate and two members of the Licensing Board can force a temporary licensee to transfer a licence if he unjustly refuses to do so, and can it then be said that he may not transfer if he wishes to do so?

Mr. Howel Jones (for the Crown): Act 44 of 1885 refers only to the original licensee and "holder"; that does not mean temporary holder. The original holder still retains certain rights after a temporary transfer has been made. The Act does not apply to the present case. The transfer to Heide should be cancelled, and Rack could then give transfer to Green. The transfer could be cancelled if the parties would agree to this being done.

[Buchanan, A.C.J.: Suppose the transferee misconducts the place?]

The licence might be lost altogether. Under section 58 of Act 28, 1883, Heide will certainly have to apply for a licence at the next Licensing Court. Section 42 gives the Licensing Court power to grant transfer of a licence by the holder to any other person. See also section 60. Transfer and renewal are practically the same thing. In English law the term "renewal" is used very widely. The only effect then of a temporary licence would be that the applicant would not have to get a memorial signed as in the case of a new applicant.

[Buchanan, A.C.J.: If the transfer takes place during the first half-year it must be ratified at the September meeting of the Court; but if in the second half-year no ratification seems to be necessary?]

I submit it must be ratified in any case. The Act does not contemplate a transfer from one temporary transferee to another.

That practice would be open to abuse, and might prejudice the original transferor.

[Maasdorp, J., referred to section 57 on the question of a temporary licence.]

In this case we are not dealing with a temporary licence, but with a temporary transfer.

[Maasdorp, J.: Is not the transferee the holder?]

No, a distinction is drawn in *Price v James* (Q.B.D., 1892, vol. 2, 428). I submit that the first transfer should be cancelled, and transfer then given by the holder of the licence to the new transferee.

Mr. Schreiner was not called upon in reply.

Buchanan, A.C.J.: The question for decision depends upon the construction placed upon the 56th section of the Liquor Licensing Act of 1883. By that section any person who is the holder of a licence other than a temporary or club licence, who during the currency of his licence sells or disposes of his business in respect of which the licence was granted, may make application to the Magistrate for a temporary transfer of such licence to the purchaser of such business, and such Magistrate and any two members of the Licensing Board Court may, if they think fit, and upon proof of payment by the applicant of the sum prescribed for such transfer, grant the temporary transfer of such licence accordingly. Then the 61st section says that any person to whom a licence may be temporarily transferred, shall, until the end of the period for which the licence was granted, possess all the rights, and be subject to all the duties, obligations, and penalties of the original holder of the licence." These two sections taken together show that when the person who has originally obtained the licence transfers that licence to another person, with the consent of the Magistrate and two members of the Licensing Board, the transferee, steps into the position of the original grantee, who is relieved from any liability. It is stated on affidavit that the practice formerly had been to allow of a licence being temporarily transferred more than once; but that recently the authorities have taken a different view of the law, and are now of opinion that once the original holder of a licence has given temporary transfer of his licence, and the transferee wishes to again transfer to another person before his transfer has been confirmed by the Licensing Court, the Magistrate has no authority or power to ratify the second

temporary transfer. Counsel have referred to all the sections of the different Acts which bear upon this point, and after reading them, I think there can be no doubt that the power vested in the Magistrate and the two members of the Licensing Board of sanctioning a temporary transfer is not exhausted by the fact that one temporary transfer has already been allowed. If the Magistrate is satisfied that a second temporary transfer should be granted, the law allows him to sanction it being done. The law does not compel him to do so, but no mandamus is asked for here to compel him to ratify the second temporary transfer. The Court is only asked to declare that the Magistrate has authority to ratify such transfer; in other words, that the Magistrate has power to ratify a temporary transfer of the same licence more than once. The order will, therefore, be granted as prayed.

Maasdorp, J., said that the only point to be considered in this case was whether the petitioner was the holder of the licence, because if not, then in this case there was no holder at all, and the licence belonged to no one. In ordinary circumstances, when a transfer took place of certain rights from one person to another, the transferee then became the holder of such rights, and he thought that the same construction must be given to the words in this Act. Therefore, even without section 61, the holder of the licence under this section would be entitled to go to the Magistrate and apply for the licence to be transferred to a person of whom the Magistrate approved.

[Applicant's Attorney, Mr. C. W. Herold.]

JOE V. MAHOMET { 1901.
Dec. 13th.

Beneficial occupation—Act 8 of 1879, section 7.

Appellant had been sued for rent of premises hired to him for a certain term. He pleaded want of beneficial occupation during a portion of the aforesaid term by reason of the said premises having been closed by the local authority under Government regulations in consequence of an outbreak of plague thereon. He

pleaded moreover that respondent (the landlord) had been guilty of such negligence as would disentitle him to recover, and for which appellant claimed damages in re-convention.

Held (1) That as by section 7 of Act 8 of 1879 loss of beneficial occupation through vis major no longer exempts the tenant from payment of rent for premises of the beneficial occupation of which he has been so deprived respondent was entitled to recover (2) That as in the Court below the Magistrate had found that the respondent landlord had not been guilty of negligence appellant was not entitled to damages in reconvention.

This was an appeal against the decision of the Resident Magistrate of the Cape in a case in which the present respondent obtained judgment for the sum of £10, which he claimed as one month's rent of premises in Long-street, let by him on a monthly tenancy to the defendant. The amount sued for was in respect of rent for the month of April. Defendant (now appellant) denied the debt, and pleaded the general issue, and counter-claimed for damages alleged to have been sustained by him for the reason that plaintiff failed during the months of April, May, and June, 1901, to give him occupation of the premises in such good order as to enable him to carry on business.

Mr. Wilkinson read the record of evidence, from which it appeared that in March the floors of the premises in question were taken up and rats discovered. Subsequently the defendant (appellant) became ill with plague and the premises were closed by the authorities.

Mr. Wilkinson (for appellant): My contention is based on two points. First that the appellant did not have the beneficial occupation of the premises during the time for which rent is now demanded. It may, perhaps, be said that the General Law Amendment Act is inconsistent with this contention, but I submit that in this case section 7 of that Act does not apply. The real reason for closing these premises was partly the plague, and partly the respondent's default. The words of the section

"suchlike unavoidable misfortune" show that it was only in cases in which the want of beneficial occupation arose from unavoidable misfortunes similar to those specified that it was intended to make any change in the Common Law. In Statutes general words following specific words are restricted in their interpretation by such specific words *Maxwell on Statutes* (Chap. II., Sec. 5) Plague is not *ejusdem generis* with "inundation," "invasion," "tempest," etc.

[Buchanan, A.C.J.: If the Court has already interpreted these words, it will hold to its own interpretation.]

In the case of the *United Mines of Bultfontein v. De Beers* (10 Shiel, 665) it was only held that Act 8 of 1879 bars any claim a lessee of a mining lease would otherwise have had to remission of rent on account of want of beneficial occupation by reason of hostile invasion.

[Maasdorp, J.: You claim exemption. What law exempts you?]

The common law of the country. See *Van der Linden* (Bk. 1, c 15, sec. 12). This is not derogated from by section 7 of Act 8, 1879, which only applies to a certain class of unavoidable misfortunes. It may be fairly questioned whether plague is unavoidable, though it may be unforeseen. My second point is that if the premises became useless by reason of the default of the landlord the tenant would be entitled to a remission of rent quite apart from damages.

[Buchanan, A.C.J.: In this case the Magistrate found that there was no evidence of the landlord's default.]

I submit that respondent's refusal to put in new floors in March was evidence of default.

[Buchanan, A.C.J.: Still appellant remained in occupation.]

Yes, but with the floors up he could make no use of the premises.

Mr. Currey for respondent): This Court will accept the finding of the Magistrate on the fact that the landlord was not guilty of default. The appellant remained in occupation of the premises a week after the floors were up, and then only left because he caught the plague. The real point is, is misfortune arising from an act of the executive unavoidable misfortune, and that point was decided in the affirmative in the similar case of *De Jong v. Kaplansky* (11 Shiel, 203) and *United Mines v. De Beers* (10 Shiel, 665).

Mr. Wilkinson was not called upon in reply.

Buchanan, A.C.J.: The appellant was sued in the Magistrate's Court for £10, rent for the month of April last. To this claim he denied the debt, pleaded the general issue, and also claimed in reconvention for damages for want of beneficial occupation of the premises leased to him. It appears that in or about the month of March the floor of the premises in question was taken up, but this fact did not prevent the beneficial occupation of the premises by the appellant. But during the month of April the appellant was attacked by plague, and was removed to the plague hospital. He did not get back for the rest of the month, and so, in that sense, he did not have the beneficial occupation of the premises. Under the Common Law of the Colony, where, through *vis major*, a tenant has not had the beneficial occupation of property leased, he was, in consequence, entitled to a remission of rent, but by the General Law Amendment Act of 1879, this right of remission was taken away from the tenant. It has been contended in this case that this removal of disabilities must be limited to the instances mentioned in the 7th section of this Act, which are, inundation, tempest, or such like unavoidable misfortune; but in previous cases which have come before this Court, and especially in the case of the *United Bultfontein Mines and the Consolidated Mines*, the Court indicated that this section of the Act has a much wider interpretation, and that it was intended to alter the law in all these cases in which the tenant might have claimed a remission of rent because he has lost the beneficial occupation through some superior force or through some unavoidable misfortune. Mr. Wilkinson has again argued this point; but the Court does not feel at liberty to depart from the principles laid down in previous cases. The Court is therefore, unable to say that the appellant is entitled to be relieved from the payment of rent. The appellant's claim for damages suffered through the default of the landlord might have been a good one had it been substantiated, but the Magistrate has found that no default has been proved on the part of the landlord, and has consequently dismissed the claim. There have been cases before the Court in which it has been shown that a tenant is entitled to damages where

damages have been sustained through the landlord not having done his duty. But in this case such a default has not been proved. The Magistrate gave absolution from the instance on the claim in reconvention. It is a pure question of fact whether there was damage or default, and though there is some evidence, we do not feel that

we would be justified in saying that the Magistrate's finding on the facts is wrong. The appeal must therefore be dismissed, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys, Messrs. Silberbauer, Wahl and Fuller; Respondent's Attorney, Mr. J. J. Michau.]



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<i>Ex parte</i> Carroll 12		Assignment, <i>see</i> Insolvency 243	
Arbitrators—Award—Irregularity—Act 29 of 1898.		Attachment of Person, <i>see</i> Interdict 7	
The Court refused to make an award of arbitrators a rule of Court on the grounds of the following irregularities in their proceedings. (1) They did not accept the trust till after the date fixed for making their award had expired. (2) They had not appointed the umpire before commencing the arbitration. (3) Without hearing the respondent they decided against him.		Attachment of property—Sheriff's return.	
Semble: It is not necessary that the notice given to parties by arbitrators of the date of their meeting should be in writing.		A return of nulla bona had been made to a writ of attachment sued out in the Magistrate's Court. Application was thereupon made to the Supreme Court to have certain immovable property of defendant declared executable. The Supreme Court, however, refused to grant the order as prayed, as the return aforesaid had not been made to a writ issuing out of the said Supreme Court. But the Court granted provisional sentence against defendant, and intimated that should it not be satisfied the property in question would be declared executable.	
Newman v. Booty, N.O. ... 176		Ross & Co. v. Chetty 500	
Articled Clerk—Service—Sufficiency.		Attachment <i>ad fundandam jurisdictionem</i> —Property of alleged rebel—Service of process.	
An articled clerk who had served articles from December 14, 1895, till the end of September, 1897, was then sent by his principal to manage a branch business. He continued to do this for five months and then returned to his service, in which he remained		Kannemeyer v. Havinga ... 364	

	PAGE		PAGE
Attorney—Discretion to compromise—Responsibility.		from McL. on behalf of Kendrick without disclosing the name of his principal in the contract of purchase. He, however, received brokerage from McL. in consideration of his having arranged the sale of the property to McL. or his nominee. He now claimed brokerage from defendant, alleging that he had been employed by defendant's agents to sell the property.	
Appellant engaged respondent to conduct his case in a certain R.M. Court against one Phillips. Respondent sent his clerk to conduct the case, which was called before appellant had arrived, and in consequence the clerk agreed to compromise the case with Phillips.		The Court found as facts (1) that the so-called agents held no power of attorney from defendant. (2) That the sale to McL. was not negotiated through defendant. Held, that the aforesaid claim could not be sustained: (1) Because at the dates of the transactions in question plaintiff was not a licensed broker. (2) Because he had been paid brokerage on the contract between McLeod and Kendrick, and there was no proof that he had ever effected the sale to McL., or had been commissioned to act as defendant's agent.	
Held, That his error (if any) in so doing was at most an error of judgment, and that as he had shown neither mala fides nor want of ability in his conduct of the case, his principal had incurred no liability to appellant.		Webner v. Hartung ... 354	
Mfazwe v. Miller ... 262		Broker—Action for Commission.	
Attorney—Service of articles.		Wordon v. Ralston ... 82	
A clerk who had been articulated to a firm of solicitors in Scotland, and had served with them from September 2nd, 1889, till November 17th, 1892, when his articles were ceded by the said firm to another firm of solicitors with whom he had served continuously till November 22nd, 1894; was allowed to enter into articles with an attorney and notary of this colony for one year.		Broker, see Illegal Arrest ... 151	
Davidson, ex parte ... 173		Bill of Lading, see Delivery ... 36	
Audit—Costs—Partnership.		Booty captured by the enemy— <i>jus postlimini</i> —Roman and Roman Dutch Law.	
Pfuhl v. Laughton ... 10		The distinctions made by Roman Law between various classes of moveables as to <i>jus postlimini</i> are not recognised in Roman Dutch Law.	
Award, allocation of, between Co-Salvors, see Salvage ... 537		The original owner of movable property captured by the enemy is divested of such property when the enemy has acquired firm possession of the goods and they have been carried <i>infra præsidia</i> , that is to say to a place of safety.	
Brokerage — Unlicensed broker — Privity of contract.		Mshwakezele v. Gudusa ... 259	
H. had leased certain premises to one McLeod, with option of purchase. McL. agreed to purchase on condition that transfer should be given to himself or to his nominee, H. accepted these terms. McL. nominated one Kendrick and transfer was given to her. Plaintiff (who was not then a licensed broker) had purchased			

Barman—see Liquor 205

Bar, Removal of, see Practice ... 193

Beneficial occupation—Landlord and Tenant—Act 8 of 1879.

Applicants had let a certain hotel on a monthly tenancy to respondents on condition inter alia that a month's notice of discontinuance of the tenancy should be given in writing. The hotel was closed by the authorities on March 4th in consequence of a case of plague. Applicants gave the lessee notice to terminate his tenancy on April 4th, and now claimed a month's rent. Respondents tendered rent for the four days of March during which they had had beneficial occupation.

Held, that by Act 8 of 1879 loss of beneficial occupation even by an act of the Executive does not exempt a tenant from payment of rent.

De Jong and another v. Kaplansky & Co. ... 203

Brokerage—Expiration of agency—Undisclosed principal.

Plaintiffs, a firm of brokers, had obtained from defendant authority to sell certain property for three months. They failed to effect a sale within that time, but thereafter entered into communication with one J., whose name they did not disclose to defendant. Their negotiations with J. fell through and subsequently he purchased the property direct from defendant. Plaintiffs now sued defendant for brokerage.

Held, that as a broker could not be entitled to brokerage unless it was known to the principals that they were dealing in consequence of his introduction, judgment must be given for defendant with costs.

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The case of Roux v. Brittain (2 Sheil, 169), distinguished.

Rice & Co. v. Sanderson ... 716

Breach of contract of lease—Damages for want of occupation.

Plaintiff, acting for his son, had taken a lease of certain shop premises from defendant. Defendant contended that it was stipulated in the said lease that these premises should not be used as a grocery or haberdashery shop. Plaintiff denied that he knew anything of this restriction when he entered into the said lease. The building was not then complete. A sum of money was paid at the time as a deposit and a receipt was given by defendant, in which no other condition of the lease was named than that the rent should be paid monthly in advance. Plaintiff, however, admitted that this receipt did not contain all the conditions of the lease. When the building was completed, defendant refused to give possession. Plaintiff now claimed damages for want of occupation of the said premises.

Held, on the evidence, that defendant had discharged the onus which was on him to prove the restriction on the user of the premises, and that judgment must be for defendant, with costs.

Krawitz v. Friedgood ... 678

Case of Action—Pleading.

Appellant had sued the undernamed three sets of respondents (in the Magistrates' Court, Cape Town), the first for non-delivery of luggage at the Cape Town Docks, the second for not having deposited the said luggage in their warehouse, the third for not having delivered to him (appellant) the luggage in question. In none of these three cases did appellant aver

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<i>that the party sued had not fulfilled the respective duty in question.</i>	
<i>Held, that as such a summons did not disclose any cause of action, the appeal must be dismissed.</i>	
<i>Romoff v. Union-Castle Coy., Table Bay Harbour Board and McKenzie & Coy. ...</i>	265
Cancellation of Sale, <i>see</i> Summons	23
Charter of Justice, section 50—Appeal to Privy Council.	
<i>The Supreme Court has no power to grant leave of appeal to the Privy Council where the application for such leave has not been made within fourteen days from the judgment as required by section 50 of the Charter of Justice.</i>	
<i>The Cape of Good Hope Building Society v. The Bank of Africa ...</i>	18
Charter Party, <i>see</i> Demurrage	693
Change of course of river—Onus of proving, <i>see</i> Deed of Transfer	582
Child, loss of, <i>see</i> Negligence	455
Children Custody—Mother.	
<i>The Court ordered a governess who, on instructions from their father, was about to take his two children to England, to deliver them to their mother, who objected to their removal.</i>	
<i>Jensen ex parte ...</i>	171
Civil Imprisonment — Suspension — Monthly payment.	
<i>Riddell v. Sherwood ...</i>	14
Commonage — Regulations — Grazing of military horses — Martial Law.	
<i>Bambani and Others v. The Officer Commanding No. 4 Remount Depot, Lesseyton</i>	28

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Company—Notice of Motion—Service—Sections 98 and 122 of Act 25 of 1892.	
<i>Where a notice of motion was served at the place of business of a company, and not at its registered office in terms of sections 98 and 122 of Act 25 of 1892, the Court ordered fresh service of the notice to be made, the costs to be costs in the cause.</i>	
<i>Wilson v. Mossel Bay Boating Company ...</i>	140
Contempt of Court, <i>see</i> Interdict	7
Contract—Sale—Delivery—Impossibility of delivery—Breach of contract—Damages.	
<i>C. and B. entered into an agreement by which B. was to deliver during a period of two years 10,000 fair prime oxen to C. at a cost of £2 per head. At the end of the two years C. demanded delivery and B. pleaded that it was impossible to carry out the contract in consequence of matters altogether beyond his control, e.g., the rinderpest, which had destroyed all the available cattle.</i>	
<i>Held, that as there was no setting aside of specific cattle prior to the rinderpest B. was liable in damages on the contract notwithstanding that the rinderpest by destroying the cattle made delivery impossible.</i>	
<i>The damages were, however, assessed at a nominal sum sufficient to carry costs, the Court finding that the oxen, if delivered, would have been absolutely worthless to C.</i>	
<i>Held, further, that where delivery is to be made within a fixed period the person who has to so deliver will not be liable for</i>	

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<i>breach until the last day of such period has passed.</i>	
Combrinck & Co. v. British S.A. Coy.	46
Contract — Mutuality — Act 23 of 1895, Section 22.	
<i>Under Act 23 of 1895, Section 22, the Cape Town and Green Point Tramway Coy. were bound to work the concession granted to them thereby properly and efficiently. The Court found as a fact that the Company had done so. They had, however, issued books of tickets at reduced fares. These tickets the Company now refused to continue to issue save on condition that they would not be liable to any purchasers thereof who might fail to find accommodation on any particular car.</i>	
<i>Held, that as the public were not bound to purchase these tickets, there was no mutuality and hence no contract between the said Company and the public. That the Company were therefore not bound to issue those tickets, and that if they did issue them they were at liberty to attach a reasonable condition to such issue.</i>	
Brown v. Cape Town and Green Point Tramway Company...	503
Contract, passenger's—Lost Luggage —Limitation of liability.	
<i>On the back of tickets issued to passengers by the defendant company was a statement that they would not be answerable for any luggage brought on their vessels unless the passenger, in addition to his passage money, should pay a certain small fee to the company and place the luggage under their care. Further that they would not be answerable for more than £10 in case of the loss of any one package unless its value was declared when</i>	

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<i>so given into their custody. Attention was called to this notice by certain words printed on the face of the ticket. Plaintiff, who was unable to read, missed a certain box on arriving at Cape Town by one of the company's ships, and now sought to recover its full value. The box had not been delivered into the charge of the company's servants.</i>	
<i>Held, that as the above conditions were reasonable, and had been sufficiently brought to plaintiff's notice, he could not recover.</i>	
Lampart v. Union-Castle Steamship Co., Ltd.	472
Costs - Taxation.	
<i>Applicants had moved for an order compelling respondents (1) to make certain alterations in the voters' roll. (2) To admit the public to committee meetings of the Council. (3) To allow rate-payers to inspect certain books and other documents.</i>	
<i>The Court had granted an order as prayed with regard to the two latter prayers. With regard to the first the applicants were not wholly successful. The Court had granted its order with costs. The Taxing Officer had disallowed all costs connected with the unsuccessful part of the application.</i>	
<i>Held: (1) That if neither of the parties to a motion was altogether successful, the Taxing Officer should allow to each party only costs incurred with regard to the claims on which such party had succeeded provided that these claims were clearly distinguishable from the others in litigation. (2) That in the present case it was the intention of the Court to award to applicants the entire</i>	

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<i>costs between party and party of the former application.</i>	
<i>(3) That costs must not be unnecessarily increased by briefing documents, copies of which can be obtained in a cheaper way.</i>	
Maberley and Others v. Woodstock Municipal Council ...	436
Costs, see Audit ...	10
Costs—Criminal case.	
<i>Where a person in the custody of the Imperial Government gave notice of and filed an application for release and withdrew the application at the last moment, the Court on the application of the Imperial Government refused to grant them the costs which they had incurred in connection with the application.</i>	
The Imperial Government v. Hertzog ...	10
Costs—Magistrate's discretion.	
<i>Where, on the trial of a suit in a Magistrate's Court, judgment was given for the plaintiff but no order was made as to costs, and the plaintiff appealed on that question, Held, that although the question of costs was in the discretion of the Magistrate, yet that discretion should be exercised in a judicial manner on good grounds, and that, as the plaintiff had done nothing to entitle the Magistrate to deprive him of his costs, the judgment should be altered so as to include costs.</i>	
Van Heerden v. Moss ...	73
Costs—Postponement—Witnesses.	
<i>Where the nature of a case caused the onus of proof to be on the defendant, and he was not prepared to proceed to proof, the Court in granting a postponement ordered him to pay the costs of the day.</i>	
Roux v. The Colonial Government ...	137

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Costs in criminal appeal, see Municipal Regulations ...	657
Consolidation (of actions), see Jury	711
Costs, see Licence ...	229
Costs — Taxation — Jurisdiction of Resident Magistrate.	
<i>Appellant was a witness in a Supreme Court action in which respondent was defendant. Appellant had been subpoenaed both by plaintiff and defendant. Judgment was given in favour of appellant and he applied to respondent's attorney for his witness's expenses. These were not paid. The taxing master refused on appellant's application to tax his expenses. Appellant thereupon summoned respondent for the amount (£3 15s.) in the Resident Magistrate's Court. Respondent excepted to the jurisdiction on the ground that the aforesaid sum was claimed as S.C. (untaxed) costs and the Resident Magistrate upheld the exception.</i>	
<i>Held, that as the amount claimed was within the jurisdiction of the Resident Magistrate the exception was bad, and the case must be remitted to him for hearing on the merits.</i>	
Thomas v. Cabrita ...	264
Costs—Jurisdiction—Section 35 of Act 20, 1856.	
<i>Where plaintiff sued defendant in the Supreme Court for provisional sentence on a promissory note for £20, and the said parties resided within the jurisdiction of different R.M. Courts,</i>	
<i>Held, following A. v. B. (Buch. 1868—240), that by section 35 of Act 20 of 1856 the Court was bound to give costs on the Supreme Court scale.</i>	
Dreyer & Co. v. Burslem ...	738

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Consolidation of Actions, <i>see</i> Salvage	367
Compromise, discretion as to, <i>see</i> Attorney	262
Construction, <i>see</i> Will	177
Counterclaim, <i>see</i> Accommodation Note	499
<i>Crimen Falsi</i> , <i>see</i> Forgery	417
Custody of Minors, <i>see</i> Guardian	396
Custom of the Port, <i>see</i> Demurrage	510
— <i>see</i> „	693
Damages, <i>see</i> Contract	46
2. — <i>see</i> Interdict	132
3. — <i>see</i> Negligence	86
4. — <i>see</i> Wrongful Dismissal	496
5. — <i>see</i> Breach of Contract	678
Delivery, <i>see</i> Contract	46
2. — <i>see</i> Negligence	86
Delivery—Bill of Lading—Handing over ship's side—Dock agent— Regulation 31 of Harbour Board. H. delivered to U. certain 11 cases of cigarettes to be delivered at Table Bay, under a bill of lading which provided in its 4th sec- tion that the handing of the goods over the ship's side to the person authorised to receive them was to be considered delivery. U. ap- pointed M. under the 31st Regula- tion of the Harbour Board to receive the goods on behalf of the consignees and handed them to M. over the ship's side. Held, that the 4th section of the bill of lading constituted a binding contract between H. and U., and that the delivery over the ship's side to M. was a valid delivery such as would relieve the ship from any liability for the loss of the goods. Held, further, that an agent appointed by the ship under the 31st Regulation is the agent of the consignee. Holt and Holt, Limited v. The Union-Castle Company, Limited	36

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Dock agent, <i>see</i> Delivery	36
Dock agent—Landing cargo—Har- bour Board. M. having been appointed by the Harbour Board as dock agent to land certain goods consigned to T., landed them in accordance with the regulations, and placed them in a shed on the quay, as directed. Owing to the insecure state of the shed the goods were lost or stolen. Held, that as M. was the agent of the consignee and appointed by the Harbour Board under the regulation to land the goods, he was not liable for their loss after having followed the direc- tions of the Harbour Board. McKenzie and Co. v. Tuchten, Moss and Co.	78
Dock Agent—Negligence. Defendants, who are licensed land- ing agents, had landed at Cape Town Docks a certain crate con- signed to plaintiffs. The evidence showed that by the custom obtain- ing at the Docks (1) goods packed in crates were treated as non- perishable, and were not ware- housed. (2) The defendants were bound to place goods in such place as the wharfinger might point out; and that they had done so in this case. The consignees did not take delivery till 16 days after their goods had been landed, and in the interim they, not having been warehoused, were injured by rain. The plaintiffs now sued for damages, alleging that defendants had been guilty of negligence. Held, that as defendants could not be supposed to know that these goods were perishable, and as they had followed the custom of the port (which plaintiffs must be presumed to have known) and the directions of the wharfinger, they had not	

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<i>been guilty of negligence, and that judgment must be given for defendants with costs.</i>		<i>ment must be given for plaintiff with costs.</i>	
Isaacs & Co. v. McKenzie & Co.	568	McAloney v. Spilhaus ...	510
Demurrage—Lay days—Custom of port.		Distribution of Capital, see Will ...	533
<i>Defendant had entered into a Charter Party with plaintiff—whereby it was provided that the ship chartered should discharge her cargo as customary, commencing 48 hours after the master had given notice to the consignees that the vessel was ready for discharge, and that the vessel should be discharged within twenty working days thereafter. Demurrage was to be paid at a certain specified rate per diem for each day during which the ship should be detained by the default of the charterers beyond the lay days aforesaid. The vessel in question was detained beyond the said lay days in consequence of the difficulty of procuring lighters; and plaintiff now sued defendants for demurrage as per Charter Party.</i>		Demurrage—Custom of port—Charter party.	
<i>Held, that as a contract to discharge within a specified time, entered into by a party in Cape Town, who must be presumed to have known the customs of the port and to have been acquainted with the present difficulties which hinder the speedy discharge of vessels at this port, with a party in New York, who could not be presumed to have such knowledge, must be regarded as absolute and unconditional, and that defendants could not plead inability to perform it on account of the difficulty of obtaining lighters; as lightering had been shown to be one of the customary modes of discharge at this port, and also as it had been shown that defendants had other lighters at their disposal, judgment must be given for plaintiff with costs.</i>		<i>A charter party after providing for the cargo to be taken on board contained the following clauses "and being so loaded the ship shall forthwith proceed as ordered by the charterer direct to Cape Town, Algoa Bay, East London or Port Natal, one port only, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow the ship to enter at all times of high water such port according to its custom." "and there deliver the cargo agreeably to bills of lading and as customary from ship's tackle into any vessel, or at any wharf, dock or pier where the ship can safely lie (always afloat) as ordered by the charterers or their agents."</i>	
		<i>Held, that the latter clause had reference only to a place where ships could lie in safety and not to a place where they could only occasionally lie in safety.</i>	
		<i>Held, on the question of custom, that it had not been proved that it was the custom of the Port of Algoa Bay to lighten ships of large draught and then order them alongside the jetty.</i>	
		<i>On the construction of the charter party the plaintiff was held entitled to ten days' demurrage.</i>	
		Master and owners of "The Ingrid" v. S.A. Milling Co.	693
		Deed of transfer—Diagram—River—Change of course—Onus of proving change of course.	
		<i>Defendant was the owner of certain land which was described</i>	

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in the transfer deed as being bounded on the "west by the river Gamka" and was shown on the diagram to be bounded by a line B C some distance from the river, which took a zig-zag course. [On the diagram there was a note by the surveyor that the western boundary was the river Gamka.] Plaintiffs, by whom the land was originally granted to E.J. in 1878, claimed that the line B C was the true boundary of the land; or in the alternative alleged that, if the Court found that the river was the true boundary, the river had changed its course, and now ran 75 feet further to the west than it did at the date of the original transfer, and that therefore the old course of the river was the boundary.

Held, that as the successive owners since 1878 had occupied the land right up to the river without let or hindrance from the plaintiffs, and the deed described the land as being bounded on the "west by the river Gamka," the river bank must be taken to be the boundary of the land.

Held further, that the onus of proving that the river had changed its course was on the plaintiffs, and that as they had failed to satisfactorily prove this, the judgment would be absolute from the instance with costs.

Commissioners of the Beaufort West Municipality v. Madison ... 582

Donatio inter vivos by a father to his children—Rights of wife married in community—Registration of donation in excess of £500.

B. a domiciled Colonial, married a wife in England, the said par-

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ties not having entered into any ante nuptial contract. Thereafter he gave certain farms to two of his sons by the aforesaid marriage as a *donatio inter vivos*. These were duly transferred to the donees during the life-time of the donor. He also gave certain farms to another son, issue of the marriage aforesaid, which were not transferred until after the death of the donor. Thereafter B. died, leaving a will by which he conferred certain benefits on his wife. The widow thereupon set up her claim to half the estate, and the Court decided that she must be put to election. She now asked to have the various transfers of all the farms donated to her three sons set aside, as being in derogation of her rights under the community of property.

Held: (1) That the donation of the farms transferred during the lifetime of the donor, having been completed by acceptance and by registration during the donor's lifetime, could not be set aside.

(2) That the donation to the third son, not having been completed by registration during the lifetime of the donor, was valid only to the extent of £500.

Davis v. Trustees of Minors
Brisley and another ... 644

Domicile, see *Malicious Desertion* ... 10

Diamonds—Act 14 of 1885—Illegal possession—Registration.

Richards had been acquitted at the April Criminal Sessions of a charge brought under sections 1 and 7 of Act 14 of 1885. Certain diamonds, the *corpus delicti*, had been seized for the purposes of the trial by the police, and petitioner now asked to have them returned to him. This application was opposed on behalf of the Crown

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<i>on the ground that they were required as "exhibits" for the purposes of further proceedings under section 27 of the aforesaid Act. Held, that under the proviso to the seventh section petitioner was entitled to have the said diamonds returned to him.</i>	
<i>As a reasonable time had elapsed, during which the Crown, if so advised, might have instituted further criminal proceedings, a bare statement of intention to institute such proceedings did not justify them in the further detention of applicant's property.</i>	
<i>Semble : The 27th section of the Act has reference to the registration of diamonds when moved from one district of this colony to another district.</i>	
<i>Richards, ex parte</i>	246
Ejectment—Lease—Improvements.	
<i>Keast v. Zwaigenhaft</i>	58
Ejectment—Lease—Agency.	
<i>H. & Co., acting as plaintiff's agents, had leased a certain house to defendant. Plaintiff now repudiated H.'s agency, and sought to eject defendant. As it was shown that plaintiff had given a general power of attorney to one P. and that P. had consented to H. & Co. leasing the house, the Court found H.'s agency proved and gave judgment for defendant with costs.</i>	
<i>Clausen v. Woolf</i>	103
Exception—Pleading.	
<i>Plaintiff (now appellant) had sued defendant (now respondent) in the Court below for £25, balance due for work done by plaintiff under a certain agreement, and also for £101 8s. 2d. said to be due for extra work and material. De-</i>	

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<i>fendant took the following exceptions (1) that as the work had not been completed, the action was premature as to the first claim; (2) that the summons disclosed no cause of action. The Magistrate upheld both of these exceptions.</i>	
<i>Held (on appeal) : (1) that there was nothing in the summons or in the agreement annexed to show that the action was premature; (2) that if there was any ground for holding it to be premature, that ground must arise outside the agreement, and was therefore matter for plea and not for exception; (3) that the summons on the face of it disclosed a good cause of action and therefore should have been pleaded to. The appeal was therefore allowed and the case remitted, back to the Magistrate for hearing on the merits.</i>	
<i>McCormack v. Steel</i>	149
Executor—Removal—Insolvency—Power of attorney to act as executor—Creditor.	
<i>H., one of the executors testamentary of an estate became insolvent and during the lifetime of his co-executor granted in conjunction with him a power of attorney to one of the creditors of the estate, who alleged that he acted under the power after the co-executor's death, because he found H. did not manage the estate satisfactorily.</i>	
<i>H. was removed from his office as executor on application made, and the power of attorney granted by H. and his deceased co-executor accordingly became of no effect, being a power granted by persons when in a fiduciary capacity and terminating when their office ceased to exist.</i>	
<i>In re Herman</i>	44

Executor—Transfer—Minors. PAGE

Where an executor purchased at public auction property from the estate, the Court refused to grant an order authorising transfer to him on the ground that there was not sufficient proof as to the value of the property, and also because they required a report from the Master, as certain minors were interested.

Ex parte Cloete in re Cloete ... 61

Executor—Removal.

The Court ordered the removal of an executor testamentary who had failed to render his accounts, and was at the date of the application residing in Belgium and had himself consented to and requested to be relieved of his trust. The application was granted at the special instance and request of one of the sureties of the executor testamentary aforesaid.

Ex parte Schwoizer, re Estate Harman 227

Executor dative—Removal.

On the application of his sureties the Court ordered the removal of an executor dative who had joined the King's enemies and left the Colony.

Re Castelyn's Estate ... 174

Evidence, see Magistrate ... 76

Evidence — Commission — Criminal case—Germany.

Ex parte The Imperial German Consul-General for South Africa ... 34

Evidence — Parole—Documentary—Railway—Notice of loss.

Where there was a conflict in the oral evidence, as to whether certain goods had been delivered to the Railway Department or not, the Court fell back upon the receipts

wherein the department admitted having received the said goods. Notice of loss must be given to the department within a reasonable time that they may be held liable, but considering the then circumstances of the country, and of railway traffic, the Court refused to restrict such reasonable time to 14 days (as provided by Clause 145 of the railway regulations).

Executors of Estate Van der Spuy v. Smartt, N.O. ... 217

Ejectment, see Licensed Premises ... 165

Edictal citation—Rebel.

Leave granted to sue by edict an inhabitant of the Colony who had joined the Boer forces and was in rebellion against the King.

Colonial Government v. Coert Grobbelaar ... 676

Employer and employee—Justifiable dismissal—Martial Law.

Plaintiff, a salesman in the employ of defendants, had used threatening language respecting a certain sergeant of the Town Guard, who was a customer of defendants. He was thereupon ordered by the Military authorities to leave the district forthwith. His employers paid him his wages up to date, and dismissed him. He now sued for salary in lieu of notice and for damages for wrongful dismissal.

Held, that as under the circumstances, plaintiff's conduct was calculated to do serious injury to defendants' business, and as plaintiff had by his own act rendered himself unable to carry out his contract of service, his dismissal was justifiable.

Brumm v. Tappe & Co. ... 742

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Evidence.		Held, that on principles analogous to those by which a negotiorum gestor, or a mala-fide possessor was entitled to recover useful expenses, the Government was entitled to be repaid the cost incurred in removing and storing the explosives.	
<i>The two appellants had been convicted of stealing two horses. A considerable amount of hearsay evidence had been admitted by the Resident Magistrate, who had moreover admitted, as part of the record, certain telegrams and letters which were not evidence. The only direct evidence was that of a boy of twelve years of age, who had been punished by one of the accused.</i>		Colonial Government v. Smith & Co. 521	
<i>The Court quashed the proceedings and allowed the appeal.</i>		Estoppel, see <i>Periculum rei venditæ</i>... 490	
Rex v. Fleni and Allan... .. 412		Expropriation, see <i>Quitrent Land</i> ... 114	
Explosives—Storage—Act 4 of 1887		Extradition — Contravention of Transvaal Gold Law—Fugitive Offenders Act—Annexation—Act 22 of 1882.	
<i>Negotiorum Gestor.</i>		<i>C. was arrested at Cape Town on a charge of having contravened the Transvaal Gold Law of 1898, in the Transvaal in August, 1900. On an application by C. for his release, the Court granted the order, holding that there could be no extradition for such an offence under the Act 22 of 1882, and that as the offence was committed before the annexation to the British Crown of the South African Republic, the accused could not be extradited under the Fugitive Offenders Act.</i>	
<i>The defendants had erected magazines for the storage of explosives on Municipal land upon permission granted by the Town Council of Port Elizabeth during pleasure. After some years, owing to the extension of the town, the locality was found to be dangerous to the inhabitants, and notice was given to defendants to provide other accommodation and to remove the explosives. Negotiations ensued but no preparations were made by defendants to comply with the notice. Nearly a year afterwards, when war had broken out, peremptory notice to remove was given by the Council and by the Government, to whom the Council had applied for assistance. The magazines on municipal land had never been licensed by Government, as required by Act 4, 1887. The defendants being unwilling, or unable to remove their explosives elsewhere, the goods were removed by Government to a place of safety on a floating magazine in Algoa Bay, the defendants formally protesting against liability, but assisting in the removal.</i>		Regina v. Cohen 8	
		Extradition, see <i>Habeas Corpus</i> ... 381	
		Fraud, see <i>Guarantee</i> 147	
		Forgery—<i>Crimen falsi</i>—Act 3 of 1861.	
		<i>A conviction for forgery can be sustained even in the absence of any proof of prejudice to a third person, beyond the possible prejudice to the safety of the general public or of military forces. Under the Common Law it was necessary to prove (1) fraudulent intent; (2) Actual injury to some third person, but by Act 3 of 1861,</i>	

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<i>proof of fraudulent intent suffices for a conviction.</i>	
<i>Rex v. S'ater and Another ...</i>	417
raud—Notarial instruments—Execution.	
<i>D. being fully aware of his rights under his parents' will executed two notarial instruments by which he undertook to sell all his right, title, and interest in a certain farm worth about £4,000 for £1,300 to his stepfather.</i>	
<i>Held, that in the absence of proof of fraud, the transaction could not be impeached.</i>	
<i>Du Plessis v. Herholdt's Executor ...</i>	684
<i>Fidei-commisum, see Will ...</i>	210, 227
<i>2. —see Land ...</i>	251
<i>Gift over, failure of, see Will ...</i>	227
Grant—Reservation of roads.	
<i>Chamberlain v. Hully ...</i>	193
Guarantee—Novation and delegation—Fraud.	
<i>Where a guarantor had given an unconditional guarantee in favour of a debtor,</i>	
<i>Held, that no conditions alleged to be attached to the guarantee could be taken into account unless fraud were alleged and proved.</i>	
<i>Stamper as Secretary for Wiener and Co. v. Ellert ...</i>	147
Guardian — Custody of minors — Jurisdiction.	
<i>The English Court of Probate had granted Mrs. Chetwynd a divorce and custody of the minor children of her marriage. The Court, however, ordered that these children should remain within the jurisdiction of the said English Court. The Court had also appointed applicant as guardian of</i>	

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<i>the aforesaid children. Thereafter Mrs. Chetwynd removed these children out of the jurisdiction of the said Court, and at the date of this application they were in her custody in Cape Town, on their way to Australia. A judge of the English Court of Probate had ordered that the minors should forthwith be delivered to the applicant, who now applied for an order of the Supreme Court to that effect.</i>	
<i>Held, that as applicant was the legally appointed guardian of these minors, and as by section 30 of the Charter of Justice, the Court has jurisdiction over all persons residing and being in this Colony, the respondent must be ordered to deliver up the children to applicant.</i>	
<i>The case of Einwald v. The German West Africa Co. (5 Juta, 86), distinguished.</i>	
<i>Leyland v. Chetwynd ...</i>	396
Habeas Corpus—Martial law—Civil gaoler.	
<i>On the application of Mrs. R., whose husband had been arrested at Ceres by the Military and lodged in the civil gaol at Malmesbury, the Court ordered him to be released, holding that a civil gaoler has no right to hold a prisoner save on the order of a duly constituted officer of the Crown. The Court refused to grant an order interdicting the Military Authorities from trying applicant's husband under Martial Law.</i>	
<i>Reinecke v. The Attorney-General and Others ...</i>	565
Habeas Corpus — Extradition — Smuggling—Fugitive Offenders' Act.	
<i>The applicant, who had been arrested in Cape Town under a</i>	

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<i>warrant granted by the Military Governor of Pretoria, applied for his release on the ground that the warrant was indefinite and did not state under what Transvaal law prisoner had been arrested. Held, that as the evidence raised a probable presumption of guilt against the accused, and that as the offence was sufficiently set forth in the warrant, the application must be refused.</i>	
<i>Rex v. Solomon ...</i>	381
Habeas Corpus—Military authorities.	
<i>Applicant had been arrested by the military, and lodged in the gaol at Beaufort West. The affidavit of the Officer Commanding the Cape Colony district did not state the cause of the arrest. The Court granted an order calling upon the gaoler to return to the Court, on the 12th instant, the authority under which he detained the prisoner. On the return day the Court refused petitioner's application, as it appeared that the gaoler was acting under the orders of the military, and not in his civil capacity. The Court will neither interfere with, nor in any way recognise the action of the military authorities in martial law districts.</i>	
<i>Ex parte Marais ...</i>	467
<i>Habeas Corpus, see Martial Law ...</i>	169
<i>Harbour Board Regulations, see Dock Agent ...</i>	78
<i>2. —Regulation No. 31, see Delivery ...</i>	56
Hawker—Licence—Act 13 of 1870—	
Fine and imprisonment—Ordinance 6 of 1839, sections 1, 2.	
<i>Accused was convicted under section 6 of Act 13 of 1870 of trading as a hawker without a licence,</i>	

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<i>and was sentenced to pay a fine of £10 or undergo two months' imprisonment. The amount payable for the licence was 30s. for six months.</i>	
<i>Held, that the Magistrate was wrong in imposing a fine of more than £7 10s. (five times the value of the licence), and was not authorised by Ordinance 6 of 1839 in imposing the alternative imprisonment as part of the sentence.</i>	
<i>Regina v. Muskewitz ...</i>	4
Hotel lease—Conditions of forfeiture.	
<i>One Kuhr had rented certain hotel premises on a monthly tenancy from plaintiff. In November, he sold the goodwill, stock and furniture to defendant for £3,000. At the time of the sale plaintiff consented to give a seven years' lease on defendant paying him £250 and £60 a month as rent. One of the conditions of the said lease was that if defendant "should be convicted of any contravention of the laws relating to the sale of intoxicating liquors, the landlord or his agent might, without any notice whatever, re-enter and take possession of the premises and expel the tenant; and that upon such re-entry the tenancy should absolutely terminate." Early in March, defendant was convicted of having permitted drunkenness on his premises. He was not personally present when the offence was committed.</i>	
<i>Held (1) that defendant had forfeited his lease.</i>	
<i>(2) That the measure of damages was the amount due as rent during the period defendant had illegally retained possession of the premises.</i>	
<i>Ohlsson v. Parsons ...</i>	233

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Insolvency—Assignment—Failure to comply with conditions.	
Bosman v. Falconer	243
Insolvency, <i>see</i> Executor	44
Insolvency—Municipal rates—Trustee's liability <i>De bonis propriis</i> —Act 26 of 1893, section 102.	
<i>The trustee of an insolvent estate was ordered to pay de bonis propriis, the amount of a judgment for municipal rates assessed on landed property in the estate after sequestration, he having with full knowledge of the judgment distributed all the assets in the estate without making any provision for the payment of the judgment debt. The Town Council of Cape Town v. Falconer's Trustee</i>	127
Insolvency—Property acquired subsequent to rehabilitation.	
<i>Anderton Bros. had obtained a provisional grant of certain Government land. Thereafter they became insolvent and their rights in the said land were sold, and the proceeds distributed among the creditors. The Government, however, refused to confirm the provisional grant or to sanction transfer to the purchaser. A. Bros. were rehabilitated in 1893. Some six years later they obtained for fresh consideration a grant of the erven in question and sold the land to applicant. The trustees of the insolvent estate claimed the property as an asset in the said estate, and the Registrar of Deeds refused to pass transfer to the purchaser without their consent. Held, that the property had never belonged to the estate and that judgment must be given against the respondents with costs out of the said estate, failing which, de bonis propriis.</i>	
Lloyd v. Trustees of Insolvent Estate of Anderton Bros....	141

Interdict.

A rule nisi to operate as an interdict had been granted, calling upon respondents to show cause why they should not be interdicted from passing transfer to a third person of certain land which applicant alleged he had purchased. It appeared that respondent was a part proprietor of the land said to have been sold, and that the alleged sale took place in his absence and without his privity.

Held, that as the applicant had not established a clear right to the property in dispute and as he had other legal remedies, the interdict must be discharged.

Lipschitz and Another v. Harden and Another	501
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Interdict—Damages—Right of way.

Where a certain passage had been wrongfully used, but such wrongful user had been discontinued on complaint being made by plaintiff to defendant, the Court refused to interdict defendant from so using the said passage in future. The Court further held that plaintiff had forfeited all right to damages to which she might otherwise have been entitled by damaging certain property of defendant which obstructed her right of way.

Lynch v. Verster	132
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Interdict—Personal attachment—Contempt of Court.

Stevensen v. Saunders and Co. .	7
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Interdict, <i>see</i> Playwright	3
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Incest—Wife's sister—Act 40 of 1892.

Appellant had been tried and convicted at the East London Circuit Court of having had sexual intercourse with his wife's sister during the lifetime of his wife aforesaid. The facts were not disputed and

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<i>the point was reserved as to whether the said acts constituted the crime of incest.</i>	
<i>Held, that intercourse with a wife's sister even during the lifetime of the said wife does not constitute the crime of incest: since by Act 40 of 1892 an unmarried wife's sister is placed in the same relation to her brother-in-law as that which would be occupied by any other unmarried female.</i>	
Rex v. Delport	412
Injury to property, <i>see</i> Landlord and Tenant	426
2. —Injury to property, <i>see</i> Negligence	455
Illegal arrest—Brokerage.	
<i>Defendant (a broker) had been commissioned by plaintiff to sell the goodwill of a certain hotel. Plaintiff subsequently withdrew that commission, and sold the goodwill himself. Defendant claimed commission in respect of the sale, and had plaintiff arrested under the 8th Rule of Court on the pretext that he was in fuga. Plaintiff was the owner of immovable property. Defendant now admitted that no brokerage was due, Jones, J., instructed the jury that the arrest was illegal, but left it to them to say whether it was malicious and without reasonable and probable cause. The jury found for the plaintiff for £200 damages.</i>	
Hahne v. Joseph	151
Interpleader suit - Sale.	
Knoop v. Bam	53
Interpretation of Contract—Maintenance clause—Responsibility of contractor.	
<i>Plaintiff entered into a contract with defendant to construct a certain embankment. The work was</i>	

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<i>completed and a final settlement made between the parties; defendants retaining (as per contract) a certain percentage of the contract price for twelve months after the final settlement. During this period a serious breach was made in the said embankment by the flood of water in the river. Plaintiff now sued for this retention money, which defendants refused to pay, alleging that by the terms of the contract plaintiff was bound to warrant and maintain the embankment for the period of twelve months after he had received the final certificate. The clause of the contract, the interpretation of which was in dispute, was as follows:</i>	
<i>"... During this period (viz.: the 12 months aforesaid) the contractor must make good at his own cost all omissions and defects that may appear or arise subsequent to the issuing of the final certificate."</i>	
<i>Held (1) That this did not amount to a maintenance clause and that thereunder plaintiff was answerable only for omissions and defects due to his own default. (2) That it had not been proved that the injury to the dam was due to any default on the part of the plaintiff, and that he was therefore entitled to judgment, with costs of suit.</i>	
Roux v. The Colonial Government	181
Judicial Discretion, <i>see</i> Water ...	479
Jurisdiction, <i>see</i> Malicious Desertion	10
2. Jurisdiction, <i>see</i> Guardian ...	396
3. — <i>see</i> Costs	738
Justifiable Dismissal, <i>see</i> Employer and Employee	742

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Judgment debt—Arrest under Rule 8.	
<i>A writ of arrest was granted under Rule 8 against the respondents, who had left Cape Town for Natal without satisfying a certain judgment debt; the fact that they had entered an appeal against the said judgment notwithstanding.</i>	
Hogg v. Hart and Hart	108
Jury—Act 23 of 1891—Claim under £100—Separate actions—Consolidation.	
<i>Where two actions had been brought against the Government, one for £500 and one for £85, both arising out of the same set of circumstances, a railway accident, the Court allowed the actions to be consolidated and tried together before a jury.</i>	
<i>The Court will not set down a case for trial by jury unless the application is made in time to allow fourteen days' notice of trial to be given to the other side before the end of term as directed by section 12 of the Civil Jury Act.</i>	
Terhoven v. Colonial Government.	
Stephen v. Colonial Government	711
Jus Postliminii, see Booty	259
Joinder, see Water	262
Justice of the Peace, see Libel	198
Kinderbewys, see Will	32
Land — Fidei-commisum—Contract of sale.	
<i>Held, that a stipulation in a contract of sale of land, that "the said ground shall never be sold or disposed of to a stranger, but shall continue to remain among the legal heirs," imposed a trust upon the purchaser to dispose of the property within the class specified; and was not equivalent in itself to a</i>	

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<i>bequest to the class, and did not confer a vested interest on the legal heirs.</i>	
Joseph and Others v. Estate Mulder	251
Libel—Newspaper—Justice of the Peace.	
Louw v. De Kolonist Printing Co.	198
Liability of Lessor, see Sub-lease	197
Libel.	
<i>In an action for libel, judgment of £10 and costs was given against S., who at a public meeting used the following language of and concerning W. "He is a rebel and one of Le Fleur's lot."</i>	
<i>[A plea of justification was not established.]</i>	
Werner v. Strachan	220
Loss, Notice of, see Evidence	217
Liquor—Proclamation 255 of 1900, section 29—Contravention—Sale by barman.	
R. v. Phillips	205
2. —Conditions of licence—Ultra vires . Costs.	
<i>The restrictions "no liquor to be sold to any coloured person, except in quantities to be consumed on the premises" and "no liquor to be sold to any coloured person after the closing hours of the canteen" are ultra vires and illegal. The members of the Licensing Board had not, however, shown gross misconduct in inserting these conditions, and hence an application against them, for costs de bonis propriis, was refused.</i>	
Barry and Others v. Robertson Licensing Court	220
Licensed premises—Transfer of licence—Insolvency—Trustee—Ejectment—Motion.	
<i>O. leased certain premises to K., it being provided inter alia in the</i>	

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<i>lease that on the expiry of his tenancy K. should deliver, assign, or transfer to O. or to his nominee all licences belonging to, or granted or issued to him, or to be granted or issued in respect of such premises as O. should direct or require.</i>	
<i>K. subsequently became insolvent and his trustee obtained a temporary transfer under Act 28 of 1883, but declined to transfer the licence to O.</i>	
<i>Held, that the trustee was bound in terms of K.'s lease to hand over the licence to O.</i>	
<i>Semle, that ejectment may be granted on motion in cases of urgent necessity or where irreparable damage is likely to ensue. See Elder's Executors v. Coxhead (8 Sheil, 236); Mills v. Jones Bros. (9 Sheil, 543) and compare Oliver v. Potgieter (6 Sheil, 312).</i>	
<i>Ohlsson v. Kuhr's Trustee; Ohlsson v. Parsons...</i>	... 165
Law agent—Change of domicile to a foreign country—Acts 43 of 1885 and 31 of 1886.	
<i>A law agent, enrolled previous to 1885, does not forfeit the rights conferred by section 1 of Act 31 of 1886, by acquiring a foreign domicile should he subsequently revert to his domicile in this country. An agent admitted prior to 1885, who has afterwards been struck off the rolls, is in the position of a new applicant, should he again seek enrolment.</i>	
<i>Brinkman v. R.M. of Victoria West...</i>	... 191
Lis alibi pendens.	
<i>B. sued W. for provisional sentence on a bond. To the said summons W. pleaded lis pendens in a foreign Court.</i>	

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<i>Held, that as the bond had been entered into within the Colony, and the property mortgaged was also situate here, Lis pendens in a foreign country was not a good defence. Provisional sentence was granted as prayed with costs, and the property declared executable.</i>	
<i>Buchbinder v. Woolf ...</i>	... 122
<i>Locus Standi, see Power of Attorney</i>	34
Landlord and tenant—Injury to property.	
<i>The tenant of a certain farm in the district of Victoria West was sued by the landlord of the said farm for the value of a certain quantity of kraal manure, commonly used in the district as fuel. Defendant had removed nearly all this deposit, and had burned the remainder, including a large proportion which defendant alleged to be unfit for fuel.</i>	
<i>Held, that as the value of the fuel destroyed was very problematical, and as defendant had made a substantial tender to plaintiff, judgment must be given for plaintiff for the amount of this tender only, together with costs to the date thereof.</i>	
<i>Cilliers v. Tulleken ...</i>	... 426
Landlord and Tenant, see Beneficial Occupation 203
Leave to sue in forma pauperis—Income.	
<i>Where an application for leave to sue in forma pauperis had been opposed on the ground that applicant's future rights in certain property would realise more than £10,</i>	
<i>Held, that as it was disputable whether applicant possessed any such alleged rights, and as they would not in any event entitle</i>	

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<i>her to receive more than £45, the prayer of the petition must be granted.</i>	
Erlank v. Wessels	437
Limitation of Carrier's Liability, <i>see</i> Contract	472
Liquor laws — Natives — Permit — Onus — Proclamation 255 of 1900.	
<i>This was an appeal against a conviction before the Resident Magistrate of Idutywa of having contravened Section 34 of Proclamation 255 of 1900, by obtaining half a bottle of brandy for a native who by the said proclamation was forbidden to be in possession of such intoxicant without a permit signed by the Magistrate. The ground of the appeal was that the record in the Court below did not show that the native in question was not entitled to a permit and had not got one.</i>	
<i>Held, that as the onus of justifying his action was on appellant and as the fact of the native having or not having produced a permit was particularly within the knowledge of the appellant, the appeal must be dismissed.</i>	
<i>Semle : No other person may buy liquor in his own name for a native in the Transkei, even should such native hold a permit to get liquor from a licensed dealer.</i>	
Rex v. Altenkirch	548
Liquor, <i>see</i> Transkeian Territories...	76
Liquid Liability, <i>see</i> Provisional Sentence	157
Liquidation Account, <i>see</i> Will ...	32
Libel—Newspaper.	
Cartwright v. Cape Times, Ltd.	68

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Lease—Expiry—Tacit relocation—Notice of renewal.	
<i>O. leased certain premises to M. for a period of six years, who in turn sublet to L. The lease provided that the lessee could by giving the lessor written notice to that effect two months prior to the expiry of the lease, renew the lease for another six years. At the expiry of the term neither M. nor L. had given notice of renewal. L was, however, allowed to remain in possession of the premises for a further period of nine months, paying the rent monthly.</i>	
<i>Held, that this did not effect a tacit relocation, such as would entitle M. or L. to claim a renewal of the lease for the remainder of the next six years.</i>	
O'Reilly v. Lessor	55
Lease, <i>see</i> Ejectment...	51, 103
Lessor, <i>see</i> Act 8 of 1879	84
Leave to appeal—Criminal charge—Lapse of time—Act 21 of 1876, section 4.	
<i>F. who was convicted on 6th December, 1900, for contravening the Liquor Laws, noted an appeal, but did not prosecute it within the 41 days prescribed by the Act 21 of 1876. He applied on February 7th for leave to prosecute his appeal.</i>	
<i>The Court under the special circumstances of the case granted the application.</i>	
Regina v. Francis	26
Leave to appeal—Good and sufficient cause—Section 24 of Act 35 of 1896—Section 11 of Act 5 of 1879—Prosecution of appeal.	
<i>Judgment was given in favour of the plaintiff in an action on</i>	

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<i>August 14, 1900, against which judgment he noted an appeal, but did not prosecute it. On February 6, 1901, he applied for leave to prosecute the appeal on the ground that the records of the case could not be printed within the three months.</i>		<i>having, as she alleged, the intention of residing in Cape Town. At the end of the month the husband deserted the wife and went to Australia.</i>	
<i>Held, that in all the circumstances this was not such good and sufficient reason as would induce the Court to extend the time.</i>		<i>Held, that the Court had no jurisdiction to try an action for divorce at the instance of the wife, the circumstances having established no domicile.</i>	
<i>Semble, an application will not necessarily be refused if made after the lapse of the three months.</i>		<i>Ex parte Bessie Rosenwax</i> ...	10
<i>Van Niekerk and Brown v. The Colonial Government</i>	24	Marriage—Registration—Incomplete Certificate.	
Magistrate—Evidence—Discretion—Fraud.		<i>The marriage officer who had married applicants, had neglected to fill in or sign the register. The said marriage officer was subsequently deceased. The witnesses had signed the duplicate original register. The Colonial Secretary now refused to accept the incomplete register without an order of Court and applicants applied for such order.</i>	
<i>A Magistrate must decide a civil case on the evidence before him, and not import into it evidence from a criminal case which does not form part of the record. If fraud is to be relied upon it must not only be pleaded but proved.</i>		<i>Ordered, that the incomplete duplicate register be filed in the Colonial Office, together with copies of the affidavits and the order of Court.</i>	
<i>Where the plaintiff's evidence was uncontradicted, the Court refused to uphold a decision of the Magistrate granting absolution from the instance and altered the judgment to one for the plaintiff with costs.</i>		<i>Sowerby and Wife v. Colonial Secretary</i> ...	377
<i>Coetzee v. Beukes</i> ...	76	Marriage—Prohibited Degrees—Act 40 of 1892.	
<i>Magistrate's Discretion, see Costs</i> ...	73	<i>A nephew may marry his aunt, provided that the relation between them be that of affinity only.</i>	
<i>Magistrate, Jurisdiction of, see Costs</i>	264	<i>Mills v. Acting Resident Magistrate (Cape)</i> ...	438
Malicious desertion—Jurisdiction.		<i>Master of Ship, see Stevedore</i> ...	450
<i>R. and her husband were married in Natal, and a week after the marriage the husband, pretending to come to Cape Town, went to Bulawayo. The wife subsequently came to Cape Town, and was joined twelve months later by her husband with whom she then lived for one month, the parties</i>		<i>Mining Area, see Proprietary Rights</i>	41
		<i>Martial Law, see Commonage</i> ...	28
		Martial Law—Bail—Military—Act 6 of 1900.	
		<i>The Supreme Court refused, during the continuance of martial</i>	

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<i>law, to set aside the arrest by the military of persons admitted to bail under Act 6 of 1900.</i>	
Rex v. Naude and Others ...	93
Martial Law, see Habeas Corpus ...	565
Martial law—Passes—Action of Supreme Court.	
<i>During the necessary existence of martial law, the Court will not exercise any censorship over the acts of the military authorities in districts subject thereto.</i>	
Minnaar, ex parte ...	217
Martial Law—Parole—Habeas corpus.	
<i>The Court will not grant a writ of Habeas Corpus in favour of a man who has been released from a military prison on parole, and subject to the condition that he is to report himself daily.</i>	
Ex parte Solomon ...	169
Martial Law, see Employer and Employee ...	742
Massing, see Will ...	663
Municipality—Act 24 of 1898—Loan—Arbitration expenses—Act 45 of 1882.	
<i>By Act 24 of 1898 the Municipalities of Claremont and Woodstock were authorised to acquire by purchase the property of the Cape Town District Waterworks Company and failing an agreement as to the purchase price to have the amount to be paid fixed by arbitration. By section 3 of the Act they were authorised to borrow £500,000 "for the purpose of paying the purchase price as set forth in the first section of this Act."</i>	
<i>They borrowed £300,000 and on being unable to come to an agreement as to the purchase the amount was fixed by arbitration. One B., who was Mayor of Clare-</i>	

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<i>mont, did at the special request of the joint committee of the Councils undertake the duty of supervising and collecting evidence for the purpose of the arbitration and did during a period of two years without any stipulation as to compensation carry out the duties with great zeal and ability,</i>	
<i>At the close of the arbitration proceedings the Councils unanimously resolved to and did hand to B. a cheque for 500 guineas as a recognition of the valuable professional and other services rendered by him to the Councils, making the amount chargeable against the sum borrowed under the Act.</i>	
Held, that the arbitration expenses, being incidental to the proceedings in connection with the payment of the purchase price, were payable out of the capital sum borrowed under the Act and that the payment to B. was a competent one to be made out of the capital of the loan.	
Held, further, that as the expenses were incidental costs of the arbitration specially provided for in the Act 24 of 1898, the General Municipal Act 45 of 1882 had no bearing on the case.	
Ohlsson and Others v. The Claremont and Woodstock Municipalities ...	61
Municipal Rates, see Insolvency ...	127
Municipal Regulations, see Nuisance	411
Municipal rates—Section 115 of Act 45 of 1882—Educational purposes.	
<i>The Council of the Diocesan College at Rondebosch claimed exemption from municipal rates, under Act 45 of 1882, section 115, sub-section (3), in respect of</i>	

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(inter alia) certain boarding houses, the principal's residence, and certain land not at present used for any definite purpose.	
Held, that none of the aforesaid properties were applied exclusively to religious or educational purposes, and hence were not exempted from municipal rates by the terms of section 115, sub section (3), of Act 45 of 1882.	
Diocesan College v. Rondebosch Municipality	163
Merits, Affidavit of, <i>see</i> Practice ..	193
Mother, <i>see</i> Children... ..	174
Motion, <i>see</i> Licensed Premises ...	165
Mortgage Bond, <i>see</i> Registrar of Deeds	226
Municipal Regulations— <i>Ultra vires</i> —Costs in criminal appeal.	
C. had been convicted in the Court of the Resident Magistrate of Cape Town of having contravened section 36 of the municipal regulations by placing certain show boards in a public thoroughfare, and he now appealed against this conviction on the grounds: (1) that as a fact these boards were not in a public thoroughfare, inasmuch as they did not project beyond the plinth of the building tenanted by him, and (2) that if such exposure of the aforesaid boards was a violation of the section specified the said section was <i>ultra vires</i> .	
Held (1) that as by a reasonable construction of the said bye-law, it applied only to public thoroughfares, and not to private property, it was not <i>ultra vires</i> .	
(2) That as the Magistrate found as a fact that the said boards overhung a public thoroughfare, the appeal must be dismissed.	

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(3) That as appellant had given notice he would claim costs in the event of the appeal being upheld, costs must be granted against him.	
Cohen v. Town Council of Cape Town	657
Municipal Council—Water scheme—Borrowing powers—Acts 29 of 1897, section 18 and 45 of 1882, section 145.	
In order to raise money for the purchase of certain land outside the municipal boundary the Municipality of Woodstock had issued certain debentures. It was not denied that this land was purchased with a view to a municipal water scheme for which no plans or estimates had been prepared. No meeting of ratepayers was convened to express their approval or disapproval of the raising of this loan, nor was the consent of the Governor obtained. Applicant, himself a Municipal Councillor, now called upon the said Council to show cause why they should not be restrained from paying interest purporting to fall due on January 1, 1902, on the debentures aforesaid.	
Held, that as applicant had made out a <i>prima facie</i> case why the said Council should not have raised the loan in question, and as he was acting as a ratepayer in the public interest a rule nisi must be granted, to operate as an interdict, restraining the payment of interest on the said debentures.	
Maberley v. Woodstock Municipality	749
Master and servant—Minor—Verbal agreement with minor's father.	
The Court on appeal refused to reverse a Magistrate's decision, dismissing a claim brought against a minor's father for sheep alleged	

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<i>to have been lost by the minor whilst in the appellant's employment.</i>	
Kirk v. Xikisa and Another ...	180
Non-user, <i>see</i> Servitude ...	275
Negligence—Loss of child—Injury to property.	
<i>Plaintiff's child had been removed in a plague ambulance from his residence to the Cape Town Plague Camp by the sanitary authorities, on the ground that she was then suffering from bubonic plague. Shortly after her reception at the camp aforesaid the child died. Plaintiff's house was disinfected by order of the said authorities. For the space of 14 days he was thereby deprived of the use thereof, and on resuming occupation he found some of his property damaged and other articles thereof missing. Plaintiff contended that the child had contracted bubonic plague during her removal to the said plague camp, and claimed damages (1) in £500 for the loss of his child; (2) for £350 for loss of beneficial occupation of his house for 14 days, for damage done to certain of the articles therein and for loss of others. A jury found for the defendant Government on the first claim, and for plaintiff on the second, for £150 damages. The Court granted plaintiff his costs.</i>	
Murray v. Colonial Government	455
Negligence—Public company with statutory powers.	
<i>The defendants—a certain Tramway Company—whilst executing certain works in pursuance of statutory powers had and obtained, had made an excavation in the public street immediately in front of certain houses. No care was taken to protect the public against</i>	

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<i>—or to warn them of—this danger—and plaintiff being ignorant of its existence and being lawfully upon the premises aforesaid fell down the place so excavated while proceeding by night from one of the houses aforesaid to the road in front thereof.</i>	
<i>Held, that as the defendants were executing this work for their own proper use and benefit, albeit under the sanction of the Town Council, they were liable for the injury caused by their own negligence.</i>	
<i>The case of Newman v. Town Council of East London (9 E.D.C., 84, and 12 S.C.R., 61) distinguished.</i>	
Atkins v. Camp's Bay Tramway Co. ...	402
Negligence, <i>see</i> Dock Agent...	568
Negligence—Luggage—Non-delivery—Damages.	
Jamison v. McKenzie & Co. ...	86
Native, <i>see</i> Transkeian Territories	76
New trial—Weight of evidence.	
<i>A new trial on the ground that the verdict of a jury was against the weight of evidence will not be granted unless the verdict has been so perverse that a man of ordinary intelligence could not have arrived at it.</i>	
Hoogendoorn v. Roos ...	421
Nuisance—Municipal regulations—Act 5 of 1883—"Government Gazette."	
<i>Appellant had been convicted by the Resident Magistrate of King William's Town of contravening section 58 of the Municipal Regulations framed under Ordinance 9 of 1864. Appellant excepted on the ground: (1) That it was not stated on the charge sheet that Ordinance 9 of 1864 was a Kaffrarian Ordinance; (2) That</i>	

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<i>these regulations were not proved until after plaintiff's case had been closed, and then only by the production of the "Government Gazette" containing a copy of a proclamation promulgating the said regulations.</i>		<i>the Resident Magistrate upheld the exception and refused leave to amend the said summons.</i>	
<i>Held (1) That by the omission of the word "Kaffrarian" in the charge, appellant had not been prejudiced on the merits.</i>		<i>Held (on appeal), that the exception was good, but that as the non-joinder of parties was a matter peculiarly within the knowledge of defendant and as no larceny on the part of appellant had been shown, the Resident Magistrate ought to have allowed the amendment asked for.</i>	
<i>(2) That by Act 5 of 1883, section 7, production of a copy of the "Government Gazette" is evidence of a proclamation therein contained.</i>		<i>Sharples v. Woolven's Agency...</i>	266
<i>(3) That as a fact Gidi was the servant of appellant, and had been proved to have committed the nuisance with which appellant had been charged on the premises of said appellant, with his knowledge and for his benefit.</i>		<i>Newspaper, see Libel...</i>	68
<i>(4) That the appeal must therefore be dismissed with costs.</i>		<i>Newspaper—Prohibited circulation—Postmaster-General.</i>	
<i>King William's Town Municipality v. Attwood ...</i>	411	<i>The Military Authorities having prohibited the circulation of the "S.A. News" in all districts of the Colony in which Martial Law was in force an intimation to that effect was sent to the proprietors of the paper by the Postmaster General, whereupon they moved the Court for an order removing the prohibition.</i>	
<i>Nuisance—Interdict.</i>		<i>The application was refused.</i>	
<i>The Court granted an interdict restraining the Municipality of Mowbray from discharging dirty water other than storm water, on to plaintiff's railway line.</i>		<i>The South African Newspaper Company v. The Acting Postmaster-General ...</i>	29
<i>Colonial Government v. Mowbray Municipality and others</i>	775	<i>Novation and Delegation, see Guarantee ...</i>	147
<i>Non-joinder of parties—Amendment of summons.</i>		<i>Notarial Instruments, see Fraud ...</i>	684
<i>Appellant had sued one F. (carrying on business as Woolven's Agency) in a Resident Magistrate's Court. After summons had been issued, appellant discovered that F. had a partner named Woolven. Defendant F. excepted to the summons on the ground that Woolven was not joined, and</i>		<i>Ordinance No. 6 of 1839, sections 1, 2, see Hawker ...</i>	4
		<i>Ordinance No. 15 of 1845, see Will ...</i>	79
		<i>Partnership, see Audit ...</i>	10
		<i>Partnership—Failure of proof.</i>	
		<i>Hopkins v. Burton Bros. ...</i>	148
		<i>Partnership Debt, see Provisional Sentence ...</i>	92
		<i>Partnership—Dissolution.</i>	
		<i>Clark v. Jacobson ...</i>	756
		<i>Partnership—Deed—Construction.</i>	
		<i>Teitelbaum v. Katz ...</i>	708

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<i>Pactum de non petendo</i> , see Promissory Note	201
Pleading, see Cause of Action ...	265
Proclamation 255 of 1900, see Liquor	205
Practice—Removal of bar—Affidavit of merits—Plea. Higgins v. Fletcher	193
Promissory note— <i>Pactum de non petendo</i> . <i>W. and his wife resided for some time at a certain hotel. In settlement of their account, W. tendered a promissory note payable on demand at the National Bank, Johannesburg. This note was endorsed by his wife. Defendant set up a verbal agreement that he should not be called upon to pay the note until he had returned to Johannesburg. The Court found as a fact that this agreement had been proved.</i> Held, that as it had not been shown that defendant was able to return, or was taking no steps to do so, this agreement amounted to a pactum de non petendo and that provisional sentence could not be given against him. Clark v. Woolf and Another ...	201
Passes, Military, see Martial Law ...	201
Provisional sentence—Liquid liability. <i>Defendant was sued provisionally on an acknowledgment of debt. She was entitled to a certain share in the estate of her late father, but could not get a statement of accounts from the executor. She claimed that the debt should be paid out of her interest in the said estate.</i> Held: (1) That for provisional sentence a document showing a clear liquid liability when the case comes into court should be produced. (2) That recourse	

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<i>cannot be had to anything save the document sued on. (3) That as it was not clear that defendant's fidei commissary interest in the estate of her late father would be insufficient to discharge the debt in question, provisional sentence must be refused.</i> S.A. Association v. Day ...	157
Play-right—Performance—Interdict. Wheeler v. De Jong and Walton	3
Pleading, see Exception	147
Postmaster-General, see Newspaper	29
Power of attorney—Woman—Security bond. <i>The defendant gave R. a general power of attorney authorising him inter alia, "in her name to enter into any securities of what kind or nature soever." R. passed a security bond under this power in favour of W. binding defendant, without her knowledge and for R.'s own benefit.</i> Held, that the defendant was not liable, as the words did not authorise the agent of a woman to renounce the protection which the law gives her in case of her being bound as security for a third person. Watson and Co. v. Ann Maria de Wit	90
Power of attorney—Unstamped—Transfer of property— <i>Locus Standi</i> —Act 10 of 1879. Van Aardt v. Bekker and Maynier	34
Proclamation No. 343 of 1894, sections 5, 11, see Transkeian Territories	76
Promissory Note, see Provisional Sentence	59
Public Company, see Negligence ...	402

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Prodigal—Curator bonis appointed.	
In the matter of the Petition of Maria Cornelia Ebdon, mar- ried to John Alfred Ebdon	379

**Proprietary rights—Selecting and lo-
cating claims—Diamond mine—
Area granted under an agreement
—Application to extend area.**

By deed of agreement between the applicant and the respondent company as owners of certain property the latter gave to the former the right to search for diamonds by underground working only, within a limited area, with the right of obtaining within a certain period a lease of a certain area. One of the articles of the agreement was as follows:

"The lessors reserve the right, in the event of surface ground being resumed by competent authority, to enter on and prospect such ground, but so as not to interfere with the lessee in locating the claims he may select to take on lease under this agreement, which claims the lessee shall be at liberty to select and locate by means of trial pits." The applicant in the course of prospecting having found diamonds, claimed his rights under the agreement and the High Court gave him an order entitling him to make trial pits within a defined area in the neighbourhood of the place where the diamonds were found "for the purpose of selecting and locating the claims." This order was complied with. After the expiry of the agreement the applicant applied for an extension of the area granted, stating that as the High Court had intimated that they would be prepared to extend the area and the time allowed by the agreement if the diamondiferous soil extended beyond this area and the trial pits

*is the area granted were insuffi-
cient, he was entitled to an order
extending the area.*

Held, that as the agreement had expired, and the applicant had chosen the area granted when the judgment was given he was not entitled to a further area on the present application.

Vide McCarthy v. De Beers Consolidated Mines (10 Sheil, 687.)

**McCarthy v. De Beers Consoli-
dated Mines** 41

**Provisional sentence—Promissory
note.**

Celliers v. Treurnich 59

**Provisional sentence — Promissory
note—Partnership debt.**

**Minville Du Pont & Co. v. Geis-
lar and Silbeman** 92

**Provisional sentence—Summons—
Amendment—Mortgage bond.**

Where on a claim for provisional sentence on a mortgage bond, which provided that on failure of the payment of the half-yearly interest the whole amount would become due, the summons did not state the ground on which the principal amount of the bond became due, the Court granted provisional sentence subject to the amendment of the summons.

The defendant was in default.

Bell v. Hayward... .. 14

**Provisional sentence—Allegation of
fraud—Variation of defence—
Stay of execution.**

Defendant, the Acting Commandant at Ceres, was sued on an I.O.U. for £500 given in consideration of certain scrip delivered to him by plaintiff.

Defendant pleaded that he had been induced to purchase the scrip by fraud, that he had returned it

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<i>to plaintiff, and that the I.O.U. had been given merely as a receipt for the scrip.</i>	
<i>Plaintiff's affidavit showed that he merely held the scrip for defendant.</i>	
<i>When plaintiff had originally demanded payment, defendant admitted the debt but asserted that it was a condition precedent to payment that he should receive certain remittances.</i>	
<i>Held, that as plaintiff had established a prima facie case provisional sentence must be granted, but in consideration of the circumstances of the country and defendant's absence on active service, execution was stayed till October 12th.</i>	
Herman v. Fraser ...	433
<i>Periculum rei venditæ — Estoppel.</i>	
<i>Defendants in the Court below (now appellants) had purchased certain pigs from plaintiff and left them in plaintiff's custody. While plaintiff had charge of them two of them died. Defendants kept back a balance of £4 12s. 6d. when paying plaintiff for the pigs and for his having taken care of them. For this sum plaintiff had sued in the Court below. Defendants denied the debt, and argued that the loss of the two pigs should fall on the seller, in whose custody they had been left. The Magistrate held that in law the loss fell on the purchaser, and that defendants were liable for the full price of all the pigs. On appeal it was argued that defendants having sent plaintiff a cheque in full settlement of his account, and plaintiff having accepted it, he could have no further claim.</i>	
<i>Held (1) That as the cheque in question had not been accepted in</i>	

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<i>full settlement by plaintiff, he was not estopped from making further claims.</i>	
<i>(2) That the Magistrate's decision as to the liability for the loss of the two pigs was good in law, and that the appeal must be dismissed with costs.</i>	
Smith & Co. v. Bradley and Another ...	490
Permit to Native, <i>see</i> Liquor Laws	548
Prohibited Marriage degrees, <i>see</i> Marriage ...	438
Privity of Contract, <i>see</i> Brokerage ...	354
Promissory note—Maker and surety—Consideration.	
<i>E. had given a promissory note to one M., who had endorsed it. It then passed to a certain B., who had become surety and co-principal debtor in solidum for E. E. failed to meet the note, which B. paid, and then ceded to Jones. Jones sued E. on the note in the Magistrate's Court. The Magistrate gave absolution from the instance, and against this judgment the plaintiff in the Court below now appealed.</i>	
<i>Held, that though B. had discharged his obligation as surety, seeing that the note was still in existence, the judgment of the Magistrate must be set aside, and the appeal allowed, with costs.</i>	
Jones v. Eksteen ...	651
Post-nuptial contract.	
<i>Parties had been married in the Transkei at a place where no notary or attorney resided, under the impression that by a post-nuptial contract they could exclude community of property. They now applied for leave to execute such post-nuptial contract. The Court refused the application.</i>	
<i>Ex parte Barnett & Wife</i> ...	677

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Quitrent land—Expropriation for railway purposes—Acts 19 of 1874, 9 of 1858 and 26 of 1882.	
<i>The Colonial Government have the right to make and repair railways and to raise materials for that purpose on quitrent land, coming under the provisions of Sir John Cradock's proclamation; nor are they bound to pay any compensation to such quitrent tenants for materials so taken. By Act 19 of 1874, Government have the same rights as were given by Act 9 of 1858 to the Road Commissioners with regard to the expropriation of land for general railway purposes, but when they expropriate for these general purposes compensation must in the absence of any special reservation in the grant of such land, be paid whether the land be quitrent or freehold. How far the Government are entitled to expropriate for additional railway purposes, or for objects connected therewith, cannot be defined in general terms, but each case must be judged on its own merits. If the Government convey water across land by means of pipes the owner of such land is entitled to compensation (Act 26 of 1882, section 7).</i>	
Logan v. Colonial Government	114
River, Change of Course of, <i>see</i> Deed of Transfer	582
Registration of Marriage	377
Rights of Wife married in community, <i>see</i> Donatio inter viros	644
Registration of donation, <i>see</i> Donatio inter viros	644
Rebel, <i>see</i> Edictal citation	676
Renunciation of benefits by usufructuary, <i>see</i> Will	767
Rent, <i>see</i> Act 8 of 1879	84

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Right of Way, <i>see</i> Interdict	132
Rule of Court 8, <i>see</i> Arrest	13
2 — <i>see</i> Judgment-debt	108
Roads, <i>see</i> Subdivided Land	672
Roads, reservation of, <i>see</i> Grant	193
Registrar of Deeds—Mortgage bond and deeds of transfer.	
<i>A certain mortgage bond and two deeds of transfer had been lost or mislaid while in the custody of the Registrar of Deeds. The Court ordered the Registrar to issue certified copies of the said mortgage bond and deeds of transfer.</i>	
De Villiers, <i>ex parte</i>	226
Railway, <i>see</i> Evidence	217
Registration, <i>see</i> Trade Mark	161
Sale, <i>see</i> Contract	46
2. — <i>see</i> Interpleader Suit	53
3. — <i>see</i> by Auction, <i>see</i> Summons	23
Summons, Amendment of, <i>see</i> Provisional Sentence	14
Summons—Injury to property—Necessary averment—Magistrate's Court.	
<i>When claiming civil damages for injury done to property it is not necessary to aver in the summons that the injury was "wilfully and maliciously" done, and any such averment will be taken as mere surplusage, not being of the essence of the claim.</i>	
Ben v. Mulvihall	25
Summons—Service—Sale by auction—Cancellation.	
<i>Where summons was served on defendant's clerk at his place of business which was built on the same erf as his residence, the service was held to be good.</i>	
<i>Where on certain goods being knocked down by an auctioneer to</i>	

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B., the owner immediately objected to the price, and the auctioneer then told the highest bidder "the rule was off" and the latter acquiesced.	
Held, on the facts that there had been no sale [although the falling of the hammer, and the acceptance by the auctioneer of the bid ought strictly to constitute a sale].	
Beukes v. Kleyn	23
Servitus Fluminis recipiendi, see Water	551
Servitude—Loss by non-user—Servitude of bailing water from a furrow— <i>Servitus stilicidii vel fluminis recipiendi</i> —Cost of surveyor's plans—Case of <i>Edmeades v. Scheepers</i> (1 Juta 334), distinguished.	
Plaintiffs sued defendant for damages for various acts of trespass committed on a certain strip of land of which plaintiffs were the proprietors. Some of these trespasses were admitted, and the Court found on the evidence that others had been committed without justification. It was shown, however, that defendant's property had servitudes over the strip of land in question. One of these entitled the owner of the dominant tenement to dip water from a furrow running through this said strip, such dipping to be done with a clean vessel. Plaintiff's predecessors in title had laid pipes in this furrow which pipes conveyed a considerable portion of the water to a brewery. The water still running in the open furrow was said to be unfit for drinking purposes. There was a further servitude attached to defendant's property giving its owner the right of crossing the strip of land at a certain point. This,	

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plaintiffs maintained, had been lost by non-user per modum et tempus. In reconvention defendant claimed damages against plaintiffs for having stopped up certain pipes by means of which he claimed a right to discharge storm-water on to plaintiff's land.	
Held (1) That under his dipping servitude, defendant could not claim to have water brought down to him in pipes; and that the owners of the servient tenement were not responsible for the pollution of the furrow by third parties.	
(2) That a servitude could be lost by non-user only if it were proved that such non-user had continued during the full period of prescription (30 years) and that hence defendant was still entitled to his right of way across the servient tenement.	
[The case of <i>Edmeades v. Scheepers</i> (1 Juta 334) distinguished.]	
(3) That defendant's own malfeasance in discharging drainage water through the pipes in question justified plaintiff in stopping them, even though defendant was thereby prevented from discharging his storm water on to plaintiff's property.	
(4) That as the surveyor's plans of the property would be useful to plaintiff in ways not connected with this case half the cost of the survey was allowed as costs in the cause.	
Ohlsson's Cape Breweries, Ltd. v. Thompson	275
Service of Articles, see Clerk (articled)	160
2. —see Attorney	173
Security Bond, see Power of Attorney	90

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Sequestration—Attachment—Sale— Release from attachment.	
Van der Byl & Co. v. Abdullah Khan	58
Hassan Khan v. The Master ...	58
Service—Rule nisi—Divorce.	
<i>Service of an order of Court calling on a husband to show cause why he should not return to his wife, was made on the attorney who entered appearance to the original summons, but who had dropped out of the case on the defendant being barred from pleading.</i>	
Held, that this was not sufficient service.	
Haussman v. Haussman ...	60
Service of Notice of Motion, see Company	140
Service of Summons, see Summons	23
Salvage—Amount.	
<i>There are three requisites in cases of salvage: (1) That the vessel was in danger or distress; (2) That the salvors rendered assistance; (3) That their efforts were successful. In determining the amount to be paid as salvage the Court will consider: (1) The enterprise shown by the salvors; (2) Their skill; (3) The risk to which they exposed themselves; (4) Time occupied in the salvage; (5) The risk to the ship salvaged; (6) The value of the property salvaged.</i>	
<i>In this case the Court found that most of these conditions were present and awarded £1,000. The value of the ship, cargo and freight was between £8,000 and £9,000.</i>	
Mossel Bay Boating Co. v. Brinck	441

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Salvage—Allocation of award between co-salvors.	
<i>Plaintiffs sued in these actions (consolidated by order of Court) for salvage in respect of the derelict vessel "Andes" which had been salvaged by the two tugs "Midge" and "Buffalo," the property of the Union-Castle Coy. and of the East London Harbour Board respectively. The "Buffalo" first went out, but did not succeed in finding the derelict. She was afterwards found and taken in tow by the "Midge." At the "Midge's" request the "Buffalo" helped to tow the derelict into port. The value of the "Buffalo" was about three times that of the "Midge" and the number of her crew about double. The derelict together with her cargo was worth about £6,000.</i>	
Held, that under the circumstances a little more than a third of the value of the ship and cargo should be awarded as salvage and that £1,250 together with £83 10s. 6d. (money disbursed) must be awarded to the "Midge" and £1,000 to the "Buffalo."	
The "Andes," Master of v. East London Harbour Board and Another	537
Salvage—Consolidation of actions.	
<i>Where two salvors who had rendered aid to defendant's ship on the same occasion had each brought an action for salvage against the applicant, the Court ordered the actions to be consolidated after the pleadings should be closed.</i>	
<i>Ex parte The Master of "The Andes," in the matter of the Union-Castle Company and the East London Harbour Board v. The Master of "The Andes" ...</i>	367

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Salvage—Danger and risk—Tender. Table Bay Harbour Board v. New Zealand Shipping Co.	20

Stevedore—Master of ship—Agreement with third persons.

Plaintiffs sued defendant in his capacity of Master of S.S. Volage for payment for services rendered and work done as stevedores in discharging cargo from the said ship at Cape Town.

Held: (1) That the Master was acting within the scope of his authority in contracting with plaintiffs for the services aforesaid although the owners of the Volage had agents in Cape Town. (2) That no contract entered into between plaintiffs and a third person, whereby plaintiffs may have bound themselves to discharge the said cargo could be set up as a defence to the contract sued upon; unless (possibly) defendant could show that such third person had already paid plaintiffs for the said work.

McKenzie & Co., v. Johnson ... 450

Smuggling, see Habeas Corpus ... 381

Sale of Land—Verbal Contract.

Plaintiff and defendant had agreed to purchase jointly a certain piece of land. Thereafter defendant bought the land aforesaid in his own name and repudiated the said agreement. No written contract between the parties had been entered into.

Held, that since the evidence showed that there was a verbal contract between the parties, defendant had defrauded plaintiff by purchasing the property in his own name without plaintiff's sanction, but, that in view of the facts (1) that money had subsequently been expended on the property and (2) that it would not be convenient

to order specific performance, damages were given for £50 and costs.

Cohen v. Woolf ... 492

Sale of land—Variance between diagram and beacons.

Prima facie, a person purchasing landed property is entitled to have transferred to him all the land bought. If the seller wishes to give transfer of less than the property sold, the onus is upon him to show that there had been a contract to accept such insufficient transfer.

The jury found for plaintiff for the cancellation of a parol contract of sale, for interest on the purchase money from the date of payment and for nominal damages.

Hoogendoorn v. Roos ... 383

Sub-lease—Damage to goods of sub-lessee—Liability of original lessor—Privity of contract.

A lessor incurs no liability to a sub-lessee by reason of damage to such sub-lessee's goods arising from the defective state of the premises sub-let; provided that such sub-lease was contrary to the terms of the lease entered into by the original lessee with the original lessor.

Atkinson v. Hay ... 197

Sub-divided land — Roads — Title deeds.

An estate of considerable size in the neighbourhood of Green Point had been cut up and sold in lots some years previous to 1896. Subsequently a certain lot held by one owner was sub-divided between the respective predecessors in title of applicant and respondent, and a road at the back of respondent's property in addition to one in

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<i>front thereof was granted to his predecessor in title. This grant was endorsed both by respondent's transfer and by applicant's diagram. Applicant now contended that in spite of this transfer and diagram, the said predecessors in title intended only that there should be one road to respondent's property, giving access to the front thereof, and he now asked for an order restraining said respondent from entering on the ground at the back of his premises.</i>		Title Deeds, <i>see</i> Sub-divided Land ...	672
<i>Held, that as the order prayed could be granted only on evidence which would justify the Court in amending the original transfer, and as such evidence had not been produced the application must be refused with costs</i>		Trade mark—Registration.	
<i>The case of Ohlsson v. Whitehead (9 Juta, 84) distinguished.</i>		<i>The words "Irish" and "Crown" whether used separately or in combination are not words registrable as a trade mark under Act No. 12, 1895, section 2, subsection (e).</i>	
Garrett v. Andres	672	Legg v. Findlay & Co.	161
Trespass — Lease — Termination — Damages—Notice.		Trade Mark—Removal—Leave to sell—Rule nisi.	
<i>Damages given against a lessor who had entered upon the property leased before the termination of the lease.</i>		<i>On application made a rule nisi was granted calling upon the absent registered owner of a trade mark, to show cause why the trade mark should not be removed from the register.</i>	
Van Schalkwyk v. Van Schalkwyk	664	<i>Ex parte Legg</i>	17
Testamentum Militare.		Transkeian Territories—Liquor — Native—Proclamation 343 of 1894, sections 5, 11.	
<i>Where a member of the Cape Mounted Rifles had written to his sister in England, while on active service, stating that in the event of anything happening to him, he wished his estate to be shared by her with another sister and was subsequently killed in action, The Court upheld this letter to be a last will and testament and granted an order to the Master to accept it as such.</i>		<i>Section 5 of Proclamation 343 of 1894 does not allow a holder of a liquor licence in the Transkei to supply liquor to natives on the authority of a letter from a white resident, but only on a permit signed by a Magistrate authorising the bearer of the permit to obtain such liquor. B. gave a native a letter asking F., the holder of a licence, to supply the native with liquor for B., giving the native the money to pay for it. F. supplied the liquor in sealed bottles. The native broke the seals and poured the contents of the bottles into calabashes and was proceeding to his own house when he was arrested. F. was charged with contravening section 5 of Proclamation 343 of 1894 and convicted.</i>	
<i>Ex parte Van Zyl and Buissinne, N.O.</i>	765	<i>On appeal the conviction was sustained.</i>	
		<i>Held further, that the omission of the word "deliver" in the sum-</i>	

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<i>mons did not take the case out of the operation of the proclamation.</i>	
<i>Rex v. Francis</i>	76
Transfer, Deeds of, <i>see</i> Registrar of Deeds	226
Transfer, <i>see</i> Power of Attorney ...	34
2. —to Executor, <i>see</i> Executor ...	61
Taxation, <i>see</i> Costs	264
2. —— <i>see</i> Costs	436
Tacit Relocation <i>see</i> Lease	55
Tender, <i>see</i> Salvage	20
Trade mark—"Cape Club Soda."	
<i>The words "Club Soda," having acquired a descriptive meaning in this colony, cannot be registered here as a trade mark.</i>	
<i>Held, that respondents must disclaim the sole right to the use of the word "Club."</i>	
<i>Wordon and Pegram v. Cantrell and Cochrane</i>	191
<i>Ultra Vires, see</i> Licence	229
2. —— <i>see</i> Municipal Regulations ...	657
Undisclosed Principal, <i>see</i> Brokerage	
Variation of Defence, <i>see</i> Provisional Sentence	433
Verbal Contract, <i>see</i> Sale of Land ...	492
Variance between diagram and beacons, <i>see</i> Sale of Land	343
Water—Act 45 of 1882—Judicial discretion.	
<i>The Municipality of Stutterheim had been constituted under Act 45 of 1882. Under powers conferred by section 109, sub-section (6) of that Act a bye-law had been framed by the said municipality, providing (inter alia) "that no person should make any private watercourse within the boundaries of the municipality without the permission, and under the control of the said Council." Respondent had applied to the Council for</i>	

leave under this bye-law to lay down a pipe to his own property, and the Council granted the leave applied for, but subject to the condition that before laying down the said pipe applicant should first pay certain arrears of water-rates, which he had denied to be due. It had been held by the E.D. Court that the Council were not justified in insisting on this condition, and the said Court had granted an order restraining the Council from obstructing applicant in laying down the pipe aforesaid. Against this order the Council now appealed.

Held, that the Council having exercised a judicial discretion by granting permission as applied for could not prevent respondent from acting on that permission merely because he refused to pay the rates in dispute; and that the appeal must therefore be dismissed, with costs.

Stutterheim Municipality v. De Beer 479

Water—Natural flow—*Servitus Fluminis vel Stilicidii Recipiendi.*

Plaintiffs and defendant were neighbouring proprietors whose respective properties abutted on a certain private road over which they all had rights of user, but which was vested in the first plaintiff. Some seven years ago defendant had by raising the level of his own ground caused his storm water to flow into the said road. He had also made a sluic at one side of the road to carry off this water and had erected a fence which encroached on the road. In 1900 the road had been made up by plaintiffs and slightly raised, thereby blocking up a ventilator at the back of defendant's house. Plaintiffs now sued

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(1) for an interdict to restrain defendant from allowing storm, and other water to flow from his property on to the above road. (2) For an order directing him to fill up the said sluic and to remove the said fence where it encroached on the road. (3) To recover £6 from defendant, being his pro rata share of the cost incurred by plaintiffs in making up the said road. Defendant claimed £100 damages in reconviction for injury done to his house by alterations made in the level of the road.

Held, that as the natural flow of the water was not from defendant's ground to the road, and as defendant had failed to establish any servitude either by grant or by prescription entitling him to discharge his water on to the said common road, an interdict must be granted as prayed. As defendant had already removed the fence complained of and as the road had not been made up satisfactorily, no order was made with respect to the other prayers of the declaration. Plaintiffs were, however, authorised to fill up the sluic should defendant fail to do so. Defendant's claim in reconviction was dismissed, the Court finding that the damage (if any) done to defendant's house was owing to his own negligence in not providing for the carrying off of his storm water after the road had been raised. Plaintiffs were allowed costs.

Freeman and Others v. Simon ... 551

Water—Natural and accustomed flow.

Plaintiff and defendant were owners of adjoining pieces of land which were formerly one farm, and which were divided in 1894. Defendant had received certain sur-

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face water on to his ground, from higher ground thereunto adjoining, and the defendant discharged the aforesaid water, together with his own surface water, on to the land of plaintiff. Plaintiff admits he was bound to receive the surface water from defendant's own land, but with respect to the water from the other higher ground aforesaid, claimed (1) that he was not bound to receive it, (2) a perpetual interdict restraining defendant from discharging water on to plaintiff's land, (3) £500 damages, and (£) costs of suit.

Held, (1) that as the natural flow of the water was from the upper farm to defendant's ground and thence to plaintiff's and that (2) as the water had not been directly contaminated by defendant, no damage had been sustained by the aforesaid plaintiff, and that the judgment must be absolute from the instance with costs.

Kock v. Hendricks ... 368

Water Rights—Plea in abatement—Joinder.

In an action between K. and H. two lower proprietors of certain lands, in which action plaintiff claimed that defendant should be interdicted from discharging water on to his (plaintiff's) land, defendant pleaded in abatement that certain upper proprietors whose water flowed across his land on to plaintiff's should be joined as co-defendants.

Held: (1) That as the dispute was simply between plaintiff and defendant, and could be settled without prejudice to the rights of third parties, it was not necessary that they should be joined in the action. (2) That such upper pro-

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<i>prietor might be allowed to inter- vene if advised that his rights might be prejudiced by the deci- sion in such action.</i>	
Koch v. Hendricks	262
Water Scheme, see Municipal Council	749
Wrongful Dismissal—Damages.	
<i>Plaintiff, who had been engaged by the Town Council, had been dis- missed from his employment on notice given by a committee of the aforesaid Council. He now con- tended that the said dismissal was illegal.</i>	
<i>Held, that as sections 64, 65, 67, and 68 of Act 26 of 1893 en- able the Council to resolve itself into a Committee of the whole Council, and that as section 32 of the Council's Rules of Order pro- vide that the resolutions of a com- mittee so constituted shall have the same effect as if adopted by the Council out of committee the defen- dant Council was entitled to judg- ment with costs.</i>	
Cottrell v. Town Council of Cape Town	496

Will—Interpretation.

*Ajouhaar had left a will by which
certain land was bequeathed to his
wife Alima "she to remain in
full and undisturbed possession
thereof and of the rents and pro-
fits during her natural life."
After her demise, the property was
to be divided among the seven
children of the testator and "such
other child or children as might
still be begotten and which should
then be living, being the issue
of the testator and the said
Alima, by whom the pro-
perty should be held under the
like conditions, and after their
death become the absolute and*

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<i>unconditional property of the grandchildren of the said Alima, being the issue of her children or such other child or children as may be begotten by the said Alima and the testator."</i>	
<i>Held, that after the death of all the children of the testator and Alima, the whole of the estate must be divided per capita amongst all the grandchildren of the said testator and Alima.</i>	
Sajira (or Sanjeenah) and Others v. Executors of the Estate of the late Ajouhaar	580
Will—Distribution of Capital.	

*The late T. had by will nominated
his mother and his children as his
sole heirs; the mother to receive
the interest only arising out of the
estate during her lifetime and out
of it to maintain and educate the
children. Also one J.M.B. was to
receive £5 per mensem out of the
said interest and the children were
not to receive any part of the capi-
tal until after the decease of both
the testator's mother and of J.M.B.
The mother being deceased and all
the children being now majors the
Court had ordered that the capital
should be distributed among them
after the death of J.M.B. This
order had subsequently been sus-
pended until the executors of the
mother's estate could be heard as
to their right to a share of the
capital. J.M.B. consented to
an immediate distribution. The
executors now applied for an order
directing amongst whom the capi-
tal of the estate should be distri-
buted.*

*Held, that as certain of the par-
ties interested were not before the
Court no order could be made and
that the order already granted
must be cancelled.*

Ex parte Theron's Executors ... 533

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Will—Construction	
<i>Ex parte</i> Stradling, N.O. ...	177
Will—Construction— <i>Fidei-commissa</i> .	
<i>Mrs. Mathew</i> left the bulk of her property among her seven children, in equal shares. The share of William Francis, one of these children, was burdened with a <i>fidei-commissum</i> , in favour of his eldest five children. The share of Thomas John (another son) was burdened with a <i>fidei-commissum</i> in favour of his brothers and sisters, conditioned on his dying without lawful issue. He did so die, leaving him surviving five brothers and sisters; one sister (<i>Eliza</i>) having predeceased him. Plaintiffs contended: (1) That the estate of the deceased <i>Eliza</i> was not entitled to share in the property of Thomas John. (2) That the <i>fidei-commissum</i> imposed on William Francis did not apply to his share in the estate of Thomas John.	
Held, (1) That as it could not be ascertained till the death of Thomas John whether his share of the inheritance was to be divided among his brothers and sisters or not: consequently in the interim, no interest had vested in these brothers and sisters; and that hence the estate of <i>Eliza</i> could not benefit. (2) That the <i>fidei-commissum</i> in favour of the five children of William Francis did not include the share of Thomas John's estate which fell to him on the death of the said Thomas John.	
<i>Merrington and Others v. Estate Mathew and Others</i> ...	210
Will— <i>Fidei-commissum</i> —Failure of gift-over—Payment of corpus.	
<i>Le Sueur, ex parte</i> ...	227

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Will — Construction — Survivor — Liquidation account — Posthumous child— <i>Kinderbewys</i> .	
<i>A. and B.</i> , married in community of property executed a mutual will appointing each other executor and administrator, and providing that if <i>A.</i> died first <i>B.</i> should remain in full possession of the estate until her death, but that if she married again she should sell or value the estate and then award herself one-third, the remaining two-thirds to be divided between the "children born of our marriage," their portions to be secured by <i>kinderbewys</i> . <i>A.</i> died first and <i>B.</i> remained in possession of the estate. On wishing to re-marry she drew up an account awarding herself half of the whole estate and one-third of the remaining half, but omitted to provide for the portion of a posthumous child, since dead. The Master refused to accept the account and called for one in which she was to receive one-third of the whole estate and the children the remaining two-thirds. She lodged this under protest, and then put in a third account in practically the same terms as the first except that the share of the posthumous child was brought up. A <i>kinderbewys</i> had been executed in terms of the second account.	
Held, that as the will consolidated and distributed the whole estate the second account was to be amended so to include the share of the posthumous child and the <i>kinderbewys</i> was ordered to be amended accordingly.	
<i>In re Van Velden</i> ...	32
Will—Witnesses—Ordinance 15 of 1845.	
<i>Louw v. Louw's Executors</i> ...	79

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Will—Massing—Survivor—Adiation.	
<i>G. and his wife were married in community of property and thereafter executed a mutual will whereby the survivor and children of the marriage were nominated as sole heirs of the joint estate; the survivor to have one half and a child's portion, the residue to devolve on the children in equal shares, and by representation on such of their descendants as might die during the lifetime of the testator. The surviving spouse was also to enjoy a life usufruct of the entire joint estate. G. died, and his widow thereafter made a will by which she nominated her son E.H.M.G. as her sole heir and executor. The said E.H.M.G. was removed from his executorship by an order of Court, and the plaintiff (A. R. Truter) was duly appointed. The said plaintiff now claimed (1) to be entitled to administer half of the joint estate and a child's portion: (2) to participate with the defendants in the administration of the entire joint estate. Held, that as no executor had been appointed under the first (mutual) will it was competent for the survivor to appoint an executor by a second will made subsequent to the death of the predeceased, and that the executor so appointed was entitled to administer the joint estate conjointly with the executor of the estate, and further, that the said executor of the widow was entitled to administer any property acquired by her since the death of her husband.</i>	
Estate Grimbeck v. Estate Grimbeck	663

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Will—Construction — Renunciation of Benefits by Usufructuary—Transfer.	
<i>Z. and his wife (married in community) executed a mutual will whereby they bequeathed all their landed property to the survivor, to be held free and undisturbed by such survivor during his or her natural life, after which the joint property was to devolve upon such of their joint sons as might be living at the survivor's death. The testator died and his widow, who was also executrix, adiated under the will and she now wished to renounce her life interest in favour of her sons, who were prepared to pay the hitherto unpaid balance of the sum prescribed by the will, on transfer of the property. The Registrar of Deeds refused to pass transfer of the property. Held (1) that as the effect of the will was to institute the children heirs on the death of the survivor and to substitute directly the survivors for such children as might predecease their mother: and for their father to substitute the children of such predeceased children: and as further the will fixed the death of the survivor as the date for ascertaining the ultimate beneficiaries:—while the renunciation of benefits by the survivor might give the children the benefit of occupation at an earlier date than that contemplated in the will, it could not alter the provisions of the will. (2) Hence that while there was no objection to a transfer of the property to the sons, subject to the provisions of the will, their petition for an unconditional transfer must be dismissed.</i>	
<i>Ex parte Zondagh</i>	767
Woman, see Power of Attorney ...	90

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